

## Form B

Commonwealth of Australia

*Trade Practices Act 1974 — subsection 88 (1)*

### AGREEMENTS AFFECTING COMPETITION: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (1) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- to make a contact or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

*(Strike out whichever is not applicable)*

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

#### 1. Applicant

- (a) Name of Applicant:  
*(Refer to direction 2)*

A91089 Dairy Farmers Milk Co-operative Limited (DFMC) which provides  
this application on behalf of itself, its current and future members and  
A91090 Australian Co-operative Foods Limited (ACF).

- (b) Short description of business carried on by applicant:  
*(Refer to direction 3)*

**Acquirer of raw milk from farmer members for on-sale to ACF**

- (c) Address in Australia for service of documents on the applicant:

**C/- Kathryn Edghill  
Addisons Lawyers  
Level 12, 60 Carrington Street  
Sydney, NSW 2000  
Email: kathryn.edghill@addisonslawyers.com.au**

## **2. Contract, arrangement or understanding**

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:  
*(Refer to direction 4)*

**See attached Submission.**

- (b) Description of those provisions of the contract, arrangement or understanding that are, or would or might, substantially lessen competition:  
*(Refer to direction 4)*

**See attached Submission.**

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

**See attached Submission.**

- (d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

**See attached Submission.**

## **3. Parties to the proposed arrangement**

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

**See attached Submission.**

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:  
*(Refer to direction 5)*

**See attached Submission.**

## **4. Public benefit claims**

- (a) Arguments in support of authorisation:  
*(Refer to direction 6)*

**See attached Submission.**

- (b) Facts and evidence relied upon in support of these claims:

**See attached Submission.**

## **5. Market definition**

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):  
*(Refer to direction 7)*

**See attached Submission.**

## **6. Public detriments**

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:  
*(Refer to direction 8)*

**See attached Submission.**

- (b) Facts and evidence relevant to these detriments:

**See attached Submission.**

## **7. Contract, arrangements or understandings in similar terms**

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

**See attached Submission.**

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:  
*(Refer to direction 9)*

**See attached Submission.**

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

**See attached Submission.**

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

**See attached Submission.**

**8. Joint Ventures**

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

No

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

N/A

- (c) If so, by whom or on whose behalf are those other applications being made?

N/A

**9. Further information**

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

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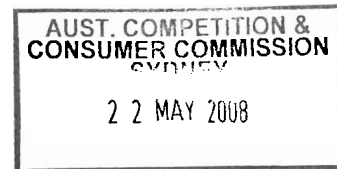
Dated..... **22 MAY 2008**

Signed by/on behalf of the applicant

.....  
(Signature)

**KATHRYN EDGHILL**  
(Full Name)

**PARTNER, ADDISONS**  
(Position in Organisation)





## **DIRECTIONS**

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
  - (b) to the extent that of any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
  6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
  7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
  8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
  9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

# RESTRICTION OF PUBLICATION OF PART CLAIMED

Dairy Farmers Milk Co-operative Limited

and

Australian Co-operative Foods Limited

Submission accompanying application for authorisation of  
milk supply arrangements

22 May 2008



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## 1. Introduction

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Dairy Farmers Milk Co-operative Limited (**DFMC**) provides this submission on behalf of itself, its current and future members and Australian Co-operative Foods Limited (**ACF**), in support of the application for authorisation of certain milk supply arrangements under section 88(1) of the *Trade Practices Act 1974* (Cth) (**TPA**). This submission proceeds from the premise ACF will be sold. When this submission discusses the environment post-completion, the milk processor is still referred to for convenience as ACF even though it will then be owned by another (at present unknown) entity.

Representatives of DFMC and ACF would be pleased to meet with the Commission, if required, to discuss the authorisation application and the contents of this submission.

## 2. Executive Summary

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ACF is a milk processor co-operative. DFMC is a milk supply co-operative. ACF and DFMC are currently related bodies corporate for the purposes of the TPA.

Currently, ACF acquires almost all of its raw milk from DFMC under a Milk Supply Agreement dated 1 July 2004 (**MSA**) which is due to expire in June 2017. DFMC, in turn, acquires milk from its farmer members for supply to ACF. The vast majority of that milk is acquired under individual supply contracts between DFMC and each of its farmer members.

The MSA provides that for so long as ACF and DFMC are related bodies corporate, DFMC will adopt:

- the same milk purchasing policy (including price structure) in relation to its acquisition of milk from its farmer members, as ACF applies to its purchase of milk from DFMC (**back to back milk purchasing policies**); and
- the same milk price in relation to its acquisition of milk from its farmer members, as DFMC receives from ACF for the milk DFMC sells to ACF (**back to back pricing**).

ACF is considering bids for the acquisition of its business. If a sale proceeds, ACF and DFMC will cease to be related bodies corporate.

DFMC and ACF seek authorisation for:

- amendment of the MSA prior to completion of any sale of ACF to provide for continuation of the back to back pricing and back to back milk purchasing policies provisions, contained in clauses 4.4 and 5.6 of the MSA; and
- if required, implementation of the back to back pricing and back to back milk purchasing policies by DFMC in its dealings with farmers for the supply of milk to ACF.

Authorisation is sought for such conduct in respect of the following contracts and arrangements between DFMC and its farmer members, namely:

- (a) **existing supply contracts**, which are those currently in existence, and those entered into between the date of this application and completion of the sale of ACF (including arrangements with farmer members for the acquisition of milk for on sale to ACF which

exist without the parties having entered into a written contract) (**existing supply contracts**) – for which conduct authorisation is sought until the contracts and arrangements expire; and

- (b) **future supply contracts**, which are those supply contracts to be entered into after completion of the sale of ACF, including any renewals of any existing supply contracts (and any arrangements with farmer members for the acquisition of milk for on sale to ACF which occur without the parties entering into a written contract) (**future supply contracts**) – for which conduct authorisation is sought for five years.

DFMC and ACF submit that the conduct:

- (a) has **no anti-competitive detriment** because:

- milk prices agreed between DFMC and ACF have been, and will continue to be, in line with prevailing market prices;
- membership of DFMC is voluntary and members enter into and renew supply contracts on a regular basis;
- ACF will be free to acquire from other suppliers, and DFMC's farmer members will be free to supply to ACF directly; and
- regional factors ensure that there will be no industry- wide pricing.

- (b) will result in the following **public benefits** which outweigh any anti-competitive detriment:

- certainty for farmers, processors and consumers by ensuring that existing supply contracts will be enforceable;
- certainty of future milk supply arrangements, providing farmers with the security necessary to plan and grow production (which is particularly important in a period of extended drought and high input costs);
- continuation of access for farmers (particularly small to mid sized) to DFMC's abilities and expertise on trends and prices for dairy products which in turn lowers transaction costs; and
- enhances the potential to grow exports through security of the existing milk pool and the potential for growth of the pool.

### **3. Description of the Parties**

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#### **3.1 DFMC: the milk cooperative**

DFMC is a co-operative limited by shares and a trading Co-operative within the meaning of section 14 of the *Co-operatives Act 1992* (NSW). It came into existence on 2 April 2004 and commenced trading following the restructuring of ACF on 29 June 2004, details of which are contained in section 3.3 below.

DFMC's principal activity is the acquisition of milk from members (pursuant to supply contracts with its members) and the sale of all such milk to ACF (pursuant to the MSA). DFMC is the owner of the milk it sells to ACF. It is not an agent for its farmer members in respect of the sale. DFMC is not a milk trader and does not have any infrastructure such

as milk collection and storage facilities. DFMC is dependent on ACF for the collection and storage of the milk which it acquires from its members and on sells to ACF.

Active membership of DFMC is dependent upon satisfaction of the criteria set out in rule 13.2 of DFMC's registered Rules (**Rules**), a copy of which is located at **Appendix A** to this submission. It includes, among other matters, the supply of at least 200 litres of milk to DFMC in any relevant seven day period.

Members of DFMC are dairy farmers from Queensland, New South Wales, Victoria and South Australia. A confidential list of members and their locations is located at **Appendix B** to this submission.

A very small number of DFMC members do not currently have written supply contracts with DFMC.

Membership of DFMC is voluntary and members join and leave regularly. Rules 18 and 20 of the Rules deal, respectively, with membership and cessation of membership of DFMC.

**Confidential Table 1** below sets out the regions in which DFMC's farmer members are located, the number of DFMC farmer members in each of those regions, and the total amount of raw milk supplied by each region in the past two financial years:

**Confidential Table 1: DFMC farmer members by region**

**Restriction of publication of part claimed**

Following the restructure of ACF on 29 June 2004, all members of ACF became members of DFMC. DFMC also holds shares in ACF. Since June 2004 DFMC has admitted new members who are not also members of ACF.

