

Implementation of the 2020 Dairy Industry Code and the release of the Dairy Plan – does it benefit the farmer?

Bruno Zeller Robert Walters*

Abstract

In 2020, the Australian Government established a new (we better have the title accurate) Dairy Industry Code¹ (the Code) for the dairy industry. At the same time a study and report – the Dairy Plan – which was a joint initiative of Australian Dairy Farmers, Australian Dairy Products Federation, Dairy Australia and Gardiner Dairy Foundation was released. The Code establishes clear and enforceable rules about the conduct of business relationships between farmers and processors. The Dairy Plan² will deliver increased profitability, confidence and unity across the industry. This paper explores and asks the question, what has, or will the Code and the Dairy Plan achieve for farmers producing milk? At issue could be the lack of support provided by the Code to farmers. The paper is a limited study and only examines Australia and looks to what New Zealand are currently doing in this area. It calls for a wider research to be undertaken to identify ways that can assist farmers strengthen their dairy enterprises. Such a study would identify the gaps between state and national law and policy, and compare that with other countries. The importance of the new developments is whether the new initiatives protect a vital agricultural sector and more specifically, the farmer, as currently agricultural exports are under attack.

Introduction

The Australian agricultural sector throughout 2020 experienced the effects of the global pandemic (coronavirus), and in addition international pressure a country can

* Bruno Zeller B. Com, B. Ed, Master of International Trade Law (Deakin), Ph.D (The University of Melbourne). Professor of Transnational Commercial Law, University of Western Australia. Adjunct Professor Murdoch University, Adjunct Professor Sir Zelman Cowan Centre, Victoria University Melbourne, Visiting Professor Aalborg University, Denmark

Robert Walters LLB (Victoria), MPPM (Monash), Ph.D Law (Victoria), Lecturer Victoria Law School, Victoria University, Melbourne, Adjunct Professor, European Faculty of Law, The New University, Slovenia, Europe

¹ Dairy Industry Code,

<https://www.agriculture.gov.au/sites/default/files/documents/Dairy%20Code%20of%20Conduct%20Factsheet.pdf>

exert on an industry as geopolitical uncertainties continues to rise. It highlights the problem a country places many of its eggs in a single basket and not diversify into other markets, so as the risk of trade reduction is minimised. This is specifically so in the agricultural sector where most of the production is destined for export. One exception is the dairy industry which in essence is exporting very little, when compared to cereals, grain, meat fruit, vegetables and wine. However, these commodities are now being placed under threat where countries are beginning to boycott Australia's product. This paper will specifically look at the dairy sector and analyse the response of the government and more importantly the utility of the introduction of the Dairy Industry Code.

For more than a decade there have been a number of inquiries into the dairy industry across Australia,³ which have ranged from competition and pricing to relative costs of doing business. This does not account for the state based inquiries that have been undertaken, for example in Victoria. However, through all this work undertaken by government the question arises, has much changed? A further accentuating question is what benefit or benefits have farmers seen from these inquiries and implementation of recommendations that have come from them? Arguably, at times, it appears they are the forgotten link in the chain, and largely miss out on the benefits from government reform.

In 2016, the Australian Senate referred an inquiry into the Australian dairy industry to the Senate Economics References Committee, in order to establish a fair, long term solution to

³ Australian Dairy Farmers, <https://australiandairyfarmers.com.au/wp-content/uploads/2020/04/ADF-submission-to-the-Inquiry-into-the-performance-of-Australias-dairy-industry-and-the-profitability-of-Australian-dairy-farmers-since-deregulation-in-2000.pdf> May 2010 - Milking it for all it's worth— competition and pricing in the Australian dairy industry by the Senate's Standing Committee on Economics November 2011 - The impacts of supermarket price decisions on the dairy industry by the Senate's Standing Committee on Economics January 2013 – Horizon 2020 by the peak bodies representing the dairy industry July 2014 – Australian dairy: prosperous, trusted, world renowned nutrition vision statement by the Australian Dairy Industry Council. October 2014 – Relative costs of doing business in Australia: Dairy Product Manufacturing by the Productivity Commission. June 2015 – Dairy Moving Forward by the peak bodies representing the dairy industry. August 2017 - Australia's dairy industry: rebuilding trust and a fair market for farmers by the Senate's Economics Reference Committee April 2018 – Dairy Inquiry by the Australian Competition and Consumer Commission. April 2019 – Federal election policy statement by the Australian Dairy Industry Council. November 2019 – Australian Dairy Plan by the peak bodies representing the dairy industry.

