Supermarket Pricing Inquiry

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Submission to

Queensland Legislative Assembly Supermarket Pricing Select Committee

12 April 2024

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Contents

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 Queensland Legislative Assembly's Select Committee Inquiry into Supermarket Prices.
3. We have recently made submissions to the following inquiries, the Terms of Reference for which cover some of the issues to be addressed by the Select Committee:
    a. Review of the Food and Grocery Code of Conduct 2023-4 (Emerson Review)[1], and
    b. Senate Select Committee on Supermarket Prices 2024[2].
4. Those two submissions are attached to, and form part of, this submission, and we ask that they be considered as part of our response to this Committee's Terms of Reference.
5. At the time of making this submission, the Emerson Review has recently released an Interim Report, and we comment on that Interim Report below.
6. 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 our submissions to the Emerson Review and the Senate Select Committee 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 the 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.

[1] https://treasury.gov.au/review/food-and-grocery-code-of-conduct-review-2023
[2] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Supermarket_Prices/SupermarketPrices

In Summary

7. eastAUSmilk believes there is adequate evidence available to the Select Committee through this inquiry and the Interim Report of the Emerson Review to adopt the conclusions identified in this submission in paragraphs 65 onward.
8. We urge adoption of those conclusions, and that the Select Committee support the actions proposed in those conclusions.

The Circumstances of Dairy Farmers

9. Rather than repeating them here, we refer you to our comments headed 'The Circumstances of Dairy Farmers' in our submission to the Emerson Review of the Review of the Food and Grocery Code of Conduct 2023-4.

Dairy Industry Code

10. Rather than repeating them here, we refer you to our comments headed 'Dairy Industry Code' in our submission to the Emerson Review of the Review of the Food and Grocery Code of Conduct 2023-4.

Dairy Farmers, Processors, and Supermarkets

11. Rather than repeating them here, we refer you to our comments headed 'Dairy Farmers, Processors, and Supermarkets' in our submission to the Emerson Review of the Review of the Food and Grocery Code of Conduct 2023-4.

Processors, Suppliers, and Supermarkets

12. Rather than repeating them here, we refer you to our comments headed 'Processors, Suppliers, and Supermarkets' in our submission to the Emerson Review of the Review of the Food and Grocery Code of Conduct 2023-4, but those comments are supplemented directly below.
13. At paragraph 31 in our submission, we said:

    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.*

14. We think the entire Australian community is entitled to be cynical about this news story https://www.news.com.au/lifestyle/food/eat/coles-drops-prices-on-more-than-300-products-across-meat-bakery-and-pantry-goods/news-story/e26cc8186f6e36f8ea3236695789bb80 and view it as a late and transparent attempt to avoid negative findings in various reviews, and consequent changes to the Food and Grocery Code which reduce the market power of supermarkets.

    a. See also our comments at paragraph 18.

Supply Chain Margins

15. Rather than repeating them here, we refer you to our comments headed 'Supply Chain Margins' in our submission to the Emerson Review of the Review of the Food and Grocery Code of Conduct 2023-4, but those comments are supplemented directly below.

16. Elements of that part of our submission were in some respects specific to the dairy industry, but we believe the arguments in favour of monitoring of margins apply equally to most supermarket products but in particular perishables such as fresh produce.

17. Evidence being seen in public[3] and provided, or to be provided, to the inquiries referenced at paragraph **Error! Reference source not found.** 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.

18. The 3 April 2024 announcement by Coles of reductions in prices of 300 products https://www.news.com.au/lifestyle/food/eat/coles-drops-prices-on-more-than-300-products-across-meat-bakery-and-pantry-goods/news-story/e26cc8186f6e36f8ea3236695789bb80 needs to be examined closely.

    a. It may indicate either that Coles' margins include fat which can be trimmed, or Coles may attempt to restore their margin by pressuring their suppliers or producers to share the pain of the revenue cut.

    b. We are advised by suppliers that this is a common approach of the big supermarkets when they implement price reductions – offsetting supermarket losses from price cuts by pressuring other parts of the supply chain to reduce their pricing or cross-subsidise other supermarket activities such as marketing.

        i. Processors have outlined to us a range of tactics employed by supermarkets to reduce the profit margin impact of consumer price cuts by shifting some of their costs to suppliers, as is mentioned in our submission to the Emerson Review of the Review of the Food and Grocery Code of Conduct 2023-4.

        ii. The underlying threat is, of course, impairment of the supplier's business relationship with the supermarket, if they decline to participate in this cost-shifting.

19. There is no doubt that major supermarkets keep an eye on the prices of their competitors and adjust their own pricing or other offers accordingly. However, this competition does not result in consistently lower prices or consistently smaller margins for the supermarkets, but, rather, major supermarkets continue to see large profits each year.

