

15 March 2024

Dairy Industry Code Review
Department of Agriculture, Fisheries and Forestry
Agriculture House
Canberra ACT 2601



Dear Reviewer,

Re: Submission to the Dairy Industry Code Review

The Victorian Farmers Federation (VFF)/United Dairyfarmers of Victoria (UDV) appreciates the opportunity to provide this submission to the Dairy Industry Code Review.

Context

The VFF/UDV notes that the development of the Dairy Industry Code was initiated by the 2015-16 retrospective step-downs in milk prices by the then two largest milk processors. This step-down had a major impact on the industry and an Australian Competition and Consumer Commission (ACCC) inquiry and the subsequent development of a mandatory Code of Conduct.

The need for the Code of Conduct arose because processors were free to behave poorly and did not self-regulate adequately. Market conditions indicate that the need for the Code remains as strong as ever.

The main purpose of the Code is to promote greater transparency in milk pricing, address market failures and promote trust among market participants. The VFF/UDV considers that the Code of Conduct has worked well to correct some market failures and to promote improved competition for milk at the farmgate. The Code of Conduct has been a positive for farmers.

The following section of this submission provides responses to the issues raised in the Discussion Paper.

Response to questions posed in the Dairy Industry Code Discussion Paper

1: Extension of 3-year contracts

Farmers with a Milk Supply Agreement (MSA) of longer than three years can postpone the end of the supply period by 12 months by providing the processor notice no earlier than 30 days and no later than 7 days before the end of the MSA.

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rural communities since 1979.

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

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

The VFF/UDF believes that the current arrangements are working well and there is no need to make any changes. A three-year contract can add to certainty for both sides and the ability to extend the contract further reduces uncertainty. There are always risks that market prices may change during the period a contract is in force – but this is part of the normal commercial arrangements between market participants. Sometime the one participant or the other will benefit from locking in the price compared with the current market price.

VFF/UDV recommendation: No changes are required to the Code.

2: Small business definitions and exemptions

Small businesses are currently defined in the Code as milk processors with an annual turnover of less than \$10 million. Small businesses are exempt from some provisions of the code. The discussion paper notes that some processors may deal with one farmer but because of their turnover they do not qualify as small businesses.

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 definition of a ‘small business’ should not be expanded to also take account of the number of farmers from whom the processor purchases milk. A processor may buy milk from a small number of producers but could still exert significant market power because of their size and dominance in the market.

VFF/UDV recommendation: No changes are required to the definition of a ‘small business’ under the Code.

3: MSA variation requirements

The code currently prohibits 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. This can lead to cases of multiple versions of a single MSA being published by the processor. This can impose an unnecessary administrative burden on both the processor and farmer.

Question 3.1: Rather than publishing all MSA's (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?

It is important that the current operational MSA is clearly identified so that the arrangements between producers and processors is transparent. Publishing multiple versions of an MSA is likely to lead to confusion and reduce transparency. However, it is also of value to see what changes have been made to a MSA over time so that its development and evolution is clear.

This can be achieved by publishing the current most up to date MSA along with a separate document outlining changes over time.

VFF/UDV recommendation: Ensure the most recent and current MSA is available (with a separate document listing any changes or variations to previous versions).

4: Non-exclusive contract arrangements

There can be both benefits and costs to farmers and processors of non-exclusive MSAs. While providing flexibility there may also be complications managing non-exclusive agreements from both the farmer and processor perspective.

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

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

The VFF/UDF takes as a starting point that the best outcomes for producers and processors occurs when there is open and free negotiation of agreements so that there is as much flexibility as possible. Non-exclusive contracts have a role to play in the relationship between producers and suppliers.

By their nature, non-exclusive contracts are likely to be more administratively costly to develop than exclusive contracts. It is up to each participant to weigh up to costs and benefits of entering into non-exclusive contracts.

VFF/UDV recommendation: No changes are required to the current Code.

5: Minimum pricing requirements in multi-year contracts

The code requires processors to set a minimum price for the duration of the MSA, including multi-year agreements. This may be a single price for the duration of the agreement, a month-by-month price or yearly price. There is no ability to vary the price except under 'exceptional circumstances'.

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

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

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

MSAs involve agreement between the producer and the processor. Each party can weigh up the risks and rewards of the price on offer and decide whether to accept the offer or to decline and continue to negotiate.

In the case of longer-term contracts, both producers and processors can lock in forward contracts for inputs to ensure that margins are protected from market changes. If they choose

not to do so, they take on a greater amount of risk. This is a commercial decision for each market participant.

It is not appropriate to define what constitutes an 'exceptional circumstance' under the code. Once this is done there is scope for processors to 'game the system' and manufacture circumstances which meet the circumstances for 'exceptional circumstances'. It is the VFF/UDV's view that whether 'exceptional circumstances' exist or not should be determined on a case-by-case basis.

VFF/UDV recommendation: No changes are required to the current Code.

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. Dispute resolution can be costly and time consuming. Allowing a group of farmers with a similar issue to resolve the dispute collectively can save time and money.

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?

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?

Fair and equitable access to effective dispute resolution is an important element of the Code. Given the size of the processors the VFF/UDV considers that apportioning costs on a pro-rata basis based on turnover will allow all market participants to engage in the dispute resolution process.

It is appropriate for a group of farmers with a similar issue to engage collectively to resolve the dispute. This would save time and money and by engaging collectively this could help, at least partially, counterbalance the market power of the larger processors. Given that they already have significant market power, the VFF/UDV would not support processors joining collectively to resolve a dispute. This would enhance their already significant market power and would further disadvantage producers.

VFF/UDV recommendation: The costs of dispute resolution should be based on pro-rata turnover and that producers be permitted to engage in multi-party dispute resolution but not processors.

7: Contract cooling off period

A 14-day cooling off period applies to a MSA during which the farmer may terminate the agreement without incurring any liability.

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?

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 VFF/UDV does not believe that holding multiple contracts is an issue. Most contracts are signed at the last minute and there is no scope to hold multiple contracts.

VFF/UDV recommendation: No changes are required to the current Code.

8: Unwritten or unsigned contracts

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

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

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

Some producers choose to have verbal agreement or unsigned contracts with processors. This system is a relic from the past when there was trust in the industry and some producers continue to use verbal agreements. If a producer won't sign a written contract, then they go onto a base exclusive contract.

Maintaining the flexibility to have verbal agreements is to the advantage of both sides.

VFF/UDV recommendation: No change is required to the Code.

Conclusion

The VFF thanks you for the opportunity to provide input to the Dairy Industry Code Review. The policy contact for this matter is Glen Hepburn, Senior Policy Advisor Economic and Rural Affairs, via e-mail ghepburn@vff.org.au.

Yours sincerely,

Bernie Free

President

VFF Dairy Council/United Dairyfarmers of Victoria