Australia's dairy crisis. In particular reference to fresh milk security the inquiry was to focus on the legality of retrospective elements of milk contracts; the behaviour of Murray Goulburn; and any other related matters.⁴ One of the major recommendations from this inquiry was that the Australian Competition and

Consumer Commission (ACCC), as part of its inquiry into the Australian dairy industry, evaluate the extent to which the code of conduct will reduce power imbalances between farmers and processors, and recommend improvements to the code may better achieve this outcome. Any outcomes from the ACCC inquiry should be incorporated in the proposed review of the code after its first year of operation.⁵ Importantly, Chapter 6 of this inquiry discusses the concept of “Government needs to play the right role”⁶ and argues for the proposition of ‘direct government intervention—milk levies and floor prices’ – whereby deregulation never hurt anybody; what hurt was regulation in the first place. The discussion largely centred around Western Australia and Queensland. Chapter 6 also noted that that industry advocated for a market-based solution, not more intervention:

‘It is unsurprising then that many stakeholders were against direct government intervention in the industry in the form of milk levies and floor prices. For example, Fonterra was not in favour of measures that could be considered reregulation’.⁷

This observation is contrary to the attitude of the European Union (EU) and the United States (US), where subsidies⁸ and assistance to farmers is a priority and keeps the dairy sector viable. In addition, and unsurprisingly processors rather work in a deregulated market in

⁴ Australian Government, The Senate Economics References Committee Australia's dairy industry: rebuilding trust and a fair market for farmers, Commonwealth of Australia, 2017.

⁵ Ibid.

⁶ Ibid, p 70.

⁷ Ibid.

⁸ Selam Gebrekidan, Matt Apuzzo, Benjamin Novak,

<https://www.nytimes.com/2019/11/03/world/europe/eu-farm-subsidy-hungary.html>

order to maximise profits as in Australia dairy farmers are price takers. Furthermore, the idea of a floor price was also discussed, and it was proposed that a floor price for milk or a 50-cent levy on the sale of fresh milk, be introduced, with proceeds directed to an emergency fund to assist dairy farmers. The report went on to say that such a proposal is not supported, and there is concern that, such an approach would result in steps towards re-regulation of the dairy market that would jeopardise the industry.⁹ More importantly it noted, that there was limited support from farmers for the introduction of a floor price, and was compared with the problem in the wool industry. However, the falsehood in this argument is that the wool industry in essence was an export industry whereas in Australia milk is based on home consumption and contrary to New Zealand where most of their milk products are exported¹⁰. A better argument would have been to compare market operations with Canada where basically government policies are directed to maintaining viability of the industry based on home consumption only. It was further highlighted that should a floor price be regulated, it would create an increase in the price of entry into our dairy industry, and the consequences of such an approach would dilute the ability for new and younger farmers to come into the profession.¹¹ The contrary view was taken by Farmer Power which were of the view that changes needed to be made in order to stem the exodus of farmers from the industry.¹² This was supported by Mr Lionel Harniess stating:

“We have been in deregulation for some 16 or 17 years now. It has been a race to the bottom, and here we are. Quite bluntly, it has not worked. We need to go back into regulation and quota”.¹³

Moreover, a further and additional proposal was discussed in relation to establishing a levy on the price of milk. In other words, it was argued that, a 50c per litre levy could be redistributed to all dairy farmers providing a top up payment of around 12c per litre, which

⁹ Australian Dairy Farmers, <https://australiandairyfarmers.com.au/wp-content/uploads/2020/04/ADF-submission-to-the-Inquiry-into-the-performance-of-Australias-dairy-industry-and-the-profitability-of-Australian-dairy-farmers-since-deregulation-in-2000.pdf>

¹⁰ New Zealand Dairy Sector, https://www.clal.it/en/?section=stat_newzealand

¹¹ Chapter 6 para 6.5 also see Mrs Sarah Parker, Committee Hansard, 2 February 2017, p. 22.

¹² Chapter 6 para 6.7. Also see Farmer Power, Submission 17, p. 9.

¹³ Chapter 6 para 6.6 also see Mr Lionel Harniess, Committee Hansard, 2 February 2017, p. 22.

would give some certainty to farmgate milk prices. However, the Australian government through the Department of Agriculture and Water Resources cautioned against such an approach, stating that:

“The Australian government would need to be satisfied that the benefit to industry from such a levy would outweigh any other industry of public detriment. For example, the imposition of a levy on domestic drinking milk risks distorting market signals along the dairy supply chain, being a disincentive to improved productivity, and impeding international competitiveness. Further, it may have unintended consequences of reducing consumption of fresh milk, damaging the profitability of dairy farmers and squeezing supply chain margins further. Such a levy would also make it difficult for Australia to advocate against domestic dairy support measures in other countries when negotiating trade agreements”.¹⁴

However, and based on the above and the most recent inquiry being undertaken prior to COVID-19 and the impending economic fall-out from governments’ right response to the pandemic, it is argued that the structural instruments and recommendations from the Inquiry are now outdated, and further work is needed to stabilise the industry in the future. **The views of Farmer Power and Mr Harniess have been proven correct and the question therefore is; have the lesson be leaned.**

In addition to argue that as an example the EU or the US would abandon domestic support measures is a fanciful argument. Thus, the Australian Government approach has been to create and increase competition in the supply chain, rather than to introduce regulatory mechanisms to protect specific areas of the sector. However, it is questionable as Australia continually, for some time, been moving towards corporate farming. Whether this remains a viable long-term option is not fully understood, because the global economic framework is shifting away from the traditional ‘leave it to the market response’.