**3.2 ACF: the milk processing co-operative**

ACF is a co-operative limited by shares and a trading Co-operative within the meaning of section 14 of the *Co-operatives Act 1992* (NSW). It operates under the trading name Dairy Farmers and is one of Australia's largest dairy manufacturers, supplying fresh and processed products to both local and export markets.

Its principal activities are the collection, processing, packaging, distribution and marketing of milk and other dairy or related food products (such as cheese and yoghurt) for its members. It acquires almost all of its raw milk from DFMC. ACF currently supplies its products nationally. Its key brands include Dairy Farmers, Oak, Coon, Cracker Barrel, Dare, Moove, Shape and Ski. Details of ACF's brands are contained in **Appendix C** to this submission.

ACF collects raw milk from DFMC's members in each of the locations identified in Table 1 in section 3.1 above. Details of ACF's facilities, and the products manufactured at each, are set out in **table 2** below:

**Table 2: Location of ACF's facilities**

State	Location of facility	Products manufactured
NSW	Lidcombe	Fresh white and flavoured milk and fresh cream
	Wetherill Park	Dairy foods, sour cream, bottle and carton UHT
	Hexham	Fresh white milk, condensed milk and deserts, cottage cheese
	Baulkham Hills	Fresh white milk and fresh cream
Queensland	Malanda	Fresh white and flavoured milk, fresh cream and cheese
	Booval	Fresh white and flavoured milk, fresh cream, powders
South Australia	Clarence Gardens	Fresh white and flavoured milk
	Jervois	Cheese and powders
Victoria	Simpson	Cheese
	Allansford	Cheese (cut and wrap only)
	Shepparton	Fresh white and flavoured milk
ACT	Canberra	Fresh white and fresh cream

### 3.3 ACF and DFMC are related parties

ACF and DFMC are related parties within the meaning of section 4A (5) of the TPA because DFMC has the right to remove from office a majority of the directors of ACF.

Before 29 June 2004 ACF was wholly owned by farmer members. Pursuant to a Scheme of Arrangement, on 29 June 2004 DFMC was created and interposed between the farmer members and ACF. DFMC was issued with 5 shares in ACF. At the same time:

- farmer members shares in ACF were cancelled and all such members became members of DFMC; and
- DFMC divested at least 80% of its interest in ACF to its members, such that its members now directly hold membership and shares in ACF.

The result of the restructuring and demerger is that:



- DFMC is wholly owned by its members who are almost all also members of ACF;
- DFMC owns 20% of ACF<sup>1</sup>;
- DFMC members own the remaining 80% of ACF; and
- A new rule 50A was included in ACF's registered Rules which gives DFMC the power to remove from office a majority of directors of ACF at any time during the currency of the MSA.

## **4. Current Milk Supply Arrangements**

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### **4.1 The Milk Supply Agreement and the Supplement**

The milk supply arrangements between ACF and DFMC are contained in the MSA and a supplement to that agreement dated September 2005 (**Supplement**), copies of which are contained in confidential **Appendix D** to this submission. The term of the MSA was extended by agreement between the parties and is due to expire in June 2017. The MSA, together with the Supplement, set out the terms on which ACF acquires milk from DFMC.

Currently, the key terms of the MSA are:

- ACF must use its reasonable endeavours to pursue commercial opportunities which will sustain and grow the current regional supply of milk to ACF: clause 3.1(a);
- ACF must assist DFMC to provide its farmer members, on a regional basis with a consistent and orderly opportunity to grow on farm production: clause 3.1(b);
- DFMC must purchase all of the qualifying farmer members' milk which is offered for sale to it: clause 3.2.1;
- ACF must, subject to certain limited exceptions, purchase from DFMC all of the qualifying farmer members' milk which DFMC has purchased: clause 3.3(a);
- DFMC must adopt the same milk purchasing policy (including price structure) in relation to its acquisition of milk from its members, as ACF applies to its purchase of milk from DFMC (referred to earlier in this submission as the back to back milk purchasing policies): clause 4.4;
- the commercial price for milk payable by ACF is the market value or price of milk on a GST exclusive basis: clause 5.1.1. If the parties are unable to agree on a 'commercial price', the issue may be resolved by mediation and then expert determination: clause 5.4.3 and 14.
- the parties must agree a pricing structure for the acquisition of milk by ACF which has regard, among other matters, to quality, quantity, geographic, transportation and handling factors: clause 5.1.2;

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<sup>1</sup> There is currently a dispute before the Courts between ACF and DFMC regarding the percentage shareholding of DFMC.

- an obligation on DFMC, only for so long as it is a related party of ACF, to adopt the same milk price in relation to the purchase by DFMC from its farmer suppliers of milk, as DFMC received from ACF for the milk it sells to ACF (referred to earlier in this submission as back to back pricing): clause 5.6;
- DFMC must direct ACF to make, on its behalf, payment to DFMC's farmer members for milk supplied by them to DFMC which is on sold by DFMC to ACF: clause 7.2; and
- subject to certain limited exceptions ACF is precluded from acquiring milk directly from a farmer or from any other supplier of milk other than DFMC (the **Restraint**): clause 9;

Relevantly, clause 20 of the MSA provides that the following provisions cease to apply in the event that ACF and DFMC cease to be related parties:

- back to back pricing (clause 5.6);
- the back to back milk purchasing policies (clause 4.4); and
- the Restraint on ACF (clause 9).

The Supplement relevantly provides:

- all milk acquired by DFMC pursuant to its supply contracts with farmer members will be on sold by DFMC to ACF on the same terms and conditions as contained in those supply contracts as if DFMC was named in those contracts as the supplier instead of the farmer members and ACF was named in those contracts as the milk co-operative instead of DFMC.
- DFMC will not terminate any supply contracts with farmer members without ACF's prior written approval (such approval not to be unreasonably withheld); and
- DFMC will not give its consent or approval under any of its supply contracts with farmer members without obtaining ACF's prior written approval (such approval not to be unreasonably withheld).

The purpose of the Supplement was to deal with the following situations:

- If liquidated damages were payable by a farmer member to DFMC under a supply contract with the farmer member, the same amount would be payable by DFMC to ACF; or
- If a farmer member was required to repay an amount under a supply contract to DFMC because the farmer member did not satisfy a payment condition, DFMC must repay the same amount to ACF.

#### **4.2 DFMC's supply contracts with farmer members**

DFMC currently offers two classes of supply contracts to its farmer members, and has done so since at least September 2005. These are:

1. Defined Volume Fixed Term Contracts; and
2. Volume Incentive Contracts (also referred to as Supply Agreements).

Farmer members are free to choose whether or not they enter into a supply contract and, if so, which of these supply contracts they enter into. Farmer members who choose not to enter one of these supply contracts are still free to supply milk to DFMC, in which case they are paid a Base Milk Price.

All prices paid by DFMC to its farmer members for milk supplied to it, whether under a supply contract or otherwise, are identical to the prices which are payable by ACF to DFMC for that milk.

**Defined Volume Fixed Term Contracts** are generally two to three year agreements under which a farmer member agrees to supply DFMC with a defined volume of raw milk, which volume is to be supplied by that farmer member on a six monthly basis during the term of the contract. Price is determined as follows:

- the farmer member receives the Contracted Base Price for milk supplied each month during the contract period. Under the contract, the Contracted Base Price is defined as an amount announced by DFMC from time to time for a reference litre of milk (3.95% Fat and 3.15% Protein). This price is usually jointly announced by ACF and DFMC. If the Contracted Base Price is less than the Minimum Base Price, which is an amount set out in the schedule to the agreement, DFMC will make a top up payment at the end of the year to ensure farmer members are paid the Minimum Base Price. The Minimum Base Price provides a level of certainty for farmer members as to the price they receive for milk during the term of the agreement.
- the farmer member also receives payments for supplying the Defined Volume referred to in the contract as the Contract Consideration Payment and a Volume Incentive. In addition a payment is made for "new milk" which is milk supplied for increased production on a monthly basis measured year against year. The Contract Consideration Payment is calculated by reference to the actual amount of milk supplied (up to a maximum of 20% above the agreed Defined Volume), and the rate of payment is set out in the schedule to the agreement. The Volume Incentive is announced by DFMC from time to time; and
- if in any two or more consecutive six monthly periods the farmer member does not supply the Minimum Volume (which is the Defined Volume less 10%), the farmer member is liable to pay liquidated damages on the shortfall. In this situation, the Supplement provides that any payment of liquidated damages to DFMC must be on paid to ACF.

Neither the farmer member nor DFMC can terminate the contract without giving 180 days notice, except in limited circumstances.

