



**Submission in response to:
Discussion paper on the operation of the
Dairy Industry Code
5th April 2024**



**Submission in response to: Discussion paper on the operation of the Dairy
Industry Code 5th April 2024**

Contents

1	INTRODUCTION.....	3
2	PURPOSE.....	3
3	BACKGROUND & PRIOR REVIEWS.....	4
3.1	Reviews of the Dairy Code	5
3.2	Perishable Agricultural Goods Inquiry.....	5
4	FIRST LEGISLATED REVIEW: RECOMMENDATION 2.....	6
4.1	Extension of 3-year contracts.....	6
4.2	Small business definition and exemptions.....	7
4.3	MSA variation requirements	7
4.4	Non-exclusive contract arrangements.....	8
4.5	Minimum pricing requirements in multi-year contracts	8
4.6	Multi-party dispute resolution and arbitration	9
4.7	Contract cooling off period	10
4.8	Unwritten or unsigned contracts	10
5	OTHER ISSUES	11
5.1	Processors changing Ownership.....	11

**Submission in response to:
Discussion paper on the operation of the Dairy Industry
Code**

5th April 2024

1 INTRODUCTION

Australian Dairy Farmers Limited (ADF) is a not-for-profit organisation which is the recognised national Peak Industry Representative Body (IRB) for dairy farmers from all dairy producing States across Australia. ADF's mission is to provide strong leadership and representation to allow for the continued growth of internationally competitive, innovative and sustainable dairy farm businesses. ADF's membership base include State Dairy Farming Organisations (SDFO's) and direct farmer members. ADF's has formal representative functions with organisations such as Dairy Australia; Animal Health Australia; SafeMeat; and the dairy representative member of National Farmers Federation.

As such, ADF has a significant interest in, and right to be consulted on the operation of the ACCC Dairy Industry Code of conduct.

2 PURPOSE

In 2021, the Australian Government conducted the first review of the Code, which identified some issues that the Government considered warranted further exploration prior to the second review of the Code being performed.

As advised in the DAFF 2024 Discussion paper on the operation of the Dairy Industry Code, hereafter the Discussion Paper: *"DAFF will consider your feedback and review all evidence provided. This will be used to assess the impact each of the eight concerns has on the industry. **The second review of the***

Code will consider the outcomes of this consultation process, on these individual topics, and will involve further consultation on the Code overall.”¹(emphasis added).

The Minister for Agriculture Fisheries and Forestry announced in March 2024 at the Dairy Industry Symposium that consultation for the second review of the Dairy Code would commence in September 2024, with the legislated review to be complete by December 2026.

As a result ADF provides this submission in good faith on the grounds that the information provided will be used to inform the *second* review of the Code as stated above, and that the output of this consultation will not be implemented prior to the second review.

The Discussion Paper also states that: ***“The purpose of the reviews is to check that requirements and responsibilities of the Code are operating as intended.”²*** (emphasis added). Therefore ADF contend the purpose of the review is key in assessing consultation feedback. That is whether the Code is operating as intended! For example, as per below to address: transparency of milk pricing; imbalances in bargaining power; and price risk. **The purpose of this review should not be to endeavour to amend or re-draft the original purpose of the code to achieve different objects.**

3 BACKGROUND & PRIOR REVIEWS

As per the Discussion Paper section titled ‘Context’, in 2015-16 retrospective step-downs in milk prices by Australia’s then-two largest milk processors which had wide-ranging impacts on the industry. In response, the dairy industry came together to develop a voluntary code of conduct **to address transparency of milk pricing, bargaining power, sharing of price risk across the supply chain and other matters.**

In 2016, the Australian Competition and Consumer Commission (ACCC) held an inquiry into the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry. The **ACCC found significant imbalances in bargaining power** at each level of the dairy supply chain, and found that the voluntary code was insufficient to address market failures and required strengthening

¹ DAFF 2024, Discussion paper on the operation of the Dairy Industry Code, Department of Agriculture, Fisheries and Forestry, Canberra. CC BY 4.0. Page1

² IBID Pp2

in a number of areas. The ACCC's 2018 Dairy Inquiry Final Report included a recommendation for a mandatory code for dairy.