¹⁴ Ibid, at 71.

The Australian Farm Institute, noted that,¹⁵ of the 112 submissions received by the ACCC (Australian Competition Consumer Commission), only one representative group submitted that new legislation or re-regulation should be considered to set prices and deal with alleged anti-competitive behaviour. The report highlighted that the industry has consolidated since deregulation, and that national milk production has decreased by 15% but has become increasingly stable over the past decade. Evidence obtained by the ACCC found no direct relationship between retail private label milk prices and farmgate prices, and that: production volumes trended down in higher cost regions (Qld, WA) since price support was removed; the price of private label milk does not appear to have altered this trend; farm exit trends in the higher cost regions have not changed in response to the introduction of \$1/L milk; total farm numbers, output and profitability trends have not changed since the introduction of \$1/L milk¹⁶ They went onto say that:

“Of course, farmers should get a fair return on what they produce but the question here is whether the price floor is the right avenue to correct the issues in the dairy sector. Although now out of fashion with economists, the idea of a commodity price floor remains attractive to policymakers. Price floors for agricultural commodities have been intensively used in global markets, such as the US and EU. However, this can have a negative impact on sustainable production and distort the correct functioning of markets by sending price signals that cause an unwanted accumulation of surplus product. If the price floor is higher than the market clearing price, consumers reduce their purchases, while on the other hand suppliers increase production as they are now getting paid more for the product than before, naturally creating a surplus of unsold product in the market. If this surplus is allowed to be in the market, it will create a downward pressure on the price. To keep the price from dropping, the government has to either: (1) buy up the entire surplus; (2) strictly enforce the price floor and let the surplus go to waste; or (3) control how much is produced”.¹⁷

¹⁵ Australian Farm Institute, which is made up with people from Sydney University.

¹⁶ Ibid.

¹⁷ Ibid.

Thus, as the AFI have argued, and this paper concurs, further questions need to be asked namely;

- ‘What impact would a regulated price have on the dairy export market?’
- Would a floor price lead to a supply management system such as that employed in Canada?
- Has the attention on the \$1/L price war distracted from the fundamental problems within the industry (e.g. disproportionate risk allocation between farmers and processors)?
- With Australian dairy producers being amongst the world’s most efficient, what impact might a floor price have on production efficiency?’¹⁸

Viewed this way, this paper argues the work these and other inquiries that have been undertaken by consecutive governments, further work is needed to establish a robust legal framework in a new world whereby exports may no longer be guaranteed. In addition, it is our view that government, along with industry are forced to look for other international markets and look more inwards. It questions whether there will be real on-ground benefits from the introductions of the 2020 Dairy Industry Code.

Unfortunately, government believes domestic wellbeing must be subordinate to international trade in all circumstances. It is not a nuanced opinion and simply misguided to suggest, “if governments regulate or are seen to regulate a price of any commodity, our trading partners will do exactly what they have done on barley.”¹⁹ Firstly, for the Minister to discuss barley in the same way as dairy (milk) products does not necessarily provide an accurate account of two very distinct sectors of agriculture production. Secondly, regulation alone does not change or diminish trade as amply demonstrated by the EU and the United States both regulating and protecting their domestic markets and in addition they are still exporting. The very attributes of milk, its wickedly short ‘shelf-life’ relative to commodities such as barley and obvious consumption in liquid form (albeit typically pasteurised and often homogenised) renders the argument illogical. That is, the products and their pasture to plate channels are functionally different. It argues for further work to be undertaken, post COVID-19, to ensure

¹⁸ AFI , <http://www.farminstitute.org.au/ag-forum/briefing-dairy-regulation-floor-pricing>

¹⁹ Mr Littleproud speaking at the a Rural Press Club of Victoria Stock and Land,
<https://edairynews.com/en/supermarkets-perpetrators-of-dairy-industry-misery-minister-73631/>

the Australian dairy industry remains viable. Part 1 of this paper will analyse the utility of the code of conduct in improving the viability of dairy farmers. This is followed in Part 2 that will discuss the Australian Dairy Plan to ascertain whether it has the ability to influence the improvement of the industry as a whole, particularly to the farmer. Part 3 will briefly suggest two mechanisms found in the EU and the United States by which governments can influence through setting minimum prices only when needed in order to give the industry some level of security. This paper will conclude the arguments in Part 4.