**Volume Incentive Contracts** (or Supply Agreements) are generally one year agreements under which a farmer member agrees to supply DFMC with all of the raw milk produced at his or her farm (excluding any raw milk acquired directly by ACF, as provided for in the MSA). The farmer member can terminate the contract with DFMC at any time during the term on 120 days' notice. Farmer members receive:

- a Base price for their raw milk each month during the term of the agreement. The Base price is the fixed price for that month announced by DFMC; and
- a Volume Incentive Payment

Copies of sample Defined Volume Fixed Term Contracts and Volume Incentive Contracts are located at confidential **Appendix E** to this submission,

Upon expiry, contracts are frequently renewed, or new contracts are made. In the case of a Defined Volume Fixed Term Contract this can occur, at the end of any six month period during the term, if farmer members wish to increase the Defined Volume they agree to supply to DFMC.

At any one time there are a number of supply contracts being renewed or new agreements being negotiated and entered into by DFMC. At present there are 776 supply contracts between DFMC and farmer members. These expire at different times, with the last contract currently expiring on 28 February 2011. The details of the current supply contracts are set out in the table in confidential **Appendix F** to this submission, but may be subject to change as farmer members under Defined Volume Contracts enter into new agreements during the term.

Throughout this submission the terminology used to describe payments for raw milk are consistent with those used in the Defined Volume Fixed Term Contracts. However, this terminology is not generally used in the negotiations between DFMC and ACF, or in discussions with dairy farmers. Specifically:

- the term 'base price' is frequently used informally, but the term in the written contract is the 'Contracted Base Price.' Both expressions refer to the price that is announced by DFMC and ACF from time to time; and
- the term 'contracted price' is frequently used informally, but the term in the written contract is the 'Minimum Base Price.' Both expressions refer to the minimum price at which DFMC will acquire milk from farmer members as specified in their contract.

#### **4.3 Regional Pricing**

The prices paid by ACF to DFMC, and DFMC to farmer members, for raw milk depend on a number of factors related to the quality of milk as well as upon the geographic location from which the raw milk is sourced. However, each member within a specified region is paid the same amount, subject to quality bonuses and penalties. The regions are:

- Far Northern (The Atherton tableland in Queensland);
- Northern (Wide Bay, South Burnett, Darling Downs and West Moreton in Queensland and Northern NSW);
- Central (Mid North Coast, Tamworth, Hunter Valley, Sydney, South Coast, Central West, all in New South Wales);
- Riverina/North Victoria (South Riverina in New South Wales and North Victoria); and

- West Vic/South Australia (Colac, Camperdown, Warnambool, Mt Gambier, South Australia Riverland, Central South Australia).

In some regions where it is important that raw milk is sourced close to capital cities, an additional location bonus of up to one cent per litre is paid to farmer members whose farms are within a specified distance of those capital cities.

#### **4.4 Price negotiation process**

Currently, ACF and DFMC agree from time to time on the price (including Volume Incentive components) which ACF will pay DFMC for milk.

The MSA requires ACF and DFMC to:

- agree the milk purchasing policy no later than six months before the commencement of each relevant financial year: clause 4.1.1;
- agree upon a pricing structure for milk: clause 5.2.
- within the time frame required by clause 4.1.1, agree pricing periods for each financial year of between one and twelve months' duration. These may, and do, differ according to geographical areas: clause 5.3; and
- no later than one month prior to each pricing period, to negotiate and agree in writing the commercial price for milk for the next pricing period: clause 5.4.

A further description of the process is included in sections 4.6 and 10 below.

In accordance with the back to back milk purchasing policies and back to back pricing provisions of the MSA, DFMC then pays that price to its farmer members, including those under the Defined Volume Fixed Term Contracts and the Volume Incentive Contracts, as well as those who supply without such contracts.

#### **4.5 Back to back pricing**

The prices agreed between ACF and DFMC during the process described in section 4.4 are:

- the 'Contracted Base Price' and the Minimum Base Price and the Contract Consideration Payment and the Volume Incentive for farmers under the Defined Volume Fixed Term Contracts;
- the Base price and the volume incentive for farmers under the Volume Incentive Contracts; and;
- Base price for farmers supplying without a supply contract.

As a result of the back to back pricing arrangements, the prices agreed between ACF and DFMC form part of the supply contracts offered to farmer members by DFMC from time to time.

#### **4.6 Implementation of Agreements**

Since DFMC came into existence in June 2004, ACF and DFMC have implemented the arrangements set out in this section.. Prior to June 2004 ACF determined pricing internally.

ACF and DFMC typically begin a series of meetings to review of pricing, standard contract terms and the Milk Policy Guide in January or February of each year. At these meetings ACF and DFMC make any changes to milk purchasing policies necessary to address the concerns raised by farmer members and DFMC Directors, and ACF's requirements .

The first negotiation meeting for the following financial year's prices is held in May or June. This meeting generally sets a minimum Contracted Base Price for at least the period July to September. It is usually the case that more meetings are held to determine if the Contracted Base Price needs to be increased. Each meeting involves forceful commercial negotiation between ACF and DFMC. If as a result of negotiations a higher Contracted Base Price is negotiated for that period farmer members are notified and adjustments are made.

The first negotiation meeting is usually attended by three representatives from each of ACF and DFMC. ACF's representatives have been its Chief Executive Officer, its Company Secretary and Chief Financial Officer and its General Manager of Sourcing & Farm Services. DFMC's representatives have been its Chairman, its Deputy Chairman, and a third member of its board. DFMC, in appointing people to its negotiating committee, seeks to provide representation for its farmer members in each region.

At the negotiation meeting, ACF and DFMC agree on:

- the Contracted Base Price, for each region, that will be announced for at least July, August and September;
- indicative Contracted Base Prices, for each region, for the remainder of the year;
- Minimum Base Prices, for each region, to be included in Defined Volume Fixed Term Contracts between DFMC and farmer members;
- changes (if any) to the Milk Policy Guide, which applies to all regions; and
- changes (if any) to the standard terms of the Defined Volume Fixed Term Contracts or Supply Agreements, which apply to all regions.

The representatives of DFMC present the agreed terms and conditions to their board. The ACF management team advise the ACF Board of the proposed arrangements. Following board approval, ACF and DFMC jointly negotiate and agree the form of the announcement to members and the changes required (if any) to the Milk Policy Guide and the standard terms of the Defined Volume Fixed Term Contracts or Volume Incentive Contracts. Once agreed, a letter is sent jointly by ACF and DFMC to DFMC farmer members informing them of the agreed and indicative prices and any further changes affecting their supply contracts with DFMC.

Subsequent meetings are held during the year, usually at two to three month intervals. DFMC monitors and reviews the competitive price, ACF's milk needs, and the supply pattern from its farmer members in order to indicate to ACF whether the supply pool is at risk from matters such as competition or difficult seasonal or farm gate cost conditions. For the financial year 2007/08 there have been at least five price changes as a result of negotiation and some negotiations have continued for up to 4 weeks.

The value of raw milk from farmers within a region, and the prices therefore paid by ACF for that milk depends upon:

- (a) the supply and demand situation for milk within a region,
- (b) regional trends in milk production,
- (c) regional trends in population growth and per capita consumption especially drinking milk,
- (d) milk demands at regionally located factories and the high alternative cost of inter-region milk transport and competitive cost issues of sourcing milk from those regions; and
- (e) the product mix of each of ACF's regional factories.

In relation to the Contracted Base Price, prices are negotiated in each of the five regions set out in section 3.4 above (although prices in the Riverina/Northern Victoria and Western Victoria/South Australia are increasingly set together). While the prices negotiated by DFMC and ACF may differ across regions, the same price is offered to all of DFMC's farmer members within a region.

DFMC and ACF negotiate milk prices on a region by region basis, as the value drivers are regional. Such drivers can be localised weather impacts, the nature of competition with each region, the economics of dealing with shortfalls by transporting milk from other regions or the requirement to fill specific contracts. The regional nature of pricing is evidenced by the variance in the timing of price changes between regions and the different quantum of price movements. For example, in November 2007 the Contracted Base Price increased in the Northern region but did not increase in the Central region. However at the same time the Minimum Base Price increased in both regions. In March 2008 price increases of varying magnitudes (up to 3.25 cents per litre) were offered in all regions except South East Queensland as the price in that region was viewed as being competitive at the time. Far North Queensland has no competition at farm gate. Price is determined by assessing what a like business would pay for like milk used as an input for like products, even if by deduction that business is in another region, and ongoing negotiation occurs to ensure monitoring, reviewing and resetting of the Far North Queensland price to ensure a commercial value at farm gate to enable viability of the farmer suppliers. In this region of no competition at farm gate, processor milk supply and milk security is vital, as is farmer economic viability.

