



**Australian Government**  
**Department of Agriculture,  
Fisheries and Forestry**

# **Second Dairy Code Review**



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### Acknowledgement of Country

We acknowledge the continuous connection of First Nations Traditional Owners and Custodians to the lands, seas and waters of Australia. We recognise their care for and cultivation of Country. We pay respect to Elders past and present, and recognise their knowledge and contribution to the productivity, innovation and sustainability of Australia's agriculture, fisheries and forestry industries.

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# Summary

The *Competition and Consumer (Industry Codes-Dairy) Regulations 2019* (Dairy Code) is a mandatory code under the Competition and Consumer Act 2010 (the Act) that regulates the conduct between a dairy farmer<sup>1</sup> and dairy processor<sup>2</sup>.

In 2015-16, retrospective step-downs in milk prices by Australia's then two largest milk processors had wide-ranging implications within the industry. Following this, in 2018, the Australian Competition and Consumer Commission (ACCC) conducted an inquiry into the Australian dairy industry and found inherent bargaining power imbalances between processors and farmers. The ACCC recommended a mandatory code of conduct to improve transparency and certainty in contracts, set minimum standard of conduct and provide for dispute resolution processes.

Commencing in 2020, the Dairy Code included two review points, in 2021 and 2023. The first review found that the Dairy Code was operating as intended and made three recommendations for administrative improvement. The completion of the second review was postponed to December 2026 to allow for the first review recommendations to be implemented and take effect. This report is the outcome of the second review.

The Department of Agriculture, Fisheries and Forestry (the department) commenced the second review of the Dairy Code (the Review) in October 2024, and formal industry consultation commenced in February 2025. The department's approach to consultation was to allow for a broad range of voices and perspectives to be heard, and included the establishment of a Consultation Group, engaging with relevant national bodies and other dairy stakeholders, and receiving written submissions.

The department remained committed to listening to industry's views on the role, impact and operation of the Dairy Code, and placed a strong focus on receiving information and evidence to support positions.

<sup>1</sup> Under the Dairy Code 'farmer' means a person that produces, or that may produce, milk.

<sup>2</sup> Under the Dairy Code 'processor' means a corporation that purchases, or that may purchase, milk from farmers, whether or not the corporation processes the milk.

*Example: Some cooperatives and milk brokers purchase milk from farmers but don't process milk.*

# 1 Review process

## 1.1 Review Terms of Reference

### 1.1.1 Purpose

The Review will assess the role, impact and operation of the Dairy Code. The Review will achieve this by:

- Examining:
  - whether the Dairy Code is still providing a framework that is effective for the dairy industry and remains fit for purpose.
  - the effect of any changes to market conditions in the dairy supply chain on the operation of the Dairy Code.
- Assessing the operation of the Dairy Code in meeting industry needs and objectives, including assessing whether requirements that processors and farmers must adhere to under the Dairy Code are still fit for purpose. Matters for consideration will include:
  - whether all milk being purchased should be included under a milk supply agreement.
  - whether a milk supply agreement should be offered on either an exclusive or non-exclusive basis.
  - whether all milk supply agreements should consist of a single document.
  - exploring the use of plain English in milk supply agreements.
  - whether to allow both written and verbal milk supply agreements.
  - the requirement for keeping records of all originals and copies of key documents for at least 6 years after a milk supply agreement ends.
  - exploring dispute resolution pathways under the Dairy Code including the potential benefit of multiparty dispute resolution processes.
- Providing advice on any changes that may be needed, including, but not limited to, consideration of:
  - where agreed by both parties to a milk supply agreement, changes to price requirements for a specified quantity of milk to enable participation in alternative milk pricing markets.
  - whether providing a milk supply agreement template for use by all processors would enable farmers to better understand and compare available contracts.

### 1.1.2 Consultation

The Review will involve consultation with stakeholders along the dairy supply chain, including farmers, dairy processors, industry representative bodies, government agencies including the Australian Competition and Consumer Commission, and consumer organisations, in accordance with subsection 6(6) of the Dairy Code.

The Department of Agriculture, Fisheries and Forestry will establish a Consultation Group to facilitate engagement with dairy industry stakeholders and will conduct workshops with industry participants to inform the review.

### 1.1.3 Administration

The Department will manage the conduct of the review and prepare the review report for the government's consideration.

## 1.2 Consultation Group

The department established a Consultation Group to provide information and evidence on the role, impact and operation of the Dairy Code. It was not a decision-making body. The Consultation Group was comprised of 23 farmer and processor representatives and 3 observers.

Farmer representative	Processor representative
Australian Dairy Farmers (ADF)	Australian Dairy Products Federation (ADPF)
Aurora Dairies	Australian Consolidated Milk
Australian Dairy Farmers Corporation	Bega Food Group
Australian Fresh Milk Holdings	Brownes Dairy
Dairy Farmers Victoria	Bulla Foods
eastAUSmilk	Burra Foods
NSW Farmers Dairy Committee	Fonterra Oceania – Australia
South Australian Dairyfarmers Association	KyValley Dairy
Tasmanian Farmers and Graziers Association	Lactalis Australia
United Dairyfarmers of Victoria	Noumi
WA Farmers	Saputo Dairy Australia
	The Yoghurt Shop

Observers	
ACCC	Treasury
United Workers Union	

Engagement with the Consultation Group was conducted over several meetings, examining different parts of the Dairy Code.

The Consultation Group initially met as separate farmer and processor groups to allow each group to share their views. The full Consultation Group was then brought together for an independently facilitated workshop to discuss the views, share information and evidence, and consider potential solutions. Over the course of the review, the Consultation Group met 6 times – 2 farmer specific meetings, 2 processor specific meetings and 2 workshops.

The department also received 4 written submissions and met with Coles, Woolworths, Norco and That's Amore Cheese who were not members of the Consultation Group. A consumer group was approached but declined to participate in the Review process.

The Consultation Group's remit was to provide information and evidence on the role, impact and operation of the Dairy Code. It is acknowledged that evidence may take different forms (for example, written or verbal) and may not necessarily be easily provided. The Consultation Group were offered the opportunity to provide any evidence in confidence if required. All topics raised were tested within the Consultation Group. The resulting discussion assisted in determining the extent and acceptance of each issue and provided an evidence base for the Review.