Part 1. Dairy Industry Code²⁰

The Dairy Industry Code does level the playing field between processors and farmers insofar as there are now mandatory steps to be taken and importantly it does not allow for any retrospective variation of the price (is this farm gate – we need to state where in supply chain the prices is). However, this small step is negligible when compared to the other benefits the Code provides along the supply chain. Notably, this small step appears to negate what occurred where Murray Goulburn supposedly overpaid farmers for their product and were required to return monies to the processor.

But the Code only regulates and arguably also attempts to introduce transparency into the relationship between farmers and “processors purchasing milk”.²¹ They have to deal with each other in good faith which is described section 11 as:

- (1) A processor must at all times deal with farmers in good faith, within the meaning of the unwritten law as in force from time to time, in relation to the supply of milk.
- (2) A farmer must at all times deal with processors in good faith, within the meaning of the unwritten law as in force from time to time, in relation to the supply of milk.

The problem is that as the Act notes the meaning must be derived from “the unwritten law as in force from time to time.”²² Two problems are immediately apparent, firstly, if the law is unwritten where is to be found and secondly what is the law. As to the first point the High

²⁰ Competition and Consumer (Industry Codes—Dairy) Regulations 2019

²¹ Code of Conduct above n 14, at s4

²² Ibid at s11

Court has not yet spoken on the issue of good faith and it has only been attempted by state courts. In addition, the issue of defining or at least describing good faith is still a work in progress.²³ It is also interesting that the Code of Conduct in essence between the farmer and the processor includes at the review stage other bodies not associated directly with the original “conduct” such as consumer organisations but excludes retailers in anything other than their “industry representative body”.²⁴

The Code goes to great length to explain and regulate the contract between the farmer and the processor in s12-20 and this is followed by setting out the content and “requirements for a milk supply agreement between a processor and a farmer.”²⁵ These sections are descriptive in nature and are of value insofar as they attempt to unify the industry as far as possible. However, in part, this could not be further from reality because it largely protects the processors and hardly makes a dent in the protection of dairy farmers themselves. It can be argued that this is a piecemeal exercise that continually leans in favour of the corporates. The interesting point, however, is the regulation regarding minimum price step downs whether retrospective, prospective and or unilateral. S 27 is an obvious one as it does not allow any retrospective price variations of a supply contract. However, the prospective step down is not prohibited in all circumstances as noted in s28. The processor is allowed to vary the agreement unilaterally if circumstances, as described in s28(3), are present. Of concern is the description of an extraordinary event. A temporary event is one of the exceptions however the question what is temporary is left out. Also, it is the processor who can vary the contract. The Code does not include a price rise as a step down is defined as:

(2) ‘A ***unilateral prospective step down*** is a unilateral variation of the milk supply agreement by the processor that reduces a minimum price for milk supplied under the agreement after the variation occurs’.

²³ See Good Faith – The Gordian Knot of International Commerce, Zeller, B. & Andersen, C. B., 2016, Pace International Law Review, 28, p, Good Faith - Is it a Contractual Obligation? Zeller, B., 2003, In : Bond Law Review. 15, 2,

²⁴ Code of conduct s 6(6)(c).

²⁵ Subdivision D s21

Arguably to vary the agreement to increase the price is left to a negotiation between the farmer and the processor whereas the negative step does not require negotiations. Therefore, of concern are the circumstances described in ss3(b) as being generated outside of Australia that is changed in market conditions in Australia. Considering that Australia does not export significant volumes overseas and combined with ss3(b)(iii) which noted that the circumstance “is not caused by decisions made by processors” arguably the one with the least knowledge namely the farmer is penalised. In relation decisions made by processor the ghost of Murray Goulburn rises again. Though the code does indicate that all reasonable steps must be taken if they cannot be taken the step down is unavoidable. The real problem hinges on the fact that the farmer has no ability whatsoever to check the facts specially in the event of a processor claiming the “Murray Goulburn” defence. More pervasively, the Code does allow the farmer to terminate the agreement, however, finding another processor will take time and resources, resulting in most cases if the event was outside the control of processors all other agreements in essence are also step down agreements . Where an agreement is terminated by a farmer, the situation the farmer finds themselves in will be limited access to the processing market. The resulting effect is how the regulation has created step down agreements.

Hence, the act merely regulates what normally happens in business and gives it legitimacy.²⁶ In addition to the step-down regulation s33 also noted in detail variations of milk supply variations unilaterally by farmers which – contrary to variations by processors must be contained with the agreement. Importantly the Code of Conduct does contain a section on dispute resolution procedures namely mediation and in certain circumstances arbitration.²⁷ Section 43(2) requires that a processor must have an internal complaint handling procedure and officer in place who by plain reading of the Code will initiate the necessary procedures either internally or outside the parties via mediation or arbitration depending on the terms in the agreement. The Code of Conduct also regulates the distribution of cost in mediation and arbitration which are identical, as set out in S53 for arbitration namely:

²⁶ Code of Conduct s 28(5)(a) and (b).