Prior to entering into negotiations with ACF, DFMC engages consultants to advise on world market prices, trends and other factors influencing export prices for Australian manufactured product, Australian and regional factors which may influence market price and publicly available information regarding competitor pricing and other activities. DFMC also gathers information from its farmer members which may be relevant to market price. Because of its resources and expertise DFMC is able to gather such information quickly, comprehensively, efficiently and accurately.

Supply contracts with farmers expire on a rolling basis. The standard terms of the Defined Volume Fixed Term Contracts or Supply Agreements agreed by ACF and DFMC in

May/June each year, is the supply contract which is offered to farmer members whose supply contracts expire during the next 12 month period. ACF's field officers approach (on DFMC's behalf) farmer members whose contracts are set to expire. ACF staff will offer the supply contracts to those farmers. The terms and conditions of those supply contracts are not generally negotiated; the primary matter which ACF discusses with the farmer member is the minimum volume to be inserted into their individual contract.

#### **4.7 Milk Swaps**

ACF engages in milk swaps with other processors from time to time. There are primarily two types of milk swaps: milk swaps within a region, and milk swaps between regions.

Milk swaps within a region sometimes occur to improve the efficiency of milk collection. It makes economic sense that milk tankers operating within a region collect milk from adjacent farms. However sometimes, within a region, such adjacent farms may have contracted their raw milk to different processors. In that instance ACF will sometimes arrange a milk swap with another processor so that their respective milk tankers do not duplicate collection routes, with each processor collecting some of the raw milk contracted to the other processor.

Milk swaps between regions are agreed to minimise cartage costs for processors. If ACF has an excess of supply in one region relative to its processing capacity, but a shortfall of supply in another, and there is another processor with an excess and shortfall that mirrors ACF's position, ACF and that other processor may agree to a milk swap. For example, ACF has recently arranged a milk swap with the Warrnambool Cheese and Butter Factory (*Warrnambool*) whereby excess raw milk collected by ACF in Mt Gambier (in South East South Australia but close to Warrnambool) is taken to Warrnambool's Allansford plant, while excess raw milk collected by Warrnambool in the Fleurieu Peninsula (in Central South Australia) is taken to ACF's Jervois plant.

There are no long term contracts governing either type of milk swaps. Rather, milk swaps are arranged in response to changes in the supply of and need for raw milk at a particular location.

## **5. The Application**

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### **5.1 Why authorisation is sought**

- (a) ACF and DFMC may be potential competitors after the sale of ACF

At present, section 45 of the TPA does not apply to arrangements between ACF and DFMC, including the MSA, as ACF and DFMC are related bodies corporate: section 45(8).

Upon the sale of ACF, and the removal of section 50A from ACF's registered Rules, ACF and DFMC will cease to be related parties. When that occurs the Restraint will cease to bind ACF and ACF will be free to purchase milk directly from farmer members of DFMC and others. Therefore, ACF and DFMC could be regarded as potential competitors for the acquisition of raw milk from farmer members of DFMC.



- (b) DFMC and its farmer members may be potential competitors after the sale of ACF. Once the Restraint ceases to bind ACF DFMC and each of its farmer members will be potential competitors for the supply of raw milk to ACF. Therefore, any agreement, arrangement or understanding between DFMC and its farmer members regarding pricing to ACF, including the mechanism of back to back pricing would be a breach of section 45.

## **5.2 The conduct which is sought to be authorised**

ACF and DFMC seek authorisation for the;

- (a) amendment of the MSA prior to completion of any sale of ACF to provide for continuation of the back to back pricing and back to back milk purchasing policies provisions, contained in clauses 4.4 and 5.6 of the MSA; and,
- (b) in the event that authorisation is denied for the conduct referred to in (a) above, implementation of the back to back pricing and back to back milk purchasing policies by DFMC in its dealings with farmers for the supply of milk to ACF.

Authorisation is sought for the following time periods;

- in respect of existing supply contracts (including arrangements with farmer members for the acquisition of milk for on sale to ACF which exist without the parties having entered into a written contract) for the duration of such contracts and arrangements; and
- in respect of future supply contracts and other dealings with farmer members who supply milk without a written contract for a period of five years from the date upon which related party status is lost between ACF and DFMC.

## **5.3 Continuation of the back to back pricing and back to back milk purchasing policies provisions, contained in clauses 4.4 and 5.6 of the MSA**

The parties seek authorisation to amend the MSA prior to completion of any sale of ACF to provide for the continuation of clauses 4.4 and 5.6 of the MSA and to give effect to the MSA as amended. This is to enable them to continue to agree prices under those clauses and for DFMC to continue to implement the back to back milk purchasing policies and back to back pricing in its supply contracts and dealings with farmer members for the acquisition of raw milk for on sale to ACF after loss of related party status upon the sale of ACF.

## **5.4 Implementation of the back to back pricing and back to back milk purchasing policies by DFMC in its dealings with farmers for the supply of milk to ACF**

In the event that authorisation is denied for the conduct referred to in 5.2 (a), the parties seek authorisation for an agreement, arrangement or understanding between DFMC and each of its current and future farmer members that DFMC will, for the period for which the conduct is authorised:

- adopt the same milk purchasing policy (including pricing structure) as ACF in relation to the purchase by DFMC from its farmer members of milk which is on sold to ACF; and

- adopt the same milk price in relation to the purchase by it from its farmer members of milk which is on sold to ACF as it receives from ACF for that milk.

### **5.5 Existing supply contracts**

After the sale of ACF and the loss of related party status, there is a risk that implementing post sale the prices specified in the existing supply contracts before sale, would amount to giving effect to an agreement between ACF and DFMC in contravention of section 45 of the TPA.

Further by agreeing new prices, being those components of existing supply contracts that vary over time ACF and DFMC would be deemed to be making and/or giving effect to a price fixing agreement in contravention of section 45 of the TPA.

In the event that authorisation is denied for the conduct referred to in 5.2(a), should DFMC and its farmer members agree between themselves that DFMC would continue to implement the back to back pricing in existing supply contracts, such an agreement would be a breach of section 45. This is because once the Restraint in the MSA no longer applies after the sale of ACF, DFMC and its farmer members are potential competitors for the supply of raw milk to ACF.

### **5.6 Future Supply Contracts and other arrangements with farmers for supply of milk**

Without authorisation for the amendment to the MSA described above, ACF and DFMC could not enter into new supply contracts (including renewals of existing supply contracts), or give effect to such agreements. Should authorisation not be granted on that basis DFMC needs the ability to enter into arrangements with farmers described at 5.2(b).

### **5.7 Interim Authorisation**

DFMC and ACF seek interim authorisation to continue to engage in the conduct described in section 5.2 while the authorisation application is considered by the ACCC, should the Commission not have made a final determination by the time any sale is completed.

## **6. Statutory Provisions**

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Subsection 88(1) of the TPA allows the Commission to grant an authorisation to a corporation:

- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45; or
- to give effect to a provision of a contract, arrangement or understanding where the provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45;

Subsection 91(3) of the TPA provides that an authorisation may be expressed to be subject to such conditions as are specified in the authorisation.

The test for authorisation, as set out in subsections 90(6) and 90(7) of the Act, is whether authorisation of the conduct for which authorisation is sought would result in a benefit to the public

which would outweigh the detriment to the public constituted by any lessening of competition. The ACCC and the Australian Competition Tribunal have previously indicated that this is to be ascertained by comparing the future with authorisation (the factual) against the future without authorisation (the counterfactual).<sup>2</sup>

Under subsection 91(1) the Commission also has the power to declare that an authorisation only remains in force for a period specified in the authorisation.