## 2 Recommendations

Number	Recommendation
1	ACCC to engage with stakeholders on the perceived gaps in existing minimum price guidance and update as appropriate.
2	Amend subsection 36(3) in Part 2, Division 2, Subdivision D of the Dairy Code to provide that notice to extend the end of a multi-year MSA must be given no earlier than 90 days (in subparagraph 36(3)(a)) and no later than 21 days (in subparagraph 36(3)(b)) before the end of the supply period.
3	Amend paragraph 12(4)(b) and subsection 23(1) of the Dairy Code to allow a standard 14-day cooling off period to be amended, with the agreement of both parties, to no less than 7 days.
4	Amend subsection 28(3) of the Dairy Code so that an extraordinary event is not limited to events that occur outside Australia.
5	<p>a. Amend Section 18 subsection 2(c) to remove the requirement for ‘all reasonable efforts’ be made to obtain written acknowledgement and replace with ‘reasonable efforts’.</p> <p>b. ACCC to engage with stakeholders on the gaps in existing guidance for obtaining farmer acknowledgement of an MSA and update as appropriate.</p>
6	Amend section 48 and section 51 of the Dairy Code to allow multi-party dispute resolution for mediation and arbitration where there are multiple parties with the same concerns.
7	Further engagement be undertaken on the impacts of penalty provisions in the Dairy Code and investigate if there is a need to adjust penalties to deliver greater compliance outcomes.
8	<p>a. Amend subsection 6(5) of the Dairy Code to include a third review to be completed on or before 30 June 2028.</p> <p>b. Consider the benefits of including an economic analysis of the Dairy Code impacts as part of the next review.</p> <p>c. Amend section 6(6) of the Dairy Code to remove the requirement to consult with ‘consumer organisations’ for subsequent reviews.</p>



### 3 Dairy Code Review

The key finding of the Review is that the Dairy Code continues to operate as intended in delivering a level playing field for dairy farmers and processors. Recommendations include several minor amendments to the Dairy Code and along with targeted measures to improve education and understanding of its role and operation.

The Review noted that the impacts arising from the 2015-16 retrospective step-downs are still keenly felt by farmers who remain wary of processor actions and scrutinise all processor decisions. In turn, processors are cautious when making any decisions that may impact a farmer, even if the impact is positive. In this context relationships across the supply chain were observed to be cautious and that there is an opportunity to improve trust in the interests of the industry. Much discussion also centred around the allocation of risk and which party was best placed, or bore more responsibility, to bear risk.

In assessing the concerns and comments raised during the Review, it was noted there was caution and some misunderstanding among both farmers and processors when interpreting and implementing the Dairy Code. This seems to be the underlying cause of some of the concerns raised, particularly around the minimum price, and cannot be resolved through amendments to the Dairy Code. These concerns may be addressed with additional guidance.

The requirement for milk to be purchased under a Milk Supply Agreement (MSA) that is in plain English and consist of a single document remains an effective tool for increasing transparency and providing price and supply certainty for both farmers and processors. While MSA's are drafted and implemented differently across processors, the core principles and requirements are adhered to. To assist farmers and processors in their state, one Farmer representative provides a simplified checklist for understanding the MSA. The Farmer representative offered to share this with others if they were interested.

Throughout the Review, no stakeholder advocated for the Dairy Code to be repealed. While it was noted that the reasons for the implementation of the Dairy Code have largely been resolved, there remains a level of distrust between farmers and processors and the Dairy Code remains an effective regulatory framework to address this. The benefit of the Dairy Code continues to outweigh the regulatory burden. The economic benefits of the Dairy Code is an important consideration and further analysis this may be beneficial; however this was not considered as part of this Review.

Overall, the good faith provisions within the Dairy Code are adhered to. There were some examples raised whereby actions could be interpreted as not complying with the good faith provisions. Although it was noted that none of these had been formally raised to the attention of the ACCC for investigation, all parties were reminded of the ACCC's role under the Dairy Code.

## 3.1 Minimum price

As outlined in Section 26, the Dairy Code mandates that all MSAs must include a minimum price or prices. This can be a single minimum price, or a schedule of monthly or yearly minimum prices. The

minimum price is the lowest price payable that meets the processor's quality requirements, and once agreed, a processor must not pay the farmer a rate lower than this price.

### 3.1.1 Setting the minimum price

Processor representatives raised concerns about the requirement to announce the minimum price in the MSA by 1 June, 13 months before the end of the proposed supply period. While processors feel available data is sufficient to forecast prices for 6 months, longer than this is difficult to accurately predict. Some Processor representatives feel this leaves them exposed to market fluctuations and at a competitive disadvantage with global trading. Processor representatives are seeking flexibility to review the minimum price during the MSA period however, noted factors being considered when reviewing the minimum price should be clearly stated in the MSA.

Farmer representatives indicated they thought processors do have access to adequate data and should be able to offer a minimum price without needing to review mid-way through an MSA period. Farmers did not suggest that processors should never seek to adjust prices but noted that the allowance of any mid-term price revisions *downwards* could undermine the Code's purpose. Farmers indicated that having a minimum price set for the duration of the MSA provides assurance to farmers in addressing the need for certainty in farm business planning and, in the case of multi-year MSAs, allows for future investment on-farm.

In late 2024, several processors increased the minimum price based on improved market conditions. However, there is no opportunity for a processor to decrease the minimum price based on the same market conditions.

### 3.1.2 Minimum price versus price paid

There was significant discussion regarding the difference between the minimum price and actual price offered/paid. The minimum price in an MSA is the lowest price payable that meets the processor's quality requirements. A processor may offer a price higher than the minimum price set in the MSA which can fluctuate based on market conditions.

It was noted during the Consultation Group discussion that this is not how processors implement the minimum price. Processors tend to offer and pay the minimum price and, if market conditions improve, increase the total price paid to farmers via a price step-up above the minimum price. A price step-up may, or may not, increase the minimum price that is set out in the MSA. While not incorrect, this interpretation of the minimum price requirements reduces flexibility. Farmers considered the minimum price concept had become "de facto fixed pricing" and raised concerns that the competitive transparency of the Code had been reduced by treating the minimum price in this way. However, it was acknowledged that processors are unsure of how to build in the flexibility with minimum prices and are wary of the potential legal consequences if deemed unacceptable.

While there was some concern among the Consultation Group that by implementing this method, processors may initially offer lower minimum prices, it does allow flexibility for prices to move with the market while still giving farmers certainty of a minimum price.