²⁷ Code subdivision F

53 Costs of arbitration

- (1) 'Each party to a dispute that was the subject of an arbitration in accordance with this Subdivision must pay half the costs (if any) of the arbitration (being all reasonable costs associated with the conduct of the arbitration), unless the parties to the arbitration agree otherwise.
- (2) Each party to a dispute that was the subject of an arbitration in accordance with this Subdivision must pay that party's costs of attending the arbitration, unless the parties agree otherwise'.²⁸

It must be noted that before any mediation or arbitration will take place a clear cost proposal must be obtained as mediators or arbitrators can be rather costly upward to \$10,000 a day would not be unusual. However, and upon reflection, the Code of Conduct allows the processor to "game" the issues as in most circumstance their legal team would be well-versed in presenting facts in the correct light in order to prove a point. In many circumstances the farmer is not in a position to know or it is difficult to produce facts to support an argument. What can be said is that the Code is a good starting point and that the inclusion of a review after one year is helpful. However, the main issue still has not been addressed namely:

'codes are not very successful in dealing with an inefficient market or a poor structure where there is an imbalance of power. The issue is you must face up to the fundamental problem. Intervention is required to alter the imbalance of power and the unfair structure'.²⁹

The fact remains that farmers want to maximise their returns, as the processor can buy milk from more than just one farm. Hence farmers should also be able to sell to more than one processor at the same time. This poses some of the greater challenges with the construction of the Code of Conduct.

²⁸ Ibid.

²⁹ Dairy Industry at 42

Based on the criticism from stakeholders, the only attempt to assist farmers by the government was the introduction of the *Code of Conduct 2020*.³⁰ It attempts to regulate the interaction between farmers and their adjoining processor not the whole industry. In addition, the Code needs to be read in conjunction with the underlying legislation namely the *Competition and Consumer Act 2010*³¹ which would have been the tool to also include retailers. The point is that being a regulation it is untested and even when tested by the ACCC requires a considerable time for resolution. The Minister does argue that he would engage the ACCC to include the supermarkets to participate in the Code of Conduct and hence create a level playing field.³² He noted, “that’s why I’ll be engaging with the ACCC and looking at some complementary measures, and making sure the supermarkets are part of that as well, because they have a role to play in this as well.”³³ That is correct but it is not only the players with the industry which have a role to play it is the government which has to show leadership and take hold of the problem and suggest a solution which is well thought out and takes all relevant information specially lessons learned (or otherwise) from overseas into consideration. Hence a new debate relating to government involvement in maintaining viable agricultural output is overdue. The response in part was the release of the Australian Dairy Plan late 2020.³⁴

Part 2. The Australian Dairy Plan

Not surprisingly government had no direct input into the plan and it was “collectively led by Dairy Australia, Australian Dairy Farmers, Australian Dairy Products Federation and Gardiner Dairy Foundation, [but] the plan hasn't been welcomed by all.”³⁵ One of the reasons is the geographical and weather diversity and the variations in the size of dairy farms hence a size fits all is not possible. The starting point is a stark realisation namely:

³⁰ Competition and Consumer (Industry Codes—Dairy) Regulations 2019.

³¹ No. 51, 197, <https://www.legislation.gov.au/Details/C2018C00437>

³² Stock and Land above n 19.

³³ Ibid.

³⁴ Australian Dairy Plan

³⁵ Dairy News, <https://www.dairynewsaustralia.com.au/news/2020/10/28/1712997/australian-dairy-plan-presents-dairy-industry-roadmap>

As our reference paper on profitability trends and targets shows, in 2018 the average dairy farmer had earnings before interest and taxes (EBIT) of \$0.66 per kilogram of milk solids (kgMS), well below the Dairy Plan target of \$1.50 EBIT/kgMS over a five-year average. While on-farm profit margins will vary widely between regions and seasons, nationally, less than 40 per cent of farms achieved this target in any of the five years to 2018/19'.³⁶

In addition, the importance of the Dairy sector has been recognised as it has “an annual farmgate value of A\$4.6 billion (FY20), [and] dairy is the country’s fourth largest rural industry and a major driver of regional economies, employing 43,500 people.”³⁷ There is no debate that action to improve the sector is required however this paper argues that the Dairy Plan is merely one small part in a combined effort to increase the viability of the sector.