## **7. Relevant Markets**

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The Commission has previously found the following markets in the dairy industry:

- (a) **regional markets for the acquisition of raw milk in:**<sup>3</sup>
- far North Queensland;
  - Eastern Australia (SE Qld, NSW and some parts of Vic);
  - Southern Australia (Victoria and South Australia);
  - Western Australia; and
  - Tasmania;
- (b) state based markets for the manufacture and wholesale supply of fresh milk;<sup>4</sup>
- (c) state based markets for the manufacture and wholesale of flavoured milk;<sup>5</sup>
- (d) national market for the manufacture of fresh dairy food/products, desserts and yogurts;<sup>6</sup>
- (e) national market for the manufacture and wholesale and retail supply of cheese;<sup>7</sup> and
- (f) national wholesale and retail market for cream.<sup>8</sup>

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<sup>2</sup> See for example: ACCC Determination 'Application for revocation of authorisation A90782 and its substitution by authorisation A90966 lodged by Australian Dairy Farmers Limited' 26 April 2006 at 19-20; and *Re Medicines Australia Inc* [2007] ACompT 4 (27 June 2007) at [117]-[121]

<sup>3</sup> See: ACCC Determination 'Application for revocation of authorisation A90782 and its substitution by authorisation A90966 lodged by Australian Dairy Farmers Limited' 26 April 2006 at 23; and ACCC Determination 'Application for revocation of authorisation A90745 and its substitution by authorisation A90972' lodged by Premium Milk Ltd' 9 November 2005 at 18

<sup>4</sup> See: Fonterra Co-operative Group Ltd – proposed acquisition of all shares in National Foods Limited, 31 January 2005

<sup>5</sup> See: Fonterra Co-operative Group Ltd – proposed acquisition of all shares in National Foods Limited, 31 January 2005; National Foods Ltd - proposed acquisition of Bonlac Foods Ltd, 23 September 2003

<sup>6</sup> See: Murray Goulburn Co-operative – acquisition of Classic Foods, 9 February 2006; Fonterra Co-operative Group Ltd – proposed acquisition of all shares in National Foods Limited, 31 January 2005; National Foods Ltd - proposed acquisition of Bonlac Foods Ltd, 23 September 2003

<sup>7</sup> See: National Foods – proposed acquisition of Lactos Pty Ltd, 4 April 2006; Fonterra Co-operative Group Ltd – proposed acquisition of all shares in National Foods Limited, 31 January 2005; National Foods Ltd – proposed acquisition of The King Island Company Ltd, 11 December 2001; New Zealand Dairy Board – proposed acquisition of Bonlac Foods Ltd, 14 November 2000;

<sup>8</sup> See: Fonterra Co-operative Group Ltd – proposed acquisition of all shares in National Foods Limited, 31 January 2005; National Foods Ltd – proposed acquisition of The King Island Company Ltd, 11 December 2001

For the purpose of this application, the parties will adopt the markets previously determined by the Commission.<sup>9</sup> The relevant markets for the purpose of this application are therefore the regional markets for the acquisition of raw milk in:

- far north Queensland;
- eastern Australia (SE Qld, NSW and some parts of Vic); and
- southern Australia (Victoria and South Australia)

It is also arguable that downstream markets may be affected by competition in the regional markets for the acquisition of raw milk. For the purpose of this authorisation application the parties will adopt the market definitions previously accepted by the Commission. The relevant markets are therefore:

- the NSW, Queensland, SA and Victorian markets for the manufacture and wholesale supply of fresh milk;
- the NSW, Queensland, SA and Victorian markets for the manufacture and wholesale supply of flavoured milk;
- the national market for the manufacture and wholesale supply of cheese;
- the national market for the manufacture and wholesale supply of cream; and
- the national market for the manufacture and wholesale supply of dairy foods, yoghurts and dairy desserts.

## **8. Dairy Industry Participants**

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ACF has major competitors for the acquisition of raw milk in every regional market except the Far North region. Details of each are set out below, and a list of the manufacturing facilities of each is enclosed at **Appendix G.** to this submission

### **8.1 National Foods<sup>10</sup>**

National Foods Limited (***National Foods***) is a wholly owned subsidiary of Kirin Holdings Company Limited. It was created in 1991 through the amalgamation of several dairy and food related businesses. National Foods supplies dairy products in every state of Australia.

It produces:

- a range of full cream, flavoured and modified fresh and UHT milks, with brands such as Pura, Pura Light Start, Masters, Farmers Union, Big M and Pura Classic;
- fresh dairy foods including a range of yogurts, fromage frais, dairy desserts and cream under brands including Yoplait, Fruche, YoGo and Divine Classic; and
- a range of specialty cheeses under brands such as King Island, South Cape, Tasmanian Heritage, Mersey Valley, Tilba, Timboon, and Heidi Farm.

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<sup>10</sup> This information is taken from, and further information is available at, the National Foods website: [www.natfoods.com.au](http://www.natfoods.com.au)

## 8.2 Fonterra<sup>11</sup>

Fonterra Co-operative Group Ltd (**Fonterra**) is a co-operative owned by approximately 11,000 New Zealand dairy farmers. It was formed in 2001 when New Zealand's two largest dairy co-operatives merged with the New Zealand Dairy Board.

In Australia, Fonterra operates through several subsidiaries including Fonterra Brands (Australia) Pty Ltd and Fonterra Australia Pty Ltd. Fonterra is involved in the manufacture and distribution in Australia of:

- butter;
- cheese;
- cream
- ice cream
- milk
- yoghurt; and
- dairy desserts.

Its brands include: Bega, Anlene, Brownes, Mainland, Perfect Italiano, Connoisseur, and Western Star.

## 8.3 Parmalat<sup>12</sup>

Parmalat Australia Ltd (**Parmalat**) is a wholly owned subsidiary of the Italian based global dairy company Parmalat SpA. It was acquired through a public takeover in August 1998. Parmalat supplies dairy products in Queensland, New South Wales, the Northern Territory, South Australia and Victoria.

It produces:

- a range of dairy products including yoghurt, custards and creams under brands such as Vaalia Yoghurt, Paul's Custard and Parmalat children's products;
- a range of full cream, skim and organic white milks under brands such as Rev, Slim Milk and PhysiCAL, and soy milk under the brand Soy Life; and
- a range of other beverages including flavoured milk and iced coffee under brands such as Rush, Breaka Flavoured Milk and Ice Break.

## 8.4 Murray Goulburn<sup>13</sup>

Murray Goulburn Co-operative (**Murray Goulburn**) was formed in 1950. It supplies dairy products in all supermarket chains within Australia.

Murray Goulburn is involved in the manufacture and distribution of:

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<sup>11</sup> This information is taken from, and further information is available at, the National Foods website: [www.fonterra.com.au](http://www.fonterra.com.au)

<sup>12</sup> This information is taken from, and further information is available at, the Parmalat website: [www.pauls.com.au](http://www.pauls.com.au)

<sup>13</sup> This information is taken from, and further information is available at, the Murray Goulburn website: [www.mgc.com.au](http://www.mgc.com.au)

- butter;
- milk (UHT, and reduced fat UHT); and
- cheese (tasty, mild, and reduced fat);

Its dairy products are primarily provided under the brand Devondale.

#### **8.5 Warrnambool Cheese & Butter<sup>14</sup>**

The Warrnambool Cheese and Butter Factory Company Holdings Ltd (*Warrnambool*) was established in 1888, and listed on the Australian Stock Exchange in May 2004. The company focuses on producing bulk dairy products for corporate customers. It produces:

- cheese;
- milk powders;
- whey protein concentrate,
- fresh milk;
- butter; and
- cream

Its brands include Sungold and Great Ocean Road.

#### **8.6 Norco<sup>15</sup>**

Norco Co-operative Limited (*Norco*) is a diversified agricultural co-operative based in northern NSW. NORCO Foods, a division of Norco, produces dairy goods including:

- fresh milk;
- flavoured milk;
- creams;
- custards;
- cheese; and
- ice cream.

### **9. Dairy Industry Pricing**

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#### **9.1 Australian Milk Production**

There are a number of different milk production systems in operation within the dairy farming industry which are defined by the nature of the feeding regimes employed and the timing of calving of dairy cows in the production year. The major systems are:

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<sup>14</sup> This information is taken from, and further information is available at, the Warrnambool Cheese & Butter website: [www.wcbf.com.au](http://www.wcbf.com.au)

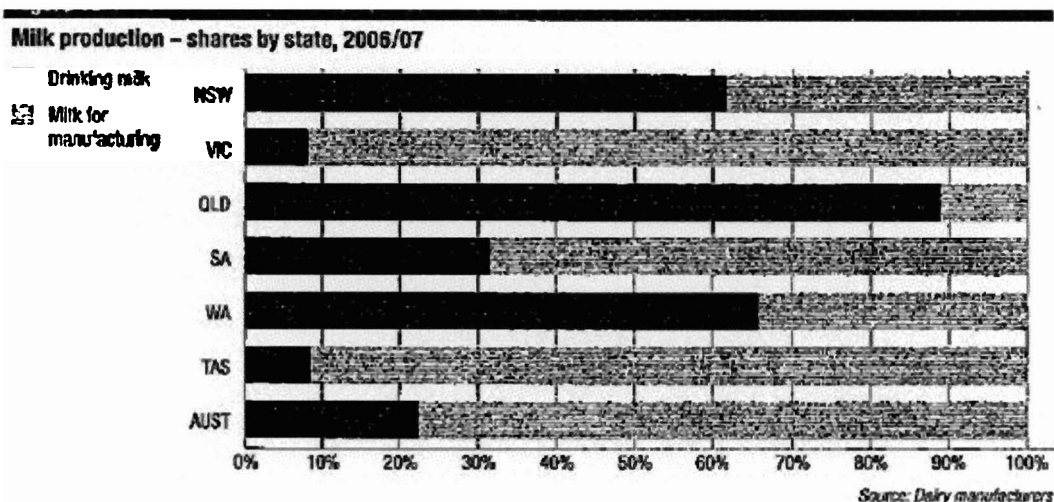
<sup>15</sup> This information is taken from, and further information is available at, the Norco website: [www.norco.com.au](http://www.norco.com.au)

- seasonal production – where the majority of cows are calved in Spring, with milk production largely reliant on pasture feed;
- split systems – where calving occurs in batches typically split between Spring and Autumn; and
- Year-round systems – where cows are calved year-round where production is reliant on a mixture of pasture, preserve feed and grain supplements.