### 3.1.3 Negotiating a minimum price

The Dairy Code requires processors to publish standard form agreements that include minimum prices. Farmers can seek to negotiate prices but there is not requirement on the processor to negotiate. While no evidence was provided, it was noted that some smaller farmers may not be confident in negotiating with their processor citing fears the processor could walk away leaving the farmer with limited choices on where to sell their milk. Farmer representatives also reported that this is particularly concerning for farmers of any scale where there are minimal processor options, as was noted is a structural feature of several dairy regions. While it was not raised during the consultation period, the department notes that this may be also relevant to small processors negotiating with large corporate farms who hold significant influence in the negotiation process.

### 3.1.4 Alternative markets

The first Review of the Dairy Code recommended an exemption to the minimum price requirements, where agreed by both parties, to enable participation in alternative milk pricing markets. This recommendation was unable to be implemented due to the lack of a liquid milk market index. This barrier remains following this Review. The department notes that industry is currently considering the development of a potential milk price indicator. However, as no market currently exists it is unable to be considered in the context of the Dairy Code.

### 3.1.5 Conclusions

It is important to note that the Dairy Code does not set the minimum price, rather provides a framework for farmers and processors to deal in good faith. While farmers should feel empowered to negotiate with processors, it is not the role of the Dairy Code to enforce negotiation conditions.

The minimum price requirements in the Dairy Code remains a critical element to providing security to farmers. The information provided during the Review highlighted the challenges for processors when considering unknown market fluctuation to forecast prices and the potential impacts of inaccurate forecasting. Farmers require the certainty of the minimum prices for the duration of the MSA, without fear of a price reduction.

Regardless of how the minimum price is determined, the MSA should clearly outline the minimum price for the duration of the MSA.

It was clear from discussions that understanding of the role and operation of the Dairy Code was something that could be improved. The industry may benefit from expanded guidance from the ACCC on the minimum price, including how it can be implemented to provide flexibility for both the farmer and processor.

Recommendation	
1	ACCC to engage with stakeholders on the perceived gaps in existing minimum price guidance and update as appropriate.

## 3.2 Multi-year MSAs

Section 24 of the Dairy Code states that the MSA must specify the start and end date of the supply agreement. It allows for a farmer and processor to enter into an MSA for multiple years. There is no limit to how long an MSA can be. An MSA longer than 3 years must include the option for the farmer to give the processor notice, in writing, postponing the end of the supply period by 12 months. A multi-year MSA must also include a minimum price or prices for the life of the agreement.

### 3.2.1 Minimum price in a multi-year MSA

Multi-year MSAs provide certainty for both farmers and processors. Farmer representatives noted in some instances financial institutions are encouraging farmers to agree to multi-year contracts, providing certainty on investment. Multi-year MSAs are offered at the discretion of the processor, and processor representatives acknowledged that farmers appreciate the certainty of multi-year MSAs and offer them where possible. As with a single year MSA, Processor representatives raised concerns with sufficient data and changing market conditions impacting ability to accurately set the minimum price in a multi-year MSA.

Instead of a review point, as suggested for single year MSAs, Processor representatives proposed allowing a multi-year MSA to include 'how' the minimum price would be set for subsequent years. The proposal suggested this could include options such as averaging the minimum price from nearby processors for the relevant year or whichever is the higher price between the annual price announced and the minimum price in the MSA. Discussion on this raised that there may be the perception of collusion if a processor uses the minimum price from other processors to set its own minimum price.

Farmer representatives maintained that processors should publish a minimum price for each financial year in a multi-year MSA. Farmer representatives did not request that minimum prices rise year-on-year but sought a safeguard that the minimum price for each subsequent year of a multi-year MSA does not fall below the first-year price. Farmer representatives also felt that mid-term mechanisms that erode price certainty should not be included in multi-year MSAs. It is felt by Farmer representatives that this will provide certainty for both farmer and processor and improve transparency of pricing in multi-year MSAs.

Discussions indicated that there remains an element of risk to the processor when setting a minimum price for subsequent years if the market drops below the offered minimum price. Discussion also highlighted that there is also a risk to farmers if the market price increases above the minimum price offered in the multi-year MSA.

### 3.2.2 Extensions of 3-year MSAs

Processor representatives raised concerns with Section 36 of the Dairy Code which allows a farmer to unilaterally extend the end date of an MSA by 12 months if the MSA was 3-years or longer. The clause allows a farmer to notify the processor of the extension no earlier than 30 days and no later than the 7 days before the end of the MSA period.

The discussion noted that this clause was originally included in the Dairy Code with intent to allow farmers in markets with less competition (such as Western Australian and Far North Queensland) to find another processor or transition their business model as necessary. However, by allowing a farmer to unilaterally employ this clause, there is uncertainty for milk supply and milk price for processors and potential negative impacts on other farmers. The extension period also does not include a minimum price, creating uncertainty for both the processor and farmer. If the minimum price from the previous year is used, it may not be competitive in the current market (from the perspective of either the farmer or processor).

However, Farmer representatives indicated the multi-year MSA extension clause is operating as intended and has helped transparency of milk pricing, reduced bargaining power imbalances and shared the price risk between processor and farmer. Farmer representatives feel the extension option is an important tool for security of a buyer. While some Farmer representatives noted processors are 'pressured' into postponing the end of a multi-year MSA, no evidence was provided to support this statement.

In the 2024 Have Your Say submissions, Processor representatives sought the deletion of Section 36 while Farmer representatives felt it was operating as intended, providing greater security of milk supply. While the notification timeframe was not explicitly discussed during the Review, the ACCC Have Your Say submission suggested increasing the timeframe to provide certainty to farmers and processors before new contracts are negotiated.

### **3.2.3 Co-operative arrangements**

The Dairy Code allows for a co-operative to enter into an MSA with members without a defined end date (Section 24). This means while the farmer remains a member of the co-operative, their MSA may remain active unless otherwise terminated. This provides security to the farmer that the co-operative will take their milk.

Some Farmer representatives raised concerns about co-operative arrangements and sought to have the co-operative roll-over concession removed from the Dairy Code. These Farmers representatives submitted that the cooperative roll-over concession does not provide security for farmers and prevents farmers from exploring other contracting options. Further, these Farmer representatives considered the concession decreases competition for milk supply in the region serviced by a cooperative. No evidence or significant concerns were raised to support this position, nor was there support from most Farmer representatives. Co-operatives engaged in the Review process noted these concessions provide security and assurance to both farmers and processors.