20. The 'competition' between them is clearly very narrow in scope and sits on top of a base which persists in providing the kind of margins that deliver the excessive profits currently seen. There seems to be an understanding that none of the supermarkets will

[3] E.g. the Four Corners program referenced in our submission to the Emerson Review.

attempt to secure a long-term increase to market share through offering prices which undermine that high-profits-market-share.

21. We can estimate (from information provided anecdotally by members and processors) the margins applying in the dairy product supply chain, and we are aware supermarkets deliberately keep the margins lower on their private label dairy products so that they are significantly cheaper than equivalent branded products.
    a. This is done to increase private label product turnover and decrease branded product turnover.
    b. Lest anyone suspect this is done largely to provide a more affordable product to consumers,
        i. Supermarkets are constantly seeking to drive down the costs and of their private label supply chain, and the margins for farmers and processors,
        ii. While their margin may be lower for private label products, the higher volume of sales driven by lower prices, and their efforts to keep the purchase price down by pressuring farmgate and processor prices and margins, produces a satisfactory margin and profit, and
        iii. There is no doubt that the prices of equivalent private label and branded products are carefully managed so as to maximise profit.
22. There is no reason to believe supermarkets behave this way in relation to dairy products alone.
23. We are presuming the ACCC has the capacity and interest to develop a good picture of the margins along the supply chain for many different products sold by supermarkets.

Retaliation

24. Rather than repeating them here, we refer you to our comments headed ‘Retaliation’ and ‘Best Practice in Eliminating Retaliatory Behaviour’ in our submission to the Emerson Review of the Review of the Food and Grocery Code of Conduct 2023-4, but those comments are supplemented directly below.
25. In that submission, 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.
26. This pattern described to us is seen as pervasive, and a product of a bad culture driven from the top.
27. We also addressed what might be the components of a best-practice approach to eliminating fear of retaliation from food and grocery supply chains.
28. We raised, addressed, and stressed, these issues in our submission to the Emerson Review 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.

Economics of Dairy Farming

29. Members advise us that the published general rates of inflation are irrelevant to their businesses.

30. While we appreciate that this evidence is anecdotal, they advise that the rate of increase of farm input costs has in recent years outstripped the general inflation rate by at least 50%.

31. More rigorous evidence supports this proposition:

    a. https://www.austrade.gov.au/en/news-and-analysis/analysis/farm-food-costs-rise-due-to-higher-energy-prices

    b. https://mecardo.com.au/cost-of-farming-up-28-in-3-years/ - which indicates a steep input cost increase for the last 20 years.

    c. https://af.farm/insights/af-agricultural-inflation-index-confirms-record-increases-in-farm-input-costs/ - UK figures but demonstrating a 37% increase in dairy farm input costs for the year to September 2022

    d. The annual *In Focus* publication from Dairy Australia includes incomplete farm input cost data: https://www.dairyaustralia.com.au. In particular, Table 6 Average farm working expenses by state is relevant. The tables in this report need to be approached with caution because milk prices were artificially held back by the reprehensible supermarket policy of dollar-a-litre milk, until well into 2019.

32. Disappointingly, while the Australian Bureau of Statistics provides Producer Price Index numbers alongside their CPI series, agriculture is not an industry they examine: https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/producer-price-indexes-australia/dec-2023

33. While there is some indication in some of the material highlighted above that farm input cost inflation has moderated in just the last year, after many years of excessive increases, the data is too patchy and incomplete to draw reliable conclusions and projections.

34. One of the notable trends is increased purchase of feed, as part of an endeavour to flatten milk production, and the impact this has on farm input costs. This is far less of an issue across Queensland where processors have traditionally insisted on flat production – the increased fodder costs in other states are already part of the Queensland cost structure.

35. Some of the price increases for farm inputs are caused by international events and instability – for example, the first two years of the COVID pandemic, and the Russian invasion of Ukraine, put significant pressure on fuel prices and ultimately fertiliser prices. Some of those causes are identified at the links provided above, but the important point is they are not domestic, and they are mostly unavoidable.

36. These costs are inescapable for farmers, and it is inevitable that some of the cost increases to farmers would have flowed up the supply chain to consumers.

    a. How much would flow through is entirely in the hands of processors and big supermarkets, who essentially determine, because of their control over the supply chain, how much farmers will be forced to absorb.