As a result, the mandatory Dairy Industry Code (the Code) came into effect on 1 January 2020.

3.1 Reviews of the Dairy Code

As outlined in Discussion Paper, there have been numerous reviews from 2016 through to present day in both the establishment of the Mandatory Dairy Code and its subsequent operation. These

1. Improved Contractual Arrangements between dairy farmers and processors to ensure fairness and transparency in pricing, supply terms, and dispute resolution mechanisms.
2. Mandatory Standard Form Contracts to provide greater clarity and consistency in contractual terms across the industry, including pricing, duration, quality standards, and dispute resolution procedures.
3. Mandatory Price-Step-Down prohibition on processors from implementing unilateral price step-downs during a contract period, providing greater stability and certainty for dairy farmers.
4. Enhanced Pricing Transparency by requiring processors to provide clear and timely information on pricing mechanisms, deductions, and adjustments to dairy farmers.
5. Dispute Resolution Mechanism strengthening to facilitate timely and effective resolution of conflicts between dairy farmers and processors. This could involve the establishment of an independent mediator or arbitrator to address disputes.
6. Enhanced Enforcement and Compliance Measures including penalties for breaches of the code.

These recommendations aimed to **address concerns about power imbalances, unfair contract terms, and lack of transparency** within the dairy industry, ultimately seeking to promote a more equitable and sustainable relationship between dairy farmers and processors.

3.2 Perishable Agricultural Goods Inquiry

The Perishable Agricultural Goods Inquiry conducted by the Australian Competition and Consumer Commission (ACCC) took place in 2020. During this inquiry, the ACCC examined trading practices and relationships within supply chains for perishable agricultural products in Australia, focusing on potential bargaining power imbalances and their impact on market efficiency. The findings

highlighted the importance of transparency and fair practices in the dairy industry and other perishable goods markets.

The key findings relating to the Dairy Code of Conduct were:

1. **Increased Transparency:** The introduction of the mandatory Dairy Code has enhanced transparency of prices and contracting arrangements within the dairy industry. This transparency benefits both farmers and processors by providing clearer information on pricing and contractual terms.
2. **Reduced Barriers** to Switching Processors: The Dairy Code has also reduced barriers for dairy farmers when switching between different processors. This **encourages competition** and allows farmers to **make informed decisions** about their milk supply arrangements.

Overall, the Dairy Code has played a crucial role in improving transparency and facilitating fairer negotiations in the dairy industry.

4 **FIRST LEGISLATED REVIEW: RECOMMENDATION 2**

The following additional consultation feedback is provided in response to specific questions listed in the Discussion Paper.

4.1 **Extension of 3-year contracts**

ADF consider that as per the purpose of the legislated review – the Code specifically with respect to extension of 3-year contracts, is operating largely as intended. That is, extensions have helped transparency of milk pricing, reduce bargaining power imbalances, and the sharing of price risk.

ADF consider ‘extensions’ of long term MSA’s are important for the security of supply in domestic fresh milk markets, as they provide ‘market confidence’ in ensuring security of purchase for the farmer as well as and security of supply for the processor. Both are important while endeavouring to maintain and grow the domestic milk pool.

They are specifically important for farmers where a processor may not intend to renew a MSA contract to purchase from a farmer in a subsequent year, and a farmer may find themselves in a position without a buyer, and as a result with significant business risk. MSA extensions afford the farmer a notice period to seek alternate buyers and/or consider options for structural change. This is especially important in regions with a limited number of processors and the risk is especially high for farmers, for example in Western Australia.

It is considered that processors already have the ability to manage risk better than individual farmers as they will by nature have much more informed commodity risk management and foreign exchange risk management practices. This will determine whether the processor offer a shorter/longer 3-year MSA, and the processor will factor in this 'price-risk' discount/premium accordingly.

To change Section 36 and the option for farmers to extend an MSA, would therefore not be consistent with the purpose of the Code and ultimately result in a risk transfer back to the farmer and potentially exacerbate the market power imbalance.