### **3.2.4 Conclusions**

It is important to note that the Dairy Code does not set minimum prices. As with a single year MSA, the minimum price in multi-year MSAs is the lowest price payable that meets the processor's quality requirements. A processor may choose to set a lower minimum price and pay a higher price that fluctuates with market conditions. This provides flexibility for a processor and reduces the risk of contracting a minimum price that isn't reflective of the future market price. However, this may be a disadvantage for the farmer if a processor does not increase prices based on the market increases. A farmer and processor should be clear on the terms of the contract when negotiating the minimum price and how the minimum price is specified for the duration of the MSA.

The views of Farmer and Processor representatives on extending a multi-year MSA are significantly different. While Farmer representatives feel it is operating as intended and don't want the clause changed or removed, Processor representatives are seeking for the clause to be deleted to be able to better manage supply risks. To better balance the risk, the notice period to extend a multi-year MSA could be amended providing earlier notice to the processor of the farmer's intention to extend the milk supply period.

There was no evidence provided to support the concerns regarding the co-operative concessions. These concessions seem to be operating as intended providing security and assurances for farmers who remain members of a co-operative.

Recommendation	
2	Amend subsection 36(3) in Part 2, Division 2, Subdivision D of the Dairy Code to provide that notice to extend the end of a multi-year MSA must be given no earlier than 90 days (in subparagraph 36(3)(a)) and no later than 21 days (in subparagraph 36(3)(b)) before the end of the supply period.

### 3.3 Cooling off period

The Dairy Code mandates all MSAs must have a 14-day cooling off period (Section 23). This allows a farmer to review the MSA terms and conditions and seek legal and financial advice before signing a milk supply agreement and commencing milk supply. A farmer may terminate the MSA during the cooling off period without liability to the processor.

#### 3.3.1 Length of a cooling off period

The current 14-day cooling off period is supported by Farmer representatives who indicated that reducing the cooling off period may encourage a farmer to delay signing an MSA in the hopes a better offer is presented. However, Processor representatives indicated that once a milk year has commenced, a 14-day cooling off period may be considered too long and present issues for both farmer and processor. Some Farmer representatives were understanding of this position.

Processor representatives are seeking flexibility to reduce the cooling off period length in an MSA, when agreed to by both parties, to balance flexibility and business certainty. Importantly, Processor representatives are not seeking to remove the cooling off period from an MSA, rather ensure it remains fit-for-purpose, and both processors and farmers operate in good faith.

Discussions indicated that often, the cooling off period may not end until after the milk supply period has commenced. This can lead to uncertainty of security of milk supply for the processor. Processor representatives proposed amendments to the Dairy Code to have a cooling off period cease upon milk collection, regardless of length of time. This was not supported by Farmer representatives, noting that depending on when an MSA is signed, the cooling off period may be significantly shorter than the 14-days.

Both Farmer and Processor representatives noted instances of the cooling off period potentially being manipulated to benefit one party (either the farmer or processor). For example, it was noted

some farmers are signing with multiple processors and selecting the best option at the end of the cooling off period, which may be at or after the milk supply period has commenced. Processor representatives provided evidence of farmer terminations at the end of the cooling off period and after the milk supply period commenced. This can lead to negative impacts which generally fall on the processor, such as a gap in milk supply, increased transport costs, and risks to retail contracts and other suppliers (i.e. ingredient suppliers). Additionally, unintended consequences of this behaviour include negative impacts on other farmers who were unable to secure a contract or price with the processor of choice. Discussions indicated that the cooling off period was never intended to be used in this way. Both Farmer and Processor representatives suggested signing multiple contracts without notifying unsuccessful processors at the time of accepting another MSA may be interpreted as not operating in good faith.

### 3.3.2 When a cooling off period commences

While a farmer may not sign the MSA, there must be a written record of the agreement. However, there are, at times, instances where there is no clear milestone to trigger the commencement of a cooling off period (for example, on verbal agreement, or when the written record is made) creating confusion for both parties. Under the Dairy Code, the cooling off period commences the day the MSA is entered into (when in writing) or when the processor gives the farmer a written record of the MSA. Some Processor representatives noted it was not clear when a verbal or unsigned MSA is considered agreed, raising confusion on when the cooling off period commences. Processor representatives indicated different points to when it is determined a verbal or unsigned MSA is agreed including once the processor sends written notice of the MSA, once milk is collected, or after the first payment for milk. This inconsistent interpretation on when a cooling off period commences can cause uncertainty for both processors and farmers.

### 3.3.3 Conclusions

Farmer and Processor representatives had different views on the cooling off period and although several options were discussed, there was no agreement from the Consultation Group on a solution to meet both perspectives.

There was significant discussion on allowing a reduced cooling off period in the MSA, when agreed by both parties. This option would still include a minimum length of time for a cooling off period, such as no less than 7 days, yet provide flexibility for the farmer and processor to negotiate a period other than the standard 14 days. However, the Review notes that the 14-day cooling off period should remain as the standard unless otherwise agreed by both parties, a reduced cooling off period should not be the default offer in the initial MSA.

There is no standard approach across agricultural industries on how a cooling off period is implemented. A comparable industry code pertaining to a perishables goods industry, the *Competition and Consumer (Industry Codes-Horticulture) Regulations 2017*, allows for the length of a cooling off period to be amended were agreed by both parties, however the cooling off period can be no less than 7 days.

The Consultation Group also discussed if a cooling off period should end at or before the commencement of milk collection (regardless of the period that has elapsed), meaning a farmer could no longer terminate an MSA after milk collection has occurred. While this would provide



certainty of milk supply for the processor, it potentially places a greater risk on the farmer and may unintentionally force farmers into an MSA before they complete due diligence.

Recommendation	
3	Amend paragraph 12(4)(b) and subsection 23(1) of the Dairy Code to allow a standard 14-day cooling off period to be amended, with the agreement of both parties, to no less than 7 days.

## 3.4 Retrospective step-downs

A **retrospective step down** is a variation of the MSA that reduces the minimum price for milk supplied under the agreement before the variation occurs. Retrospective step-downs are prohibited under the Dairy Code in all circumstances (section 27). There are no exemptions to this prohibition.

Retrospective step-downs in 2015-16 by two of Australia's then largest processors had wide-ranging implications for the dairy industry. This was also the catalyst for the prohibition on retrospective step-downs being included in the Dairy Code.