Food Security

37. A report from the House of Representatives Standing Committee on Agriculture, in November 2023, called *Australian Food Story: Feeding the Nation and Beyond*, identified the need for a national food security strategy.
38. The Commonwealth government is yet to provide a response to the report.
39. Directly relevant to Queensland's dairy industry and seafood industry, the report identified that the national supply of dairy and seafood products was sufficiently insecure that each industry required a standalone plan to achieve security of supply.
40. While we endorse this report and recommendation four addressing dairy supply security, this issue is particularly relevant for Queensland.
41. Not only is the national milk pool shrinking year on year, prompting the call for a dairy industry plan, in Queensland we are now producing less than 50% of the fresh white milk we consume, and that proportion is declining.
42. Milk is now routinely trucked from Victoria into Queensland, including as far as Cairns, impacting freshness and in-store shelf life, and undermining the capacity of the Queensland industry to grow.
43. One of the reasons for preferring local production and consumption is to minimise the carbon footprint of the supply chain. The cost of this transport from Victoria does not reflect any offsetting of additional carbon emissions.
44. Production costs are lower in Victoria than in Queensland, so the cost of getting milk to Queensland shelves from Victoria is not necessarily enormously greater, at all times of the year, than it would be to buy more milk in Queensland. However, at some times of the year (say, February/March) the cost difference is quite significant, and were processors and supermarkets prepared to offer Queensland farmers a reliable higher price than at present, matching the cost of importing from the south, Queensland farmers would produce more to meet the additional demand.
    a. The shortfall in Queensland production is the responsibility of supermarkets, as they ultimately determine the price at which processors can purchase from farmers.
45. The discussion below under 'National or Regional Pricing' is relevant, because there are times when milk is in high demand (the February/March national low production period) and it is during this time that processors and supermarkets between them determine to import less milk into Queensland than the market wants, and there are shelves empty of milk.

National or Regional Pricing

46. Major supermarkets apply a policy of uniform pricing regardless of location.
47. This inevitably means that for some products, the shelf price produces a lower margin for the supermarket than in other locations, because of the additional cost of getting that product onto those particular shelves.
48. In some locations, additional transport costs are so high that the supermarket prefers to not stock particular products, because the margin is too low or below zero.
49. In such high-cost regions, national pricing makes it unprofitable for processors to supply products to retailers. This is the case for milk in some parts of Queensland and especially in north Queensland.
50. Processors are forced to supply milk at a price which enables retailers to make a margin in high-cost regions. This has meant processors supplying at a lower price than is profitable in a high-cost region, or processors accepting a lower price in low-cost regions and cross subsidising between regions. Either way, national pricing forces processors to make less than commercial margins overall for their business.
51. The low price for plain-label milk in high-cost regions also blocks processors from setting the price of their own brands of milk at a profitable level.
52. This national pricing policy forces insufficient milk production in some high-cost regions and availability for consumers is affected, with from time to time no milk on shelves. This shortage of milk is already occurring in north Queensland and will became significantly more widespread in the future unless something is done.
53. It should be noted that transporting milk into north Queensland is more expensive than local supply. Bega currently transports milk from Victoria to Malanda which is around 3000 km and the landed cost into Malanda is well above locally sourced milk.
54. It is important to note that this pattern of seasonal or permanent reduction in margin is a policy choice open to supermarkets, one they have clearly been prepared to live with in some locations, and possibly their only option while they adhere to a policy of national pricing.
55. If they can accept lower margins in some locations, they could accept them more broadly.
56. Because of calving and other dairying cycles, February/March is, nationally, a seasonal low production period, and processors seeking milk to make up their volumes create unusually high demand. This forces milk to its highest price, and it is during this time that processors and supermarkets between them determine to import less milk into Queensland than the market wants, and there are shelves empty of milk.
57. Abandoning national pricing for selected commodities such as milk would enable price reductions for milk at some times and in some locations.
    a. It would also mean higher milk prices at times as well, reflecting supply and demand for milk in that region.

58. Where supermarkets insist on a national pricing policy for products with significantly variable price-to-shelf, the margins they are currently setting for such products must, mathematically, provide windfall profit at times of low cost-to-shelf, while providing a lower profit at times of high cost-to-shelf.
    a. That is, if the national price is set so a profit can be made when milk is expensive for processors and supermarkets to buy, the margin they are making when milk prices are low must be high.
    b. Abandoning national pricing for such products could see a significant price cut in regions when the cost of getting to the shelf are lower.

Emerson Review Interim Report

59. The Emerson Review of the Review of the Food and Grocery Code of Conduct 2023-4 released an Interim Report on 8 April 2024[4].

60. Some recommendations are couched as firm, and will not be changed in the final report, while others are subject to ongoing consideration.

61. Amongst the firm and unchanging recommendations are:

    a. That the Food and Grocery Code be made mandatory,

    b. Three components aimed at eliminating retribution upon suppliers and producers.

62. While we applaud those recommendations, they are recommendations only, and we can be very sure that in spite of their public protestations of support for these recommendations, the big supermarkets will be:

    a. Ensuring the Commonwealth government is given every reason available to reject the recommendations,

    b. Arguing that if the Code is to be mandatory many of its terms and conditions need to be would back and made softer, and

    c. Inventing straw man arguments to delay remaking of a mandatory code.

63. Those recommendations, and the others in the Interim Report, will not become reality quickly enough, unless every concerned stakeholder and government presses the Commonwealth to take up the recommendations, and swiftly.

64. eastAUSmilk will be making submissions on the Interim Report identifying other issues to address, as well as offering thoughts about how various of the recommendations can best be encoded or implemented.