4.2 Small business definition and exemptions

ADF consider that the small business entity definition under the code is effectively working as per the purpose of the Code to help transparency of milk pricing, reduce bargaining power imbalances, and the sharing of price risk.

ADF do not consider this an issue as existing Small Businesses will already have the required policies and procedures in place, ensuring they have appropriate MSA's and are abiding by them accordingly.

MSA's should be standard practice throughout industry regardless of entity size or number of farmers purchased from. The Code provides protection and discipline on all parties, farmer and processor alike, and improves market transparency. To exempt some processors would be to effectively exempt those farmers from the protections of standard MSA's within the Code.

4.3 MSA variation requirements

Section 12(6) of the Code prohibiting a processor from varying or removing a published MSA after the publication deadline and before the end of the financial year to which it applies, is an important provision in ensuring transparency of milk pricing, reducing bargaining power imbalances, and the sharing of price risk. This is a key provision to ensuring transparency, competition, compliance, and ensuring farmers have access to their MSA.

Ensuring the current version of MSA's are appropriately labelled and clearly displayed is important in ensuring transparency, as is highlighting changes to MSA's when they occur. Maintaining copies of superseded versions of MSA's appropriately labelled and saved on a web page is not only good practice, but requisite for farmers to see past MSA's as well as for maintaining compliance.

ADF consider that it is highly questionable to present what is considered standard accepted practice as an 'administrative burden'. This is especially so when the MSA has already been published and posted to the web; and even more so in the current-day technological era where market practices

and market expectation is that prices/contracts, across sectors, will be readily found on a web and/or app based application.

4.4 Non-exclusive contract arrangements

In an exclusive agreement, the dairy farmer agrees to sell all of their milk exclusively to a single processor. The processor typically guarantees to purchase all of the milk produced by the farmer, ensuring a stable market for the farmer's product. This may provide the benefit to farmers such as price stability or access to specific markets or supply chain arrangements; however can limit the farmer's flexibility in negotiating prices or seeking alternative buyers if market conditions change.

Non-exclusive agreements allow dairy farmers to sell their milk to multiple processors or buyers. Farmers have the flexibility to negotiate prices with different processors and may take advantage of market opportunities. This provides farmers with more flexibility and potentially greater market access, but may raise challenges of ensuring consistent demand/outlets for their milk.

The discussion paper states that *"Farmers raised concerns that the significant price reductions that were being applied to non-exclusive supply contracts rendered them potentially economically unviable".* While, also that *"Processors have similar concerns that non-exclusive supply contracts can be offered on a percentage rather than a volume basis, meaning they can be difficult to interpret and can change during the operation of the contract if the farmer's milk supply varies..".*

ADF considers one of the primary purposes of the Code is to improve transparency of milk pricing, reduce bargaining power imbalances, and improve the sharing of price risk, and in so doing help improve a competitive market place. While Non-exclusive contracts may not be perfect, and arguably could be more competitive, they are achieving the Code purposes by increasing transparency, importantly affording farmers a greater level of choice, and ultimately improving competition.

Farmers have also cited to ADF examples where both processor and farmer benefit from non-exclusive contracts where the processor may, for example, want less volume. Often in these instances the farmer and processor will have a trusted working relationship.

4.5 Minimum pricing requirements in multi-year contracts

As in the Discussion Paper Section 26 of the Code describes that processors are required to set a minimum price for the duration of an MSA, including multi-year MSAs. This may be one minimum price set for the duration of the agreement, a monthly price, or a yearly price. The minimum price in multi-year MSAs is intended to provide certainty of price and supply for both farmer and processor.

The ability for processors and farmers to negotiate MSA's, including multi-year MSA's, is considered consistent with the purposes of the Code to promote transparency, balance market power, risk sharing, and ultimately promote competition. The provision of multi-year contracts enable farmers and processors to choose the length of contract period, providing both greater certainty of supply while endeavouring to manage price risk.

ADF is concerned that varying or proscribing the definition of 'exceptional circumstances' would be inconsistent with prior reviews and the purpose of the Code. That is, the purpose of the Code being to reduce bargaining power imbalances, and improve sharing of price risk and competition.