Production in the Victorian, Tasmanian and Eastern and South Australian regions, where returns for a considerable proportion of the milk produced is driven by world market prices, is highly seasonal, with a peak in production in the months between approximately September to November, when it is cheapest to produce milk off a pasture base.

Other regions are mostly focused on year round supply of milk to local fresh product markets. Processing of packaged milk requires a reliable flow of milk on a year round basis as there is little seasonal variation in market demand<sup>16</sup>.

The volume of milk production by state for 2006/07 used for either drinking milk or for manufacturing dairy products is shown in the diagram below<sup>17</sup>.



Around 68% of manufactured product overall (in milk equivalent terms) is exported and the remaining 32% is sold on the Australian market. This contrasts with drinking milk, where some 96% is consumed in the domestic market. Over the past two decades the volume of Australian milk production has expanded at a faster rate than domestic consumption, with an increasing proportion destined for export market. Australia now exports around 50% of its annual milk production<sup>18</sup>.

<sup>16</sup> Spencer S. The Australian Dairy Industry – An Overview, September 2007 (produced for DFMC – sensitivity with disclosure and reliance).

<sup>17</sup> Australian Dairy Industry in Focus 2007, Dairy Australia, figure 15 at page 20.

<sup>18</sup> Australian Dairy Industry In Focus 2007, Dairy Australia, pages 21 and 22

## **9.2 Dairy farmers are largely price takers.**

As the ACCC has previously noted, and as remains the position today, dairy farmers can be considered weak sellers as they have limited capacity to influence prices received for their milk. Although the aggregate production decisions of dairy farmers can potentially have a significant impact on milk prices, individual farmers are essentially price-takers. This is due to each farmer's relatively small output compared to the total size of the farm gate market for milk. As milk is a perishable product, options for disposing of milk supplies are limited by the number of dairy processors operating factories within reasonable distances from a farm. Due to the fixed nature of production systems, dairy farmers have limited capacity to vary milk supply in response to short term changes in price<sup>19</sup>.

Agricultural goods which are non-perishable, undifferentiated and internationally traded have their prices effectively determined by international markets irrespective of domestic post-farm gate production and competition factors. In such cases, the return for the farmer is essentially governed by the price point at which a domestic manufacturer or processor could attract product away from the export market or compete with an imported item. What happens beyond the farm gate is essentially irrelevant to a farmer's ability to extract price gains<sup>20</sup>.

Of the dairy farmers surveyed as part of the preparation of the report Dairy 2004: Situation & Outlook-Report to the Australian Dairy Industry, over 70% in each region expressed a view of being unable to control or influence milk price<sup>21</sup>, although in reality factors such as milk quality, milk composition, herd size and contract payments clearly have an influence.

## **9.3 Australia and New Zealand are largely price takers for exports.**

Australia now exports around 50% of its annual milk production. Returns from manufactured dairy products are driven mainly by prices prevailing in world markets<sup>22</sup>.

Victorian production dominates Australian milk production – it accounts for 65% of total input in 2006-2007. More than 70% of milk from Victoria and Tasmanian production is exported. For the vast majority of producers supplying a dairy company in Victoria, South-East South Australia and Tasmania, returns from more than 90% of their milk are driven by world market forces, because of the direct influence of export returns for dairy products (ie, other than packaged milk lines) which are also sold in the domestic market.

The value of milk to dairy companies in the major South-East production regions has a strong influence on the farm gate milk prices that are paid in all other regions of the dairy industry, despite a larger portion of the milk supply being used on a year round basis for drinking milk purposes. Companies collecting milk in regions outside the South-East

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<sup>19</sup> Impact of farm gate deregulation on the Australian milk industry: Study of prices, costs and profits, Australian Competition and Consumer Commission, April 2001. Page 32-33 paragraph 4.2.6.

<sup>20</sup> Spencer 2004, Price Determination in the Australian Food Industry, A report Australian Government Department of Agriculture, Fisheries and Forestry, Canberra page 21.

<sup>21</sup> Spencer, S. Dairy 2004: Situation & Outlook – Report to the Australian Dairy Industry, June 2004, page 65.

<sup>22</sup> Hogan, J., Shaw, I and Berry, P 2004, A Review of the Australian Dairy Industry, ABARE eReport 04.24, Prepared for the Primary Industries Standing Committee Working Group on Dairy, August 2004, Canberra, December. Page 37.



production areas are forced to have strong regard to the farm gate prices paid for milk that is used in manufactured dairy products – against which they compete<sup>23</sup>.

There is no such thing as an exchange-traded 'world price' for dairy commodities. The world market in dairy does not operate as other tradable commodities such as grain, sugar and cotton, in that there is no single recognised trading exchange that sets prevailing 'world prices'. The dairy trade is based on individual relationships between exporters and importers, where prices are negotiated on contractual or spot arrangements.

In the past, the major determinant of the prevailing market prices for major commodity lines such as milk powders, butter and cheese was the prevailing net selling price offered by EU exporters after subsidies.. These subsidies have declined to virtually zero in the current year and true levels of supply and demand in the world market as a whole are having the major influence.

The Australian domestic dairy market is also influenced by trade from New Zealand – especially in cheese products where NZ-sourced cheese products hold about 15% of the national market. Butter and blended table spreads are also influenced by smaller volumes of trade from New Zealand. There is no barrier to trade with New Zealand<sup>24</sup>.

#### **9.4 Australian Dairy Farmers are Efficient**

While farm numbers have decreased over the past 2 decades, milk output has generally increased, due to increasing cow numbers and improved low yields up to 2002/03. However, from that time (until recently) the industry has been in a pattern of consolidation, with seasonal conditions constraining production. Nevertheless, the underlying trend has continued to fewer farms, larger herds and increased levels of production. Farmers have made many changes to their general farm management practices and adopted a range of improved technologies, including soil testing, fodder conservation, supplementary feeding, improved animal genetics, artificial insemination programs, the use of new milking equipment and techniques, and the widespread use of computers to record and monitor herd performance<sup>25</sup>.

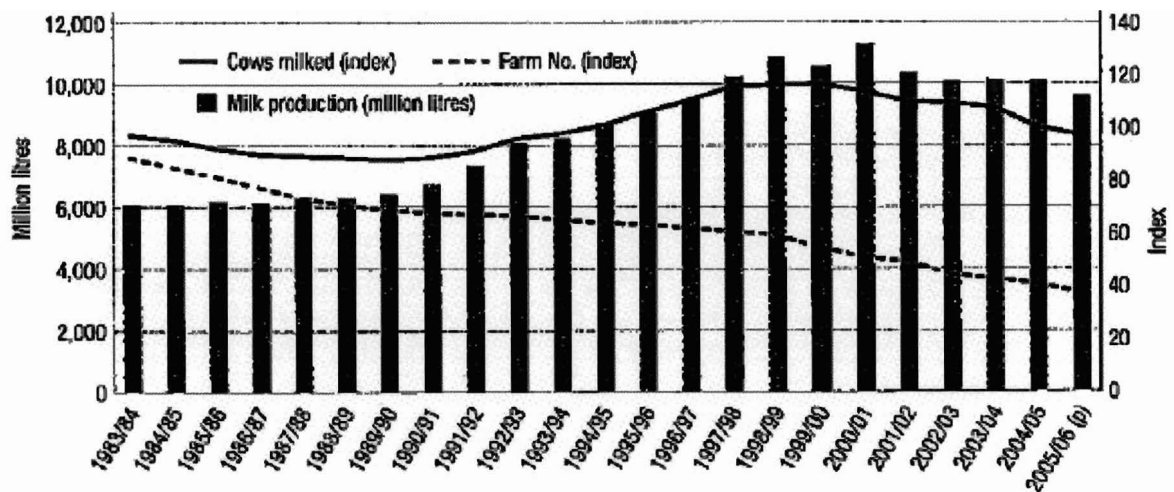
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<sup>23</sup> Spencer S. Dairy 2004: Situation & Outlook, Report to the Australian Dairy Industry, June 2004. Page 5.