[4] https://treasury.gov.au/consultation/c2024-510813

Conclusions

65. The fear of retaliation is the framework which defines and regulates the relationship between the big supermarkets and their suppliers, not the Food and Grocery Code of Conduct.
66. The market power of the big supermarkets allows them to adopt many different methods of pressuring their supply chains to keep prices higher than they need be, keep the supplier/supermarket margin higher than it needs to be, and maximise profits.
67. The analytical capacity of the big supermarkets allows them to manipulate pricing, shelf space, shelf position and more, of products competing with their private label products, to balance the sales volumes of the competing products so as to maximise profit.
68. Unless and until the fear of retaliation by supermarkets is eliminated from the relationship with their suppliers, the full extent and pattern of supermarket tactics and behaviour will not be known.
69. The Food and Grocery Code of Conduct:
    a. is completely ineffective as it is and must be mandatory.
    b. must embed an obligation for the big supermarkets to embed in their business operations policies, practices, and training, which are effective in eliminating retaliatory and bullying behaviour.
70. The only way for the social license for big supermarkets to be restored, and for the community to have confidence into the future that they are not being ripped off, is for real-time reporting of product line margins.
71. Until the big supermarkets
72. The insistence on national pricing by big supermarkets ensures from time to time there are product shortages and supply insecurity in some locations.
73. Supermarkets need to consider regional pricing for some products as a means to reducing prices overall for those products.
74. The Queensland Parliament should actively support the national *Australian Food Story: Feeding the Nation and Beyond* Report.
75. The Queensland Parliament should actively urge the Commonwealth government to support the firm recommendations of the Emerson Review Interim Report, and their speedy implementation.

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Submission to
Senate Select Committee on Supermarket Prices

2 February 2024

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Introduction

1. eastAUSmilk is the industry body representing dairy farmers in New South Wales and Queensland.
2. We thank you for the opportunity to make a submission to the Select Committee's Inquiry.

In Summary

3. eastAUSmilk supports, and urges that the Senate and Government support:
    a. making the Food and Grocery Code of Conduct mandatory, and
    b. that the government continue to monitor the product line margins of major supermarkets.

The Circumstances of Dairy Farmers

4. Dairy farmers are nearly always price takers and cannot pass on additional costs.
5. 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.
6. 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 reduce that accumulated debt.
7. The dairy industry is extraordinarily variable across the nation, and this includes:
    a. Breeds of cattle,
    b. Farm size,
    c. Production systems,
    d. Productions costs,
    e. Production risks, including climate
    f. Farm profitability,
    g. Proximity to processors,
    h. Competition for farmgate raw milk – some dairy farmers have several processors to whom they might sell, while some have only one, and
    i. Markets serviced (for example, almost all milk produced in Queensland goes to domestic milk consumption, while nationally about 30% is exported).
8. 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. Yet governments of every stripe are advised by their public servants to do just that.
9. We refer you to the 2018 report of the Australian Competition and Consumer Commission on the operation of the dairy market in Australia, for background on how dairy farmers participate in the market – it provides very useful background, and, while introduction of the Dairy Industry Code moved towards making the market more fair, it is not at all a complete solution and many of the problems and unfair practices identified by the ACCC continue to this day. The code is discussed further, below.

Dairy Industry Code

10. 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.

11. 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.

12. 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.

13. 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.

14. The 2018 report made many findings adverse to the behaviours of milk processors, and other features of the operation of the market, including[1]:

    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.

[1] 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.

15. Much of the content of the mandatory dairy code is similar to or the same as the content of the voluntary grocery code.

16. The Commonwealth government has recently modified the 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.

17. eastAUSmilk is exceptionally disappointed by this change, 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.

Dairy Farmers, Processors, and Supermarkets

18. 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

    a. their own brands, where milk processors provide their branded dairy products to retailers for them to sell, and

    b. retailers, who sell under the retailer's own brands to the public, called 'private label' products.

19. 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.

20. 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 Australia[2].

21. 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.

22. 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, 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."[3]

23. This proposition, while reflecting what was provided to the Australian Competition and Consumer Commission, does not reflect the real world.

[2] https://www.dairyaustralia.com.au/industry-statistics/industry-reports/australian-dairy-industry-in-focus
[3] Page xxi, summarising material elsewhere in the report.

Processors and Supermarkets

24. The relationship between dairy processors and supermarkets is in part addressed by the unenforceable and optional Food and Grocery Code of Conduct.
25. 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.
26. They've 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 been able to cite that advice as the reason for not intervening.
27. We note that the current cost of living crisis across Australia is, in part, the consequence of that timidity.
28. 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.
29. The members of eastAUSmilk have frequent contact with milk processor companies at the local level and upwards.
30. Every last one of those processors has horror stories to tell about being bullied by supermarkets, but they will not tell those stories. They tell our members, who tell us, but processors will not speak up.
31. 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 who want 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.

h. In markets with few retailers reasonably available to processors for sales, retailers are able to pressure processors to reduce prices to near-loss levels, or lose contracts. This threat to contracts can be made in relation to other markets further away and unrelated to that market.