### 3.4.1 Conclusions

There was clear agreement between both the Farmer and Processor representatives that retrospective step-downs should remain prohibited under the Dairy Code. Both groups determined that this prohibition was still required for the net benefit of the dairy industry and to maintain good relations between farmers and processors.

## 3.5 Exceptional circumstances

Under Section 28 of the Dairy Code, a processor may prospectively vary the minimum price under an MSA in exceptional circumstances. The Dairy Code defines an exceptional circumstance as temporary, involving an extraordinary event that occurs outside Australia, has a significant impact on supply, demand or costs, and is not caused by decisions of the processor.

### 3.5.1 Exceptional circumstances definition

Processor representatives raised concerns over the definition of, and what constitutes, an exceptional circumstance and requested clarity on when a processor could implement the clause. Farmer representatives generally considered the definition sufficient and indicated that the threshold to trigger the exceptional circumstance clause should remain high. It was also noted by some Farmer representatives that farmers similarly face challenges that could be considered exceptional circumstances for which they don't receive concession.

There was no evidence presented during discussions that a processor has triggered the exceptional circumstance clause previously, and there seems to be a fear of repercussions among processors in doing so.

The requirement for an exceptional circumstance to occur *outside* Australia was discussed as being too limiting and not reflecting all circumstances which the clause seeks to address. With the rising threat of animal diseases entering Australia, such as foot and mouth disease, there was an argument



that an exceptional circumstance could occur inside Australia. The Consultation Group held no significant concerns or requested amendments to the remaining criteria for an exceptional circumstance – temporary, has a significant impact on supply, demand or costs, and is not caused by decisions of the processor.

### 3.5.2 Conclusions

Exceptional circumstances are clearly defined in the Dairy Code, however due to fear of repercussions – both regulatory and farmer perception – no processor has taken steps to prospectively reduce its minimum price based on this clause.

While the clause has not been enacted in the past, the threshold should remain high to ensure it is only used in extreme situations and not in response to normal market fluctuations. While the Dairy Code includes some examples of what an exceptional circumstance is, it would be difficult to provide further examples or definition without inadvertently limiting the use of the clause.

Since the introduction of the Dairy Code, the global and domestic landscape has significantly changed and the threat of an exceptional event occurring inside of Australia that is beyond the control of a processor is rising. As such, the Consultation Group generally agreed that the requirement for an exceptional circumstance to occur outside of Australia may no longer be fit-for-purpose.

Recommendation	
4	Amend subsection 28(3) of the Dairy Code so that an extraordinary event is not limited to events that occur outside Australia.

## 3.6 Record of unwritten and unsigned MSA

The Dairy Code provides for a farmer and processor to enter into an agreement without a written or signed MSA (for example a verbal agreement) at the time of agreement. In this case a processor must, within 30 days of the agreement, provide a written record of its contents to the farmer and take all reasonable steps to have the farmer acknowledge the agreement (Section 18). It is not the intent of the Dairy Code that a farmer does not sign or acknowledge the MSA. This also applies to unwritten variations to, or termination of, an MSA (Sections 19 and 20).

### 3.6.1 Acceptance of an unwritten or unsigned MSA

There was confusion among both Farmer and Processor representatives as to when an unwritten or unsigned MSA is deemed accepted. Some Farmer representatives suggested verbally accepting an MSA should be binding and be the commencement of the cooling off period. Processor

representatives tend to consider acceptance of an MSA after the processor has made all reasonable efforts to have the MSA signed or acknowledged, as required by the Dairy Code. It is important to note that a processor must not collect milk from a farmer without an MSA in place, or risk incurring a civil penalty (Section 16).

It was noted during the Consultation Group discussions that some farmers refuse to sign an MSA as “they never did before”. Processor representatives acknowledged these farmers are generally long-

term suppliers and are less likely to switch processors each year. This was reported as a small number of farmers and it would be difficult to enforce signing an MSA with farmers of this mindset. The Review noted that the Dairy Code does not specify that the MSA must be signed only that 'all reasonable efforts' are made by the processor to have the MSA signed or acknowledged. Therefore, a written record of a verbal agreement may be considered acceptable. The refusal to sign a contract was not the intent of the Dairy Code.

In written submissions following the Consultation Group discussions, a Farmer representative suggested that all MSA's should be signed by the farmer before milk collection occurs. The submission indicated signed MSA's provide protections to both parties and amendments should not weaken these.

Processor representatives noted pursuing written acknowledgment of an MSA as administratively burdensome. With concerns of inadvertently breaching the intent of the Dairy Code and the lack of clarity on what is considered 'all reasonable efforts', processors tend to make multiple attempts to obtain written acknowledgement from the contracted farmer after a verbal agreement is received. When a processor is following up multiple farmers, this can take a significant amount of time and still not result in a signed document.

Most farmer representatives asserted that all MSAs should be signed prior to milk supply commencing to protect both parties. However, not all farmers sign their MSA before the commencement of the supply period, regardless of the attempts by a processor. This leaves the processor in a position of either collecting the milk without a signed MSA, potentially breaching the Dairy Code if they are found to be purchasing milk without an MSA in place, or not collecting the milk leaving the farmer unpaid and needing to dump the uncollected milk. Neither option is desirable for either the farmer or processor.

Processor representatives indicated including a 'grace period' or 'deemed acceptance' of the MSA in the Dairy Code could provide some certainty for both farmer and processor. While the 'deemed acceptance' approach was strongly opposed by Farmer representatives, they conceded a potential 'grace period' may provide an operational fix for the concerns.

### 3.6.2 Conclusions

There was no evidence presented that an unwritten or unsigned contract creates issues with enforcing the terms of the contract, when a processor has made all reasonable efforts to have the MSA signed or acknowledged. There was, however, evidence that unacknowledged contracts create uncertainty for both the processor and farmer that may negatively impact both parties.

The issue of an unacknowledged MSA stems from when a farmer chooses not to acknowledge or sign the MSA following verbal agreement or doesn't sign in a timely manner. While the Review heard it would be preferable for all MSA's to be signed prior to milk collection, the ingrained behaviour of some farmers may cause unintended consequences when enforcing this if it is amended in the Dairy Code. For example, if milk collection does not commence until a *signed* MSA is received by the processor, it potentially leaves milk uncollected for an unacceptable period if the farmer didn't return the signed MSA in time.