<sup>24</sup> Ibid, page 15.

<sup>25</sup> Australian Dairy Industry in Focus 2007, Dairy Australia, p17

### Australian milk production vs indices of farms and cows milked



*Source: Dairy manufacturers, ABS, State Authorities and Dairy Australia*

## 9.5 The current world export market

World demand for dairy products has grown strongly in recent years, driven by rising incomes, largely in the developing economies of Asia but also in the developed economies of the European Union and the United States. Growth in world dairy supplies, however, has lagged behind growth in demand as a result of supply developments in the major producing and exporting countries that will limit growth in world dairy trade over the next few years. The key influences on world trade are the growing demand side versus the uncertain supply side driven by market reforms in the European Union, leading to a reduction in surpluses and increased demand within the European Union, together with drought in Australia and New Zealand that will mean lower exports.

In New Zealand, milk production was expected to increase by 3% in 2007-2008 in response to strong world demand and sharply higher prices. However, the New Zealand dairy industry's ability to increase production and export quickly is expected to be constrained by lead times in building dairy cow numbers, following drought conditions, together with competing land uses and increasing compliance with effluent disposal regulations. A slight decline is now expected.

## 9.6 Australian export volumes and trends

Australian milk production is forecast to fall by 6% in 2007-08. Lower milk production stems from poor seasonal conditions that have cut water allocations to irrigation dependent regions and placed greater reliance on high cost purchased feeds. In response, dairy farmers in affected regions have tended to reduce herd numbers and cut production in order to contain costs. Coastal dairy farms are expected to fare better, with (assumed) average rainfall assisting the growth of adequate pasture in most areas.

In the first half of 2007-2008, the dairying regions most affected by poor seasonal conditions included Northern Victoria and New South Wales along with the Murray River (where irrigation allocations were cut substantially). Other regions also suffered the effects of reduced rainfall, including the main dairying regions of Western Australia and South

Australia, while seasonal conditions in coastal New South Wales and in Tasmania have generally been more favourable.

For the remainder of the year, Australian milk production will be strongly linked to rainfall patterns and the cost and availability of feed. With grain prices forecast to remain high over the remainder of the year, an improvement in fodder supplies from on-farm and off-farm sources will be important in helping to moderate the decline in milk production.

In 2007-08, Australian farm gate milk prices were forecast to rise by almost 33% to average around 44 cents a litre. These forecast higher prices reflected high world prices for dairy products and the need for dairy processors to maintain milk supplies for their processing facilities. However, in more recent times, prices have risen to levels a further 10% higher than those projected. Higher milk prices encourage dairy farmers to maintain production in the face of high purchase feed and water costs that might otherwise result in herd reductions. Despite the likelihood of some moderation in grain prices from their springtime highs, feed prices are expected to remain a major hurdle for dairy farm profitability over the remainder of 2007-08<sup>26</sup>.

During the period 2006/07 dairy farm cash net incomes were estimated to have fallen 80% on average, as farmers suffered reduced production, as well as a 43% increase in feed costs, although with significant variations across the dairying regions<sup>27</sup>.

Also, fertiliser prices to dairy farmers used in the production of on-farm fodder have increased by more than 300% in the last 2 years as a consequence of worldwide competition among farmers to meet the world food shortage<sup>28</sup>.

In addition, and although subject to slight variation between states, average monthly capital city diesel prices have risen from approximately 125 cents per litre to 155 cents per litre between May 2007 and May 2008<sup>29</sup>.

Comparing the periods July to February 2006/2007 to July to February 2007/08 the total production volumes of dairy products exported from Australia reduced by 19.9% whereas the comparative value of the exports for such period increased by 12.4%. Export volumes of manufactured dairy products during this period and their value are set out in **tables 3 and 4** below.

**Table 3 – Export volumes - Tonnes**

<b>Tonnes</b>	<b>2006/07 Jul- Feb</b>	<b>2007/08 Jul-Feb</b>	<b>% Change</b>
<i>Butter</i>	30,950	27,641	-10.7%

<sup>26</sup> P Berry ABARE Economics— Australian Commodities: December Quarter 2007.

<sup>27</sup> Australian Dairy Industry in Focus 2007, Dairy Australia, page 3.

<sup>28</sup> Wallquist, A. Price of Fertiliser soars with food crisis, the Australian, 12 May 2008

<sup>29</sup> Source: Australian Automobile Association

<b>Tonnes</b>	<b>2006/07 Jul- Feb</b>	<b>2007/08 Jul-Feb</b>	<b>% Change</b>
<i>Butter Oil</i>	21,597	12,236	-43.3%
<i>Cheddar**</i>	61,231	59,678	-2.5%
<i>Other Cheese**</i>	79,726	84,418	5.9%
<i>Milk</i>	55,325	50,166	-9.3%
<i>SMP/BMP</i>	130,602	83,515	-36.1%
<i>WMP</i>	110,286	86,269	21.8%
<i>Whey Products</i>	46,912	26,293	-44.0%
<i>Mixtures</i>	20,963	14,305	-31.8%
<i>Other Dairy Products</i>	40,609	34,867	-14.1%
<b>Total</b>	<b>598,200</b>	<b>479,388</b>	<b>-19.9%</b>

**Table 4 – Export volumes - Value**

<b>Value (AUD)</b>	<b>2006/07 Jul- Feb</b>	<b>2007/08 Jul-Feb</b>	<b>% Change</b>
<i>Butter</i>	72,620,414	92,104,457	26.8%
<i>Butter Oil</i>	49,129,987	43,434,158	-11.6%
<i>Cheddar</i>	242,891,421	280,939,489	15.7%
<i>Other Cheese</i>	304,084,330	364,160,674	19.8%
<i>Milk</i>	65,200,189	62,958,392	-3.4%

<b>Value (AUD)</b>	<b>2006/07 Jul- Feb</b>	<b>2007/08 Jul-Feb</b>	<b>% Change</b>
<i>SMP/BMP</i>	371,788,055	385,745,797	3.8%
<i>WMP</i>	329,540,494	423,601,851	28.5%
<i>Whey Products</i>	83,189,090	69,494,733	-16.5%
<i>Mixtures</i>	57,775,584	60,082,059	4.0%
<i>Other Dairy Products</i>	144,501,328	150,871,277	4.4%
<b>Total</b>	<b>1,720,720,892</b>	<b>1,933,392,887</b>	<b>12.4%</b>

Produced by Trade and Strategy, Dairy Australia Limited

Source: Australian Bureau of Statistics

**9.7 The prices that each dairy processor is prepared to pay varies according to different regions and factors which are important to each of them.**

The value of each regional milk 'pool' to a dairy company is based on the best use it can make from the milk it collects. For a milk processor, this value will be based on its assessment of a 'blended return' from the use of milk in:

- fresh dairy products; and
- manufactured products, which must compete with output from Victoria (larger scale, bigger throughput etc).

The true costs of milk to a processor varies depending on how the full litre of milk is used in their business and how the processor deals with the fluctuations in supply available to a plant compared with their daily processing requirements.

Processors face the demands of 'balancing milk' – handling the differences in milk flow collected on a daily basis and used in the weekly processing cycle that is compatible with the periods of peak consumer buying (ie, late week and weekends). As a result milk prices will vary across regions and by dairy company, largely according to company product mix. Each of the major processors have a different product mix, including different roles of manufactured products in regional milk usage.

A variety of approaches have been taken to the structure of farm gate supply contracts, with the major packaged milk processors now relying on contracts which contain a range of incentives designed to meet the high-reliability needs of the packaged milk business.