The executive summary notes:

‘It sets a clear industry direction for the next five years and beyond to deliver a better future for dairy. The Plan is industry led and designed to increase profitability, business confidence and unity across the industry’.³⁸

Unfortunately, it is an aspirational plan largely setting the policy direction going forward. What needs to be acknowledged is that the Dairy Plan has pinpointed the real issues which effect the dairy industry and agriculture generally. One of the important issues is that arguably the “introduction of \$1/ litre milk by supermarkets in 2011 (that de-valued dairy products for many consumers and reflect the imbalance in market power across the supply chain), the milk-price step-downs in 2016 and, most recently, COVID-19.”³⁹ The argument is that the processors are forced to view the dairy farm as a cost in order to make a profit given the market in essence is driven by the big retailers. Also, the Dairy Plan has correctly noted the issues which greatly impact the farmers namely market and climatic

³⁶ DP at 14

³⁷ DP at p 3

³⁸ DP at 5

³⁹ DP at 10

volatility which firstly cannot be controlled and secondly are of little concern to the supermarkets bottom line. The Dairy Plan does acknowledge this fact as they state:

‘Australian processors have little capacity to pass through rising production costs, increased energy, labour and compliance costs in a deflationary retail environment. Consequently, given small and shrinking margins, any increase in input costs has a significant impact’.⁴⁰

The Dairy Plan highlights that Industry success requires a heightened focus on profit to reverse the trends of the last five years. This depends on the ability to measure profit and set targets for success. The very point is that a price is set by the USD driven Dairy Commodity Index and hence as noted above processors are limited in their ability to set a farm gate price. There are only two organisations which arguably can affect independently the price of milk namely the big supermarkets and the government. At this stage both are silent on this issue or arguably unwilling to act. One issue which has been highlighted in the Dairy Plan is the lack of unity⁴¹ which has the effect to deny the industry the ability to lobby government properly. It is undeniable – and the Dairy Plan has highlighted this that “Strong support for reform has emerged loud and clear through the engagement process.”⁴² The issue is how to achieve this goal. It is obvious that the “joker in the pack” is the retail price. It is the crucial issue which determines the viability of the industry considering that the price offered by processors is set by the USD driven Dairy Commodity Index and processors are limited in offering farmgate prices due the supermarkets ability to set the purchase price. Undeniably efficient dairy farmers will survive but the point is – considering that processors are not working at full capacity – volume has to be maintained hence less efficient farmers still need to stay in the industry. Considering the decline of dairy farmers over a long period indicates that non-profitable farms have disappeared and it therefore begs the question what is the circuit breaker? Put differently how can the output be maintained without crating inefficient farms. The answer this paper argues consistently is that governments must play a role in addition to the organisations and the farmers themselves. Only legalisation is strong enough to maintain

⁴⁰ OP at 11

⁴¹ DP at 17

⁴² DP at 23

a necessary volume of milk production. As this paper already argued the Code of Conduct is not sufficient, it needs simply more actions. That is, the Code, while achieving and assisting one sector of the supply chain, it falls short in assisting the farmer.

One issue which the Dairy Plan identifies is most important and will be crucial in reforming or better put sustain the dairy Sector namely: “Implementation will require continued close engagement with the Australian Government and all affected industry organisations, as key legal, financial and governance considerations are worked through.”⁴³ The Dairy Plan has indeed focused and established criteria for a successful rebuild of an industry. It is true to say that “Trust and support for the industry are critical elements of building confidence in the industry’s outlook. The key mechanism for achieving this is the Australian Dairy Sustainability Framework (the Sustainability Framework).”⁴⁴

However the problem is that many crucial variables such as the commodity price, setting of the retail price and climatic conditions are outside the control of the dairy organisations. Looking at all the major dairy producers especially in Europe and the United States the hand of government is never far away. It is only government action which can to an extent affect the profitability of the industry. One only has to look at the regulations of the EU in relation to the Dairy Industry to appreciate the influence of legal system in maintaining a viable industry. As an example, see the Commission Delegated Regulation (EU) No 880/2012 of 28 June 2012 supplementing Council Regulation (EC) No 1234/2007 as regards transnational cooperation and contractual negotiations of producer organisations in the milk and milk products sector or pertinently Commission Delegated Regulation (EU) 2020/591 of 30 April 2020 opening a temporary exceptional private storage aid scheme for certain cheeses and fixing the amount of aid in advance. Switzerland – a small county - also has recognised that sustainability of the dairy sector can only be achieved through Business/Government interdependence. Mann and Gazzarin have argued:

Sustainability of enterprises can be defined as demonstrating the ability to be capable of continuing the same type of business in the lifetime of the next generation. In the case of

⁴³ DP at 25

⁴⁴ DP at 63

Swiss dairy farms, this type of sustainability may also depend on the willingness of the government and society to make the necessary financial adjustments.⁴⁵

In Australia there is simply no guiding hand or appetite which can enforce or more to the point stabilise the industry [at the farm gate] in times – as an example - of fluctuation of world prices. Is there of value to investigate the most common aids in the support of an industry namely the floor price or a levy on the retail price both mechanisms which are easily implemented in times when they are needed.