32. 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.

33. 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.

34. Were processors prepared to speak up, even privately and confidentially, it would be clear to Senators and the government that the ACCC's rejection of interfering with retailer power, in their 2018 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 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.

35. 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.

36. Making the grocery code mandatory will go some way to re-balancing the relationship between supermarkets and wholesalers.

37. The grocery market does not function efficiently – 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.

Supply Chain Margins

38. When the dairy industry was regulated, farmgate prices were prescribed, processor margins were reported, and retailer prices were public information.
39. 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.
40. In April 2021, ACCC reviewed the impact of deregulation on Australian milk industry prices, margins, costs and profits.
41. They found[4]:

    "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."
42. 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.
43. Sunlight is the best disinfectant, and we believe that the government, perhaps via the Australian Competition and Consumer Commission, should continue to monitor the product line 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 have the technology to report this information for all product lines, easily, and in almost real time.
    d. Supermarkets 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.

[4] https://www.accc.gov.au/media-release/big-gains-to-consumers-from-dairy-deregulation

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Submission to
Review of the Food and Grocery Code of Conduct

4 March 2024

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Contents

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 2023-24 Review of the Food and Grocery Code of Conduct, and for tolerating our submission being provided a couple of days late.
3. 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 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 the 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.

In Summary

4. eastAUSmilk supports, and urges that the Review and Government support:
    a. making the Food and Grocery Code of Conduct mandatory,
    b. requiring major supermarkets to report their product line margins in real time, and
    c. encouraging larger parties to the Code to embed policies, practices, and training, which are effective in eliminating retaliatory and bullying behaviour.

The Circumstances of Dairy Farmers

5. Dairy farmers are nearly always price takers and cannot pass on additional costs.
6. 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.
7. 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.
8. 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,
    e. Productions costs,
    f. Production risks, including climate,
    g. Farm profitability,
    h. Proximity to processors,
    i. Competition for farmgate raw milk – some dairy farmers have several processors to whom they might sell, while some have only one, and
    j. Markets serviced (for example, almost all milk produced in Queensland goes to domestic milk consumption, while nationally about 30% is exported).
9. 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 or built to fail.
10. We refer you to the 2018 report of the Australian Competition and Consumer Commission on the operation of the dairy market in Australia, for background on how dairy farmers participate in the market – it provides very useful background, and, while introduction of the Dairy Industry Code moved towards making the market more fair, it is not at all a complete solution and many of the problems and unfair practices identified by the ACCC continue to this day. The code is discussed further, below.

Dairy Industry Code

11. 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.

12. 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.

13. 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.

14. 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.

15. The 2018 report made many findings adverse to the behaviours of milk processors, and other features of the operation of the market, including[1]:

    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.

[1] 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.

16. 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 similar terms to the current Code.

17. The Commonwealth government has recently 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.

18. eastAUSmilk is exceptionally disappointed by this change, 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 code[2].

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

Dairy Farmers, Processors, and Supermarkets

19. 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

    a. their own brands, where milk processors provide their branded dairy products to retailers for them to sell, and

    b. retailers, who sell under the retailer's own brands to the public, called 'private label' products.

20. 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.

21. 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 Australia[3].

22. 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.

23. 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:

    a. 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.

    b. Their suppliers can be more positive about their relationship with the supermarkets, than others in the sector.

    c. 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.

24. 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,

[3] 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."[4]

25. This proposition, while reflecting what was provided to the Australian Competition and Consumer Commission, does not reflect the real world.

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

Processors, Suppliers, and Supermarkets

26. The relationship between dairy processors and supermarkets is in part addressed by the unenforceable, optional, and penalty-free, Food and Grocery Code of Conduct.
27. 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.
28. 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.
29. 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.
30. We note that the current cost of living crisis across Australia is, in part, the consequence of that timidity.
31. 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.
32. 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.
33. 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 tell us directly, but they will not speak up for fear of supermarkets taking action to impair their business.
34. 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.

35. 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. use of fonts so small as to be unreadable when notifying price per kilogram and other required or legitimate comparisons on labels/tags, and

f. misleading labelling more generally.

36. 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.

37. 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.

38. 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*[5], eastAUSmilk agrees that these, and other similar tactics, are what processors and our members have described to us.

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

39. 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.

40. 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.

41. 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.

42. 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.

43. Making the grocery code mandatory will go some way to re-balancing the relationship between supermarkets and wholesalers.

44. 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.

45. What governs the relation ship 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.

46. 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.

Supply Chain Margins

47. When the dairy industry was regulated, farmgate prices were prescribed, processor margins were reported, and retailer prices were public information.

48. 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.

49. In April 2021, ACCC reviewed the impact of deregulation on Australian milk industry prices, margins, costs and profits.