Previous reviews, including Code reviews and the Perishable Agricultural Goods Inquiry have reaffirmed the clear superiority in bargaining power of processors over farmers. Added to this is the superior market knowledge processors will have over an individual farmer, especially in a market with imperfect information, lack of price transparency, and where many processors are national if not multi-national corporations.

As a result the price setter, the processor, will arguably always have more information than the farmer; the processor will ultimately have control over the price they offer and as a result the floor price; and the processor will determine the level of risk they as a corporate are willing to accept in terms of supply and price. The processor has the choice whether they wish to offer a 1 year or 3 year contract priced accordingly to ensure their security of supply.

Farmers do want processors to have the confidence to maintain demand and production and continue to offer multi-year contracts. However, ADF consider it would be both unreasonable and inconsistent with the purposes of the Code to push more of the risk burden back onto the farmer by removing minimum pricing.

4.6 Multi-party dispute resolution and arbitration

There is no provision in the Code for multiple parties with the same issue to jointly enter into dispute resolution with a processor.

Given the size and bargaining power of processors, ADF believe further consideration should be given to the ability of a group of farmers with a similar issue to engage collectively to resolve a dispute. This could save both farmers and a processor time and money by engaging collectively to settle a dispute and counter-balance the market power of the larger processors. However, ADF does not support processors collectively negotiating with farmers as it is considered this would further

exacerbate bargaining power imbalances and inappropriate risk distribution in the market, inconsistent with the purposes of the Code.

Further consultation on the issue of whether negotiation and arbitration costs being shared based on pro-rata turnover is required. ADF are concerned that given power-imbalances between individual farmers and large corporate entities, potentially with their own in-house legal counsel, would act as a dis-incentive to farmers bringing forward legitimate grievances.

4.7 Contract cooling off period

As per the Discussion Paper, under section 23 of the Code, processors must provide a 14-day cooling-off period, during which the farmer may terminate an MSA without incurring any liability. If the MSA is terminated during the cooling-off period, it continues to apply to all milk supplied up until the date on which the termination takes effect.

As the processor is posting the MSA contractual terms and conditions (T&Cs) it is considered appropriate that the counter-party, the farmer, is afforded a cooling-off period to consider the MSA T&C's. Processors will have a commodity supply manager to manage their contracted supply volume and price risk with a sound understanding of what volume falls within the 14-day cooling-off period. ADF does not consider this is an issue of business "viability" for the processor, merely one of commodity risk management.

ADF do not consider that it is common market practice for farmers to hold multiple MSA's and trade those off between suppliers. Arguably to do so would increase risk to the individual farmer of over-committing supply and being unable to meet contracted MSA's after the 14-day cooling off period.

4.8 Unwritten or unsigned contracts

As per the Discussion Paper, section 16 of the Code outlines that a processor must not purchase milk from a farmer unless it is purchased under an MSA. However, there is no requirement for the MSA to be written or signed by both parties prior to milk collection, meaning a processor and farmer can enter into an unwritten MSA. In this instance, the processor must provide a written record of the MSA to the farmer within 30 days and if the MSA is longer than 90 days, take reasonable steps to have the farmer acknowledge it in writing (Section 18). All MSAs must be published on a processor's website.

Verbal agreements are a historical legacy issue of the industry. Verbal contracts are still considered binding in law in general. Arguably verbal/unsigned contracts can increase risk and uncertainty to

both parties, both farmers and processors alike, however, also improve flexibility and continuation of milk supply.

ADF consider that for reasons of ensuring continuity of milk supply that milk collections should still be allowed under unwritten/unsigned MSA contractual conditions where the processor provides a written record to the farmer within 30 days and take reasonable steps to have it acknowledged by the farmer.

5 OTHER ISSUES

5.1 Processors changing Ownership

ADF would also like to raise an issue arising from the sale and acquisition of one dairy processor by another. That is that the acquiring dairy processor should be required to honour the outstanding MSA's of the selling processor. There have been instances where an acquiring processor refuses to recognise the MSA's of the selling processor; and/or the lack of a requirement to recognise outstanding MSA's of the selling processor results in uncertainty amongst farmer suppliers undermining market confidence and creating stress throughout the sale process.