Part 3. Price Structures

The fact that the pricing mechanism for milk is still being discussed despite many views expressed in the 2017 review indicates that the problem of the dairy industry is still festering. To put the best gloss on it is to suggest that it is a complicated issue. In 1990, when milk prices were stable there was no

need to worry unduly about price. However, price stability has actually changed since deregulation took place. Rather than market forces providing price stability, competitive market forces have introduced greater price variation – despite domestic consumption of fresh milk remaining entirely predictable. The real issue is that a “price milk risk management strategy” must be in place for all concerned that is from the farm to the processor, retailer and importantly government. Arguably this is not so as currently the retailer is the driving force and the farmer at the end is the price taker. Arguably the situation is that the tail wags the dog. It is of value and important to look at mechanisms’ countries use to regulate and support the Dairy Industry. The question is what can Australia learn and either adopt or adapt the findings to our conditions.

The starting point is the fact that agriculture is an important sector. But at the same time the “agriculture industry is characterized by uncertainty in the farm yield.”⁴⁶ The point is that in

⁴⁵ Stephan Mann & Chrisian Gazzarin, Sustainability Indicators for Swiss Dairy Farms and the General Implications for Business/Government Interdependencies, International Review of Administrative Sciences 70(1):111-121 at 1

good years farms will make a profit and do not need assistance but in bad years such as droughts circuit breakers must be available as is in the EU and the United States. The instrument which is best used is a government legislated price for milk.

a) Floor Price

Floor prices are a nontariff instrument which has been used in the main to shelter domestic firms from the impacts of imports. “The implicit goal of price floors policy is to temporarily interrupt the linkage and dampen the price transmission between international and domestic markets, in particular, in unfavourable market conditions.”⁴⁷ In Australia where imports do not appear to be significant except in certain cheeses is an option where a floor price could be used as the farm gate price. There is little if no possibility to reach an oversupply of milk. A floor price applied properly is an instrument to be considered by policy makers in setting trade policies to keep the industry sustainable. The importance of the floor price is that it gives the industry certainty as to the minimum price which can be expected at the farm gate. A more sophisticated use of floor pricing arguably is if the government sets the price depending on the supply of milk that is it adjusts the price yearly depending on factors such as cost of input, climatic conditions to mention a few. In addition, as the price at the farmgate can and does vary because as an example a flat production will attract a higher price, a floor price will guarantee the viability of the smaller operator and as flow on effect the survival of country regions another issue to be considered in the overall principle of food security and wellbeing of citizens.

In Australia there has been considerable debate of establishing a floor price. That is, there have been three attempts to introduce a minimum farmgate price. The first was back in 2013, where, The Hon. Bob Katter Jnr MP on 11 February of that year introduced the *Dairy Industry (Drinking Milk) Bill 2013* into the House of Representatives. This proposed Fair Work Australia to set a minimum farmgate milk price in the form of a modern award for

⁴⁷ Feng Wu and Zhengfei Guan, Spatial Price Transmission in the Presence of Floor Prices, Gulf Coast Research and Education Center, University of Florida, at 2



dairy farmers. The Bill lapsed on 5 August 2013 and did not proceed.⁴⁸ The second occasion was The Hon. Pauline Hanson MP on 16 October 2019 introduced the *Protecting Australia Dairy Bill 2019*. This proposed to amend the *Competition and Consumer Act 2010* to require the ACCC to determine a base minimum price for milk for each dairy season, require the minister to refer to the Productivity Commission for inquiry the effectiveness of determining a base price for milk and the potential effectiveness of a divestiture regime for the dairy industry and establish a mandatory industry code for the food and grocery industry, including the dairy industry. The Bill was defeated 31-30 in the negative on 11 November 2019 and did not proceed.⁴⁹ Third, was again The Hon. Pauline Hanson MP on 2 December 2019 introduced the *Saving Australian Dairy Bill 2019*. This is a retitling of the *Protecting Australia Dairy Bill 2019* and has been referred to this inquiry for analysis and recommendation. Thus, it appears there is little appetite for or by the national government to entertain the prospect of establishing a floor price and providing greater certainty to the hard work farmers undertake to provide this country with one of the most important staples, for consumption.

b) Levy on the retail price

New Zealand having considered a similar approach, as noted by John Dahlsen suggested a 40cent levy on fresh milk at the consumer end, to be paid to the farmers. However, as the levy is collected by the retailers it would put the price of milk up to \$1.70 which is about the average world price but still below New Zealand's domestic price as an example. It is very doubtful that the retailers and processors would absorb the total levy hence the fresh milk farmer will not receive the full 40c. Dahlsen argues that only 13c will end up with every dairy farmer the rest would be absorbed by the retailer and processor.⁵⁰ Arguably the retailer and the processor at best would only discount the 40c to cover the cost. Just merely covering costs and arguable a reduction of purchases of milk is unlikely or at least not significant.