50. They found[6]:

    "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."

51. 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.

52. eastAUSmilk firmly believes that supermarket margins are excessive, and contribute to cost of living pressures.

53. Sunlight is the best disinfectant, and we believe that the government, perhaps via the Australian Competition and Consumer Commission, should continue to monitor the product line 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 have the technology to report this information for all product lines, easily, and in almost real time.

54. Supermarkets 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.

[6] https://www.accc.gov.au/media-release/big-gains-to-consumers-from-dairy-deregulation

55. They will also claim such an obligation is unduly burdensome, but this is simply not correct.

56. There are several options open to Government in addressing this proposition via modifying the Food and Grocery 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.

57. 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.

58. 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.

59. 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

60. There is a reluctance to speak out publicly, or even confidentially, against the behaviour of supermarkets. There is an expectation of retaliation. Both our members and the staff of milk processors tell us so.
61. We are advised that senior staff of supermarkets have been heard to boast of the careers and companies they have damaged or ruined by taking undocumented retaliatory action, and they claim this as a badge of honour.
    a. Making such a boast can only be taken by suppliers to be a warning they must not speak up.
    b. Even small acts of vindictive behaviour can have major impacts on supplier income and viability.
    c. The capacity to intimidate is particularly powerful when the supplier in question is providing perishable or limited life goods – the supplier knows they have no options if any action is taken by supermarkets. They can't take goods back, can't divert them elsewhere, can't delay shipping to smooth out supply curves … and their product will be worthless very quickly.
62. An increasing number of eastAUSmilk members sell directly to retailers, as set out above at paragraph 20, and many of them report a healthy and positive relationship with their retailer.
    a. However, others say they are reluctant to raise problems or press for contract changes, because it could put at risk that business relationship most important for viability.
63. At a senior and corporate level, supermarkets will say they have code of conduct and ethical principles which rule out such behaviour.
64. Some may say their training addresses these issues.
65. To the extent they have such policies, practices, and training, they are at best questionable, and information from staff of processors and supermarkets, and from our members, suggests they are ineffective.
    a. We are advised the retaliatory culture discussed above extends into such senior managers as commercial and category managers.
    b. Suppliers well understand that a category manager has the necessary power over the supply chain to maim or destroy their business.
66. Smart supermarkets will understand it is not in the interests of their companies for retaliatory behaviour to be applied to suppliers, regardless of the issue.
67. Less smart operators would see it as sufficient to be merely seen to discourage such behaviour, and certainly to not be caught.
68. Supermarket strategies might reject retaliatory behaviour, but there is a widespread perception that retaliation occurs, and it is sufficiently widespread that suppliers are logical in their fear of making a complaint.

   a. Processors uniformly reject the proposition that lack of complaints under the Code reflect a properly functioning Code – that lack reflects fear.

69. The culture in such supermarkets overtakes and undermines the strategic intent. As well-known business analyst Peter Drucker said: “*Culture eats strategy for breakfast*”.

70. A smart business should understand that if behaviour, or perceptions around it, is undermining strategy, or social license, then they need to do more than go into denial.

71. That’s particularly so when the belief about bad behaviour, or the bad behaviour itself, is widespread.

72. Doing more than denial should involve ensuring, at least:

   a. There is a policy which:

      i. recognises feedback from suppliers, even inconvenient or negative feedback, provides business value and is wanted,

      ii. recognises truly respectful relationships between retailers and suppliers are a business-critical priority, and

      iii. bans retaliatory behaviour.

   b. Training is provided to all staff who engage with suppliers, focussed on culture and behaviour change, not just a lecture designed to tick a box.

   c. Business leaders model best practice behaviour when it comes to bullying and retaliation internally, and this behaviour is recognised and important in recruitment and promotion processes.

73. In short, larger parties to the Code should be encouraged to embed policies, practices, and training which are effective in eliminating retaliatory and bullying behaviour.