The burden falls to the processor to have a signed MSA, noting the processor must make “all reasonable efforts” to have an MSA acknowledged, or risk incurring a civil penalty. The Dairy Code does not provide guidance on what steps a processor must take to have the MSA acknowledged by the farmer. Processors and farmers may benefit from amending the Dairy Code to lessen the burden of *all* reasonable efforts. Additional guidance on what would be considered reasonable efforts may also provide clarity to processors and farmers on acceptable methods to obtain acknowledgement of an MSA.

The 2025-26 contracting period saw an increase in farmers not signing an MSA before the 1 July supply period commenced. To avoid a farmer needing to dump milk, some processors were collecting milk from a farmer without a signed MSA in place, while they continued making all reasonable efforts to have the farmer sign or acknowledge the MSA.

Introducing a ‘deemed acceptance’ point may result in unintended consequences and may interfere with the normal course of contracting negotiations. Where both parties agree, a point of acceptance of an MSA could be determined through consultation between the farmer and processor.

Recommendation	
5	<ul style="list-style-type: none"> <li>a) Amend Section 18 subsection 2(c) to remove the requirement for ‘<b>all</b> reasonable efforts’ be made to obtain written acknowledgement and replace with ‘reasonable efforts’.</li> <li>b) ACCC to engage with stakeholders on the gaps in existing guidance for obtaining farmer acknowledgement of an MSA and update as appropriate.</li> </ul>

## 3.7 MSA variations

The Dairy Code requires processors to publish their standard form MSA on their website by 2pm (AEST) on 1 June each year (or closest working day). Once published, a processor must not vary or remove the MSA from the website until the end of the following financial year. However, a processor is permitted to publish new or varied MSAs after the 1 June deadline.

Relevant sections of the Dairy Code include Section 12, Section 33 and Section 57.

### 3.7.1 MSA variation requirements

The requirement to publish all variations on the processor’s website was discussed in the 2024 Have Your Say process and during the Review process. It was noted in several submissions that this requirement has increased transparency for the industry.

While this requirement is supported by Farmer representatives, during discussions Processor representatives noted the requirement to publish all variations, which primarily apply to multi-year MSAs, potentially increases the regulatory burden on a processor. To lessen this burden, Processor representatives sought consideration to publish ‘material’ variations and maintain a list of ‘minor’ variations. Farmer representatives did not support the differentiation of a ‘minor’ or ‘material’ variation due to the subjective nature of such definitions and the risk of reduced transparency.

Discussions noted that any variation to an MSA should be communicated to, and where necessary agreed by, the farmer. Removing the requirement to publish all variations to an MSA will likely decrease transparency.

The Consultation Group also noted that it may be difficult to determine what is considered a 'material' or 'minor' variation. A processor may consider a change minor; however, it may have a greater impact on the farmer who would consider it a material change. If 'material' and 'minor' amendments are interpreted differently across industry, it may also inadvertently increase non-compliance with the Dairy Code.

### 3.7.2 Conclusions

The Review found that publishing all MSA variations has increased the transparency of pricing for the industry. Variations to an MSA should be documented for farmer visibility ensuring they maintain clarity and certainty of the MSA. While it is acknowledged that publishing all variations may increase the burden on processors, the need to communicate the variation with farmers and the demonstrate transparency outweighs any perceived publishing burden.

Currently all variations must be published by the processor, regardless of if the processor considers the change minor. The Consultation Group considered if the Dairy Code should define variations as 'material' or 'minor', however no consensus was reached on if it would provide benefit to the industry. It is likely to be difficult to establish a 'material' or 'minor' variation definition that could be applied consistently across the industry and not result in potential conflict between processors and farmers.

Overall, while there is a perceived burden on the processors, the requirement to publish all variations to an MSA has increased transparency for the industry.

## 3.8 Publication of standard form

The Dairy Code mandates that at or before the publication deadline – being 2pm on 1 June – the processor must publish on its website one or more standard forms of MSAs (Section 12). This must include a statement of justification for the minimum price.

### 3.8.1 Early announcement of price

Discussions indicated that processors may elect to announce opening prices prior to the 1 June deadline. In some cases, the early price announcement is increased by the 1 June or by the end of the negotiation period. The Dairy Code requires processor to publish their standard form MSAs which contain minimum prices *at or before the publication deadline*. The Dairy Code does not include any requirement around the announcement of prices more generally.

Many Farmer and Processor representatives feel the early announcement allows farmers to consider opening prices and seek early financial advice to benefit farm planning. Farmer representatives also noted some farmers are electing to sign an MSA early, enabling them to finalise arrangements with financial institutions and negotiate other contracts (such as grain) with more certainty. However, Farmer representatives raised concerns that coordinated early announcements could potentially influence market behaviour, distorting competition.

Concerns were raised by some Farmer representatives that the early announcement could influence other processors to align prices, potentially resulting in a lower opening price offer. This concern also extended to market information and analysis being available to processors which is used to determine opening price offers.

Of significant concern were allegations raised by a small number of Farmer representatives that processors were manipulating the market through early price releases. The allegations' indicated processors were using coordinated media releases, public comments and indirect communication to indicate prices prior to the 1 June deadline. Farmer representatives were concerned this could be perceived as anti-competitive behaviour and potentially lead to unfair price offerings. It is important to note that no evidence was provided to support this allegation.

Some Farmer representatives supported simultaneous publication on 1 June with all prices pre-lodged under ACCC oversight. This was not a view universally taken by both Farmers and Processor representatives.

### **3.8.2 Conclusions**

The Consultation Group discussed the term *at or before* the publication deadline at length. Ultimately, the ability for processors to announce prices early was generally considered beneficial to farmers. There was overall little support from Farmer and Processor representatives on removing the ability to release prices early or limit access to market information and analysis.

The use of market information and analysis is an important tool for processors to consider when determining opening price offers. The same market information and analysis is also available to farmers to use in early discussions with financial institutions to assist in determining what price would be acceptable for their business. Any public market information and analysis will assist in increasing price transparency.

While there were serious allegations of processors engaging in anti-competitive behaviour when releasing prices prior to the 1 June deadline, no evidence to support this was provided. The department encourages industry participants with concerns about anti-competitive behaviour to raise these concerns with the ACCC for consideration of investigation.