⁴⁸ Australian Dairy Farmers, <https://australiandairyfarmers.com.au/wp-content/uploads/2020/04/ADF-submission-to-the-Inquiry-into-the-performance-of-Australias-dairy-industry-and-the-profitability-of-Australian-dairy-farmers-since-deregulation-in-2000.pdf>

⁴⁹ Ibid.

⁵⁰ Dahlsen at 33

The real problem with a levy which is not administered by the government is the unreliability of how much actually filters down to the farmer. If the 10c fire levy is an indication the very method of charging a levy is fraught with danger. Having the ACCC supervise the levy is not an option as the ACCC is slow, and generally also short of funds. Dahlsen correctly noted that a levy at the consumer end at best, “only partly helps the dairy farmer but it is very good for dairy farmer morale and shows the Government cares and is doing something.”⁵¹ However, Australian dairy farmers require something of considerably more substance than a boost to their morale, they need a price support mechanism that meets their total (fixed and variable) costs. Some form of levy collected at purchase by the retailer and paid to the producer – in a manner to any other form of indirect tax (i.e., GST), but being shifted to the producer, as opposed to state or federal government.

Part 4. Conclusion

This paper has demonstrated that to maximise and maintain the contribution of the dairy industry to the Australian economy is essential that a supportive government structure is in place to protect and maximise the benefits to farmers. The Code of Practice recently introduced is in our view supply chain specific and falls short of assisting the farmer. It is the farmer that requires further assistance, as they are the initial supply chain point (first point of contact), where milk is produced and processed. The Dairy Plan no doubt would be of assistance to the government in their decision making. It is in the public interest that Australia maintains a viable and competitive dairy farm industry, and not allow the supply chain – processors and a few corporates to dominate the market for their own interests. On the one hand, this should not be a problem as research has shown that, “the Australian community holds a deep cultural attachment to farming as a special and worthwhile activity that is reflected in broad, often unquestioning, sympathy for farmers and support for government assistance to agriculture”.⁵²

⁵¹ Ibid at 33

⁵² Berry, H.L., Botterill, L.C., Cockfield, G. and Ding, N. 2016. Identifying and measuring agrarian sentiment in regional Australia. *Agriculture and Human Values*. Early view online. doi:10.1007/s10460-016-9684-5

Australia ought to carefully look at the lessons New Zealand is learning from the changing global dairy situation. As a result of the European Union removing quotas new players have entered the field and multinationals are opening mega dairy operations. All of which point to greater competition and the continued reduction of prices. In Australia processors are not operating at full capacity and supermarkets like Coles are buying milk for themselves and subcontracting the bottling of milk, in doing so setting the price. Also, despite the fact that Australia is not a big player in the world market the rest of the world will dictate prices and will affect the domestic market as importing is possible.

In addition to the above, Australia needs to also rethink its approach to farming, particularly where downstream processing has been heavily corporatized. Unfortunately, it appears that government believes domestic wellbeing must be subordinate to international trade in all circumstances. It is not a nuanced opinion and simply misguided to suggest, “if governments regulate or are seen to regulate a price of any commodity, our trading partners will do exactly what they have done on barley.”⁵³ Regulation alone does not change or diminish trade as amply demonstrated by the EU and the United States both regulating and protecting their domestic markets and they are still exporting. Of importance is that something is one now while the “patient” is not dead yet. To that end a 40 c levy as suggested by John Dahlsen being a temporary measure ought to be given serious consideration. Looking at the EU temporary measures are not unusual.⁵⁴

Finally, as international trade becomes even more uncertain, it requires a joint effort by all concerned which includes government to work out how the dairy industry should be left to the cold winds of competition. There needs to be a balance and wider understanding of whether regional viability, jobs and food security should be an important issue in order to find a balanced dairy market operating efficiently. It takes a leadership role to be played by

⁵³ Mr Littleproud speaking at the a Rural Press Club of Victoria Stock and Land,
<https://edairynews.com/en/supermarkets-perpetrators-of-dairy-industry-misery-minister-73631/>

⁵⁴ See for an example The EU dairy sector EU Parliament briefing notes Main features, challenges and prospects,
[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2018\)630345](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2018)630345)

the government which is more than merely introduce a code of conduct to assist the industry as a whole, particularly farmers, and not just one section of the supply chain. In sum the government needs to take a pro-active role in the sector as a re-active response is not an option any more