74. The following paragraphs set out a more “best-practice”, rather than bare-minimum, approach.

Best Practice in Eliminating Retaliatory Behaviour

75. Organisations take various measures to ensure they meet their obligations under anti-retaliation provisions in commercial dispute resolution statutes and processes. some examples[7] follow.
76. Clear Policies and Procedures: Many organisations develop clear policies and procedures outlining the process for reporting disputes and grievances, including provisions that explicitly prohibit retaliation against individuals who report violations or participate in dispute resolution processes. These policies are communicated to all employees and stakeholders.
77. Training and Education: Organisations invest in training and education programs to raise awareness among employees and managers about the importance of anti-retaliation provisions. This training typically covers the rights and responsibilities of employees, the consequences of retaliation, and the procedures for reporting concerns.
78. Anonymous Reporting Mechanisms: Providing anonymous reporting mechanisms allows employees to report disputes or concerns without fear of retaliation. This can include hotlines, online reporting platforms, or third-party ombudsperson services that ensure confidentiality.
79. Independent Review Processes: Organisations may establish independent review processes or committees responsible for investigating complaints of retaliation impartially. These bodies ensure that disputes are handled fairly and without bias, enhancing trust in the organization's dispute resolution mechanisms.
80. Documentation and Record-Keeping: Maintaining detailed documentation of dispute resolution processes, including complaints, investigations, and outcomes, helps organisations demonstrate their commitment to addressing disputes and preventing retaliation. Proper record-keeping also ensures transparency and accountability.
81. Performance Evaluation and Accountability: Incorporating compliance with anti-retaliation provisions into performance evaluation criteria for managers and supervisors reinforces the organization's commitment to preventing retaliation. Holding individuals accountable for any acts of retaliation sends a clear message that such behavior will not be tolerated.
82. Regular Audits and Reviews: Conducting regular audits and reviews of dispute resolution processes allows organisations to identify any gaps or areas for improvement in their compliance with anti-retaliation provisions. These audits can be internal or conducted by external auditors or regulatory bodies.
83. Engagement with Stakeholders: Engaging with stakeholders, including employees, unions, regulatory agencies, and advocacy groups, fosters open communication and collaboration in addressing disputes and ensuring compliance with anti-retaliation provisions. Soliciting feedback and incorporating suggestions for improvement

[7] The information in paragraphs 65 to 73 was sourced from CHAT-GPT and edited.

demonstrate a commitment to continuous enhancement of dispute resolution processes.

Responses to Consultation Questions

1. What, if any, other objectives should guide the Code to improve relations between supermarkets and their suppliers?

    There should be a focus on sustainability, including fairness and profitability, in the whole supply chain, and the enormous market power supermarkets have over processors and farmers must be reduced to create a more properly competitive market.

    The capacity of supermarkets to increase shelf price beyond increases to input costs must be curtailed. Not only is it inflationary and unfair to consumers, when it applies to products competing with supermarket private label products (and there are many examples of this) it is an attempt to unfairly compete, distort the market, and harm the business of their supplier.

    Regional pricing must be addressed in code changes. At present, local suppliers in high cost regions cannot achieve sustainable prices, and those with a national footprint are forced to lose money in high cost regions, or pressure suppliers to accept prices which impoverish them and risk business failure. In the long run, this will force farmers, processors/wholesalers, or both, to close down, meaning that consumers in high cost areas cannot access these products. Many fresh produce lines see variable production and distribution costs between regions reflecting differences in costs. In some, like milk, the power of retailers ensures suppliers are constantly on the cusp of bankruptcy.

    Consideration should be given to processes which stop retailers embedding[8] losses in any products in any regions, as this is often the source of inappropriate pressure on processor/wholesaler and supplier viability. The disgraceful period of dollar a litre milk is a case in point.

    Retaliation action by retailers must be stopped – see elsewhere in this submission.

    Retailers apply smaller margins to their own brands to increase sales compared to other brands. This is anti competitive and there needs to be strong regulation to address this massive conflict of interest, always exercised by retailers in their own interests.

    Dairy farmers and some processors would support inclusion in the Code of a preference of some kind being given to Australian domestic suppliers.

2. Does the Code effectively address issues between supermarkets and their suppliers stemming from bargaining power imbalances?

    In all instances, suppliers are price takers, and this is the source of the power imbalance – price and other negotiations are not between equals.

    Currently the Code has zero impact on addressing imbalances, and this is the main issue which must be fixed through this review.

    Amendments to a voluntary Code are pointless.

[8] Not the same as deploying special pricing from time to time.

An extraordinary example of the most egregious misuse of market power is the use of “mitigation” requirements – which are not always written. Supermarkets have been known to agree to a price increase for a supplier and commensurate increase in their shelf price, but on the condition that if their major competitor does not similarly increase shelf price then all or part of the price increase to the supplier will be foregone.

3. Is it agreed that there is an imbalance in market power between supermarkets and all suppliers, or only some suppliers and/or some product types?

    Supermarket knowledge of supplier price structures and margins, particularly but not exclusively with branded products, gives supermarkets significantly increased power, and increases the imbalance which otherwise applies.

    That imbalance is increased when it comes to perishable or short shelf life products.

    Not only processors/wholesalers in perishable food, and farmers, but large international suppliers are known to have scaled back or left Australia in the face of our current uncompetitive duopoly.

4. Should the same rules apply to all supplier interactions covered by the Code, or should additional requirements apply where a greater power imbalance exists?

    It might be unnecessary to address this in the course of the current Code Review, as the power imbalance is so enormous in so much of the sector that we see this as a second-order issue. This review might identify this as an issue to be resolved in the future, unless substantive submissions are received on the topic.

5. Should the Code be extended to cover other aspects of the food and grocery supply chain?

    We do not support in any way reducing the strength of the Dairy Industry Code – rather, it is in need of urgent strengthening.