## 4 Additional Topics

### 4.1 Non-exclusive contracts

The Dairy Code requires that if a processor offers an exclusive MSA (an agreement between a farmer and processor that prohibits the farmer supplying milk to another processor), it must also publish a non-exclusive MSA (meaning the farmer may supply milk to multiple processors) for the same set of circumstances. Each MSA must be a genuine offer. When a processor enters into an exclusive MSA, it must publish both the exclusive and non-exclusive MSA it would have entered into in those particular circumstances (see section 12 of the Dairy Code).

#### 4.1.1 Requirement to publish

The 2024 Have Your Say submissions from both farmers and processors highlighted concerns with non-exclusive MSAs. Farmer submissions noted a non-exclusive MSA often has a lower price and is ineligible for incentive or bonus payments, potentially making it less attractive to a farmer. Processor submissions noted the requirement to publish an exclusive and non-exclusive MSA for the same circumstances increases the time and administrative burden. It was also noted that there are few farmers entering into a non-exclusive MSA, which increases the burden on a processor to have a published MSA that has no interest or uptake.

#### 4.1.2 Conclusions

The Review found that there was no consensus on how an amendment to the Dairy Code should be made to accommodate the concerns with non-exclusive MSAs.

There remains a place in the Dairy Code for non-exclusive MSAs, albeit for a small number of farmers. While the requirement to publish an exclusive MSA and non-exclusive MSA may come with time and administrative costs, it continues to provide transparency of pricing and contract arrangements for industry and is unlikely that any amendment to the Dairy Code will provide a net benefit to the industry.

### 4.2 Multi-party issues

The Dairy Code sets out that the cost of mediation or arbitration is to be shared equally between the two parties involved, unless otherwise agreed. It does not provide for a multi-party dispute (Sections 50 and 53).

#### 4.2.1 Dispute resolution and arbitration

The 2024 Have Your Say process sought industry views on two aspects of mediation and arbitration: should multi-party dispute resolution be allowed and, should the costs be on a pro rata basis.

Both farmer and processors submissions supported multi-party dispute resolution. However, citing the bargaining power imbalance, farmer stakeholders only supported this being for farmers, not processors.

Farmer submissions suggested the cost of mediation or arbitration should be a pro-rata cost sharing based on turnover, citing the power imbalance between an individual farmer and a corporate

processor. Farmers were not seeking a complete cost exemption. Farmers' submissions noted the equal split created a power imbalance which may deter farmers from bringing forward issues for mediation or arbitration. However, this approach was not supported by processors who indicated basing the cost sharing on pro-rata turnover places unrealistic and disproportionate expectations on the processor.

### 4.2.2 Conclusions

The Dairy Code currently allows for mediation and arbitration costs to be shared equally, unless otherwise agreed. This allows for the costs to be determined on a pro rata basis, if both parties agree.

The Consultation Group were broadly supportive of amending the Dairy Code to allow for multi-party action. Enabling both farmers and processors to collectively engage in dispute resolution would enable efficiencies for both parties. Farmers or processors with common grievances could combine their resources and claims into one action, which could streamline action and minimise the resources needed by individual parties to pursue action. However, any recommendations should be for the net benefit of the dairy industry and therefore allowing for multi-party dispute resolution should not benefit one group over another.

Recommendation	
6	Amend section 48 and section 51 of the Dairy Code to allow multi-party dispute resolution for mediation and arbitration where there are multiple parties with the same concerns.

## 4.3 Small business

The Dairy Code provides an exemption to a processor that is a small business entity (as defined by the *Income Tax Assessment Act 1997*) from the requirements to publish standard form MSAs and have an MSA that complies with the Dairy Code. However, all processors, regardless of size, must comply with the good faith clause.

### 4.3.1 Definitions and exemptions

The question of what constitutes a small business in the Dairy Code was raised by some Farmer representatives particularly the concern of 'bracket creep' for some small processors. However, no evidence was provided to support this concern. Should a processor turnover be above the threshold set by the *Income Tax Assessment Act 1997*, then the Dairy Code requirements for contracting milk supply must be adhered to.

In its 2024 Have Your say submission, the ACCC noted that smaller processors captured by the Dairy Code are generally complying with the publication requirements, and it has not identified any serious compliance issues among smaller processors.

### 4.3.2 Conclusions

The definition of 'small business' in the Dairy Code is defined by the *Income Tax Assessment Act 1997* and is a reasonable threshold for exemptions. As previously mentioned, all processors and farmers, regardless of size, must adhere to the good faith clauses.

Both farmers and processors are supportive of retaining the small business exemption in the Dairy Code.

## 4.4 Civil penalties

The Dairy Code includes civil penalty provisions which are integral to the ACCC's ability to effectively enforce the requirements of the Dairy Code and provide strong incentives for compliance. For example (but not limited to):

- A penalty of 100 penalty units (farmer or a processor that is a small business entity) or 300 penalty units (processor) may be applied if the party is found to have breached the good faith provisions in Section 11.
- A penalty of 300 penalty units may be applied if a processor enters into an MSA that does not comply with the Dairy Code (Section 17)

### 4.4.1 Maximum penalties

In 2021, the maximum civil penalty permitted for breaching most industry codes was increased to 600 penalty units (as prescribed in the *Competition and Consumer Act 2010*). However, as highlighted in the ACCC's submission to the Dairy Code Review, the amendment did not automatically update the civil penalties specified within the Dairy Code. The ACCC also noted that the way some civil penalty provisions are framed in the Dairy Code mean a breach may be characterised as a single contravention, irrespective of the nature or seriousness of the breach.

To ensure the Dairy Code remains effective, the ACCC's submission sought to have the maximum penalties for breaches of the Dairy Code increased in line with the updated maximum available penalty units.

The penalty provisions were not raised during the Consultation Group discussion and the ACCC submission was received in the late stages of the consultation period. Therefore, feedback was only sought from ADF and ADPF to inform the Review's conclusion and recommendations. ADF and ADPF have significantly different views on the imposition of penalties under the Dairy Code.

ADF is supportive of ACCC's position to increase penalties in the Dairy Code, noting increased penalties and compliance enforcement is essential to the continual effectiveness of the Dairy Code. ADF further indicated a desire for ACCC to conduct regular audits of processors websites and contracts throughout the year, not just at the beginning of the season.