6. Should some or all alcoholic beverages be included in the scope of the Code?

    We are not sufficiently aware of whether market power is misused in this retail/wholesale sector, but we presume the same misuses and bullying operate from the same major retailers, everywhere they can improve their profitability.

7. Is the coverage of the Code to the current signatories sufficient to address bargaining power issues across the supply chain? For instance, should the Code’s signatories be extended to more wholesalers that sit between the retailers and producers of food and grocery products?

    If evidence is provided that other players in the supply chain mis-use their market power then the Code should be extended.

8. Do the provisions set out under the Code ensure it is fit for purpose?

    The current Code is not fit for purpose, for the reasons advanced elsewhere in this submission. However, amendments to a voluntary Code are pointless – i.e. cannot make it fit for purpose.

9. Which provisions under the Code help or hinder suppliers? How can the provisions be improved?

    The entire basis of the current Code is that retailers can be trusted to operate honourably, so the whole Code without enforceability, in providing a false veneer of protection and balance, undermines the interests of suppliers.

    A ban on lower supermarket margins for unbranded or private label products with limited (say, less than 30 days) of shelf life should see the margin and hence price applied to branded products reduced, which would reduce market distortion and benefit customers.

10. Does the interaction of the Code operate effectively with other sectoral codes of conduct, particularly in the agricultural sector, and how can this operation be improved?

    We do not support in any way reducing the strength of the Dairy Industry Code – rather, it is in need of urgent strengthening.

    Australian Dairy Farmers has done an analysis of the content of each of the Dairy Industry Code and the Food and Grocery Industry Code, and finds considerable overlap and complementarity. Their analysis was part of their confidential submission to the Australian Competition and Consumer Commission review of the acquisition by Coles of two Saputo dairy processing facilities. They may, upon request, be prepared to release the whole of that submission, or the relevant part.

11. What international approaches to regulating the conduct of supermarkets in relation to their suppliers should be considered in the Australian context, including lessons learned?

    Too many overseas jurisdictions have no or ineffective regulation to be of great value, and none, as far as we are aware, have a market duopoly as we do, combined with effective regulation.

    However, our submission addresses international best practice in one respect, and that is in reducing bullying and retaliatory behaviour.

12. What dispute resolution model would most effectively facilitate positive outcomes for the industry, while also allaying suppliers concerns of retribution?

    Presuming the fear of retaliation can be overcome, the dispute resolution processes need to be built to recognise that perishable product issues must be addressed urgently. One of the biggest weapons supermarkets have in dealing with the suppliers of perishables is that those suppliers cannot dispute anything said by the supermarket’s representatives about a perishable product, because by the time anything is resolved the product is unsaleable. Members have provided examples of entire truckloads of produce being destroyed in these circumstances.

    A model which spreads costs equally will not work, because that just embeds one aspect of the power imbalance. What’s more important is fixing retailer culture and behaviour.

13. What benefits could a mandatory code bring to suppliers?

    Amendments to a voluntary Code are pointless.

The eastAUSmilk experience, outlined above, is that while our mandatory dairy code did not solve all problems and now requires urgent strengthening, Code introduction brought a significant improvement to the balance of power, and to the lives of dairy farmers.

Without a doubt, the same effect would be seen if the Food and Grocery Code was mandated.

14. If the Code were made mandatory, what should be the threshold for supermarkets to be included in the Code?

    Single store operators should not be covered, unless part of a franchise and branded business.

15. Would it be possible to keep all, or some, of the arbitration model of the current Code if it were made mandatory? If so, how?

    No comment to offer, other than the current system is entirely untested, so clearly isn't working.

16. Are Code Arbiters perceived to be independent from the supermarkets that they oversee?

    Member and processor feedback is that they are not seen as independent.

17. If not, how could the reality and perception of independence of Code Arbiters be enhanced?

    A mandatory Code, with Australian Competition and Consumer Commission supervision and enforcement, will resolve this issue.

18. Could the voluntary Code be amended to address the fear of retribution by supermarkets and if so, how?

    Our submission at paragraphs 60 to 83 addresses this issue, and we have suggested both a minimum standard which could be imposed, and a more best-practice approach. It is critical for the future of the sector that this issue is resolved.

19. Is there evidence of suspected breaches of Code that are not being enforced due to a lack of civil penalty provisions?

    As mentioned above, members, and the people they and eastAUSmilk speak with at retailers and processors, make it clear to us that the Code is ignored when convenient, particularly so by less senior staff. But it is their managers and more senior managers who create and allow such a culture to thrive.

20. Should civil penalties be available for breaches of the Code?

    Yes.

21. If civil penalties are to be applied to the Code, what penalties are appropriate?

    Vicarious liability should apply to a retailer breaching the Code.

    We suggest a scale of fines commensurate with the size of the offending business – only massive fines will ensure a recalcitrant retailer will change, if they are not doing so.

Remediation of the situation of the supplier should be the minimum default order, regardless of the cost to the retailer.

Repeated breaches should attract a criminal penalty.