ADPF is not supportive of increasing the penalties in the Dairy Code and noted there is no evidence that the current penalties are ineffective at deterring non-compliance. Under the Dairy Code, penalties primarily affect processors, and ADPF indicated that large and corporate farms should attract the same penalties as 'other' processors. Concerns were raised by ADPF that increasing the penalties may have unintended consequences for inadvertent breaches, such as an administrative oversight, which would be treated the same as deliberate misconduct.



Since the introduction of the Dairy Code, the ACCC has issued four infringement notices for alleged breaches of the Dairy Code. Additionally, in 2022, the Federal Court found Lactalis had breached the Dairy Code with the MSAs offered in 2020. All this conduct occurred in 2020 and 2021. It is important to note that the penalty amount for an infringement notice relating to an alleged breach of the Dairy Code is a fixed amount set by the *Competition and Consumer Act*. The maximum penalties specified in the Dairy Code set out the maximum amount up to which a Court may impose a penalty for contravention. The only penalty imposed by a Court to date in relation to a contravention of the Dairy Code has been against Lactalis.

#### 4.4.2 Conclusions

While the Review found there may be merit in aligning the penalties with the maximum allowable under the *Competition and Consumer Act 2010*, further engagement with stakeholders is required to determine whether an amendment is required. Additionally, the Review noted there was a general lack of understanding regarding the difference between a penalty ordered by a Court (which a Court may impose up to the specified maximum penalty) and a penalty paid under an infringement notice (which a recipient may elect to pay and is a fixed amount for each contravention).

Recommendation	
7	Further consultation to be conducted on the impacts of penalty provisions in the Dairy Code and investigate if there is a need to adjust penalties to deliver greater compliance outcomes.

## 5 Topics Outside the Dairy Code

During the Review, two topics were raised that currently are not covered by the Dairy Code and therefore were not fully explored for resolution. However, it is important to acknowledge these topics as concerns for some parts of the industry.

### 5.1 Secured creditors

With several processors recently having gone into administration, the issue of farmers being unsecured creditors was raised. Discussions noted there is no mechanism within the Dairy Code to enable a farmer to be a secured creditor and both Farmer and Processor representatives questioned if the Dairy Code was indeed the correct regulatory mechanism to seek such remedy.

The Review considers that the Dairy Code cannot be used for this purpose. A farmer could consider the Personal Property Security Register to achieve security; however, it is unlikely that the milk itself could be used for security, and a processor is unlikely to agree to another asset being used.

The Dairy Code does require that transfer of ownership of the milk is to be set out in the MSA. The point of ownership transfer may differ between MSAs, for example it was noted that some MSAs set out the transfer occurs when the milk transfers through the coupling link while others it occurs once the milk is in the hose. However, the transfer of ownership point does not determine if a farmer is a secured creditor.

### 5.2 Milk swaps

Milk swaps are an agreement between two or more processors to exchange similar volumes of raw milk. Milk swaps occur for a variety of reasons, most commonly to enable a processor to contract with a farmer outside its normal geographic area of collection. Discussions indicated that milk swaps reduce costs (such as transport costs) to the processors along with reducing environmental impacts with less trucks on the road moving smaller quantities of milk further distances.

Processor representatives noted milk swaps are critical for managing factory shutdowns (for maintenance or in times of natural disasters). Swapping milk in these instances ensures continuity of milk collection and contributes to supporting animal welfare (particularly for natural disasters).

Importantly, it was noted that when a milk swap occurs, the farmer is paid by their contracting processor under their MSA, regardless of which processor the milk is transported to.

While milk swaps were generally supported by both Farmer and Processor representatives, some Farmer representatives raised concerns that milk swaps could potentially impact the milk price offered and that any financial benefit of the swap goes to the processor and is not passed onto the farmer. There was no evidence of this provided. It was also noted by a small number of Farmer representatives that milk swaps may decrease competition in regions, a view not supported by the majority of the Consultation Group.

Processor representatives noted that farmers benefit from milk swaps. Ceasing the ability for processors to conduct milk swaps may negatively impact milk prices.

The majority of Farmer representative were not opposed to milk swaps, and any concerns they held related to transparency and potential regional competition impacts.

As milk swaps occur after the first purchase of milk, it is not regulated by the Dairy Code, and any concerns fall under competition laws. The Review encourages any industry participant who has concerns regarding milk swaps and the impact on competition to raise this directly with the ACCC for consideration. The submissions received citing concerns with milk swaps were provided to ACCC.

## 6 Sunsetting and Future Reviews

The Dairy Code is due to sunset on 1 April 2030. As part of the Review, consideration was given to if the industry felt the Dairy Code was still required beyond this time.

### 6.1 Sunsetting

During the Review, no stakeholders advocated for the repeal of the Dairy Code. While it has resolved some of the historical issues – such as retrospective step downs – there is a need for ongoing market intervention to ensure a level playing field between farmers and processors.

While the Review identified a desire for increased certainty that the Dairy Code will remain active, stakeholders also sought for its cost burden to be considered. The Review has therefore highlighted the ongoing need for the Dairy Code.

As the Dairy Code continues to operate as intended and there remains a level of distrust between farmers and processor, the Review found that the requirement for a Dairy Code remains. At this stage, sunsetting the Dairy Code on 1 April 2030 is likely to have a detrimental impact on the industry. However, extending the Dairy Code beyond this time may not be feasible and will likely benefit from being remade entirely and an additional review prior to the sunsetting date will be beneficial to determining the best course of action.

### 6.2 Future reviews

The Dairy Code currently includes two legislated review points. Although additional reviews may occur without being legislated, feedback indicates that the certainty of a legislated review point is desirable and provides certainty to stakeholders. An additional legislated review point will enable the government to assess the continued need for the Dairy Code, including if the industry is prepared for it to sunset or if it should be remade to extend its life. An economic analysis of the impacts of implementing the Dairy Code should be considered as part of the next review.

The Dairy Code requires each review to engage with farmers, processors, industry representative bodies, government agencies, and consumer organisations. As the Dairy Code regulates the conduct of farmers and processors, impact on consumers is limited which has been reflected in consumer organisations not considering involvement in this Review a priority.

Recommendation	
8	<ul style="list-style-type: none"> <li>a) Amend subsection 6(5) of the Dairy Code to include a third review to be completed on or before 30 June 2028.</li> <li>b) Consider the benefits of including an economic analysis of the Dairy Code impacts as part of the next review.</li> <li>c) Amend section 6(6) of the Dairy Code to remove the requirement to consult with 'consumer organisations' for subsequent reviews.</li> </ul>