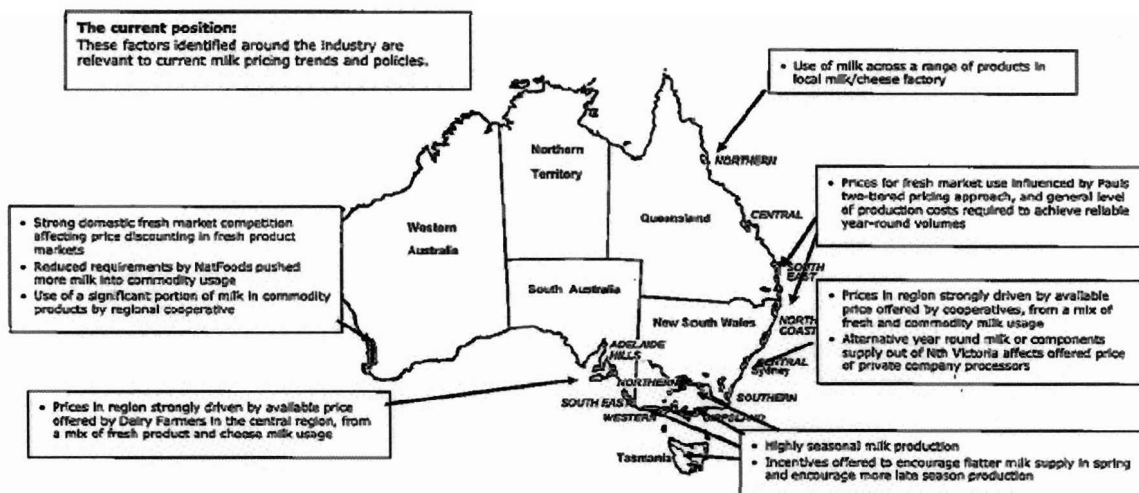
A number of factors will affect individual farmer milk prices which include:

- the product mix in use of milk;
- the percentage of milk solids (butterfat and protein) per litre of milk;
- the seasonality of milk supply (with flat production valued more highly than seasonal production by dairy companies);
- bonuses or penalties paid by the company for milk quality factors; and
- the extent of supply competition (or lack of it) in a region.

'Step-ups' are paid by several large dairy companies and co-operatives to 'top-up' milk prices over the full production year as returns and cash flows allow. Step ups are generally in the order of 10-15% of the eventual full year price (though the amount has varied to a range of 5-30% in some years), and are typically only paid by companies that have highly seasonal milk supply exposure<sup>30</sup>.

Higher prices are received for drinking milk under commercial supply contract arrangements in the northern and western dairy regions, where drinking milk makes up a larger proportion of the production mix<sup>31</sup>.

The diagram below is illustrative of the factors which influence the price processors are prepared to pay for farm gate milk which vary according to region.



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## 9.8 Milk processors are prepared to pay a premium to secure strategic acquisitions of raw milk depending upon their requirements.

In 2007, ACF indicated to DFMC that it wished DFMC to supply greater volumes of milk from the Southern Victorian region and was prepared to pay in excess of prevailing market

<sup>30</sup> Spencer, S. Dairy 2004: Situation & Outlook – Report to the Australian Dairy Industry, June 2004, pages 17-19.

<sup>31</sup> Australian Dairy Industry In Focus 2007, Dairy Australia, page 13.

<sup>32</sup> Spencer, S. Dairy 2004: Situation & Outlook – Report to the Australian Dairy Industry, June 2004, page 20.

prices for such milk. The milk was required as ACF had assessed a need for further milk to meet its business plans and it was also concerned about a looming decline in milk in various areas due to the building drought. DFMC subsequently entered in supply contracts with approximately 100 dairy farmers from this region. It should be noted that DFMC paid the same price to all suppliers in the region – new and old.

## **10. Factual and the Counterfactual**

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### **10.1 Difficulties in assessment until the identity of the potential purchaser of ACF is known**

This application for authorisation proceeds from the premise that ACF will be sold. The comments made in this section are put forward on the basis that the analysis of the competitive impacts remain valid for any potential purchaser. If the prospective purchaser has no relevant power in the markets for the acquisition of raw milk, then the authorisation has no competitive detriment. If the Commission is concerned that a prospective purchaser has or would have monopsony power in a raw milk market, these concerns are more appropriately addressed in the particular informal merger clearance process initiated by the relevant prospective purchaser.

It would be inappropriate for the Commission to assess this application by reference to one possible outcome of the sale process since that scenario may not eventuate. This is a further reason why DFMC and ACF submit that any competition issues that arise specific to a prospective purchaser should be dealt with in the informal merger clearance process.

### **10.2 The Factual**

The factual (the future **with** the authorisation) involves a future in which ACF and DFMC engage in the conduct the subject of the authorisation application. This means:

- (a) the existing supply contracts will continue;
- (b) the back to back pricing and the back to back milk purchasing policies will continue to bind ACF and DFMC;
- (c) DFMC will perform the existing supply contracts, the future supply contracts and its dealings with farmer members for supply of milk without written contracts in accordance with the back to back pricing and the back to back milk purchasing policies;
- (d) the MSA will continue in place between ACF and DFMC until 2017 under which:
  - although members are not obliged to supply to DFMC, DFMC is obliged to supply to ACF whatever milk it acquires from its members;
  - ACF is obliged to acquire whatever milk DFMC has acquired from its members;
  - ACF is free to acquire milk directly from DFMC's members or any other person;
  - farmer members will continue to be free to enter into supply contracts or other arrangements with DFMC for the supply of raw milk for on sale to ACF in the

future in which contracts or arrangements including back to back pricing will be implemented;

- (e) farmer members will continue to be able to use DFMC's resources and expertise in negotiating prices with ACF which will flow directly through to them by means of the implementation of the back to back milk purchasing policies and back to back pricing; and
- (f) farmer members who wish to supply milk to ACF but who do not wish to do so through DFMC can either do so by directly engaging in negotiations and contracts with ACF or by forming collective bargaining groups (independently of DFMC) by taking advantage of the authorisation granted to Australian Dairy Farmers.

### **10.3 The Counterfactual**

The counterfactual (the future **without** the authorisation) involves a future in which:

- (a) the MSA will continue in place between ACF and DFMC until 2017 under which:
  - DFMC is obliged to supply all of the milk it acquires from its farmer members. This includes milk acquired by DFMC from farmer members, including those who have not entered into a supply contract. However, farmer members are only obliged to supply a minimum amount of milk in order to maintain their membership of DFMC;
  - ACF is obliged to acquire whatever milk DFMC has acquired from its members; and
  - ACF is free to acquire milk directly from DFMC's members who are not subject to existing supply contracts with DFMC, or any other person;
- (b) the back to back pricing and the back to back milk purchasing policies in the MSA will no longer bind ACF and DFMC, and will be unenforceable by ACF and DFMC. This means that while ACF and DFMC can agree on the price at which ACF will acquire milk from DFMC, DFMC must unilaterally determine the price at which it will acquire milk from the farmers. This is particularly so in relation to the ongoing Contracted Base Price and Volume Incentive. While ACF must pay DFMC a 'commercial market rate' for milk, ACF will also not be obliged under the Supplement to pay DFMC the amount that DFMC decides to pay to farmers as the Contracted Base Price and Volume Incentive;
- (c) DFMC will be exposed to significant commercial risk in that the prices it has agreed and will agree to pay its farmer members for milk may exceed the price it is able to negotiate with ACF for such milk while it is nonetheless obliged to sell all of such milk to ACF;
- (d) there may be some uncertainty as to the enforceability of the existing supply contracts with farmer members insofar as the supply contracts contain provisions which, for the reasons outlined in section 5 may amount to a giving effect of a price fixing arrangement; and



- (e) farmer members will be able to form collective bargaining groups (independently of DFMC) by taking advantage of the authorisation granted to Australian Dairy Farmers.

## **11. Anti-competitive detriment**

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The Commission may not grant an authorisation unless it is satisfied in all the circumstances that the conduct has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs, or would, outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from the conduct.

A substantial lessening of competition may occur if authorisation would result, as compared to the counterfactual, in DFMC paying its farmer members prices for their raw milk (*raw milk prices*) that are either artificially high or artificially low.

DFMC submits that authorisation of the conduct including in respect of both the existing and future supply contracts would not result in a substantial lessening of competition because DFMC currently obtains, and ACF currently pays, competitive market prices for the raw milk which DFMC acquires from its farmer members for on sale to ACF, which prices are subject to the market forces described above. Continuation of the current pricing arrangements under the authorisation will merely result in the continuation of the competitive dynamic in terms of pricing between DFMC, its farmer members and ACF.

### **11.1 Historical prices demonstrate the competitive effect of the conduct**

The prices paid by DFMC to its farmer member's have historically been in line with prevailing market prices. **Confidential table 5** below (which is explained in **Appendix H** to this submission) compares the average prices paid by ACF to DFMC and by DFMC to its farmer members in each region against typical factory paid prices (by other processors) in each state for the financial years 2004 to 2007.

#### **Confidential Table 5: Raw Milk Prices**

#### **Restriction of publication of part claimed**

#### **[CONFIDENTIAL: Restriction of publication of part claimed]**

The table above and confidential **Appendix I** demonstrate that back to back pricing and multi region negotiations which lead to the prices paid by ACF to DFMC and, in turn by

DFMC to its farmer members are competitive and that DFMC does not secure supra competitive prices from ACF.

**11.2 World market prices constrain the prices which Australian dairy farmers and processors can achieve**

For the reasons described in detail in section 9 above, the prices which DFMC has achieved and can in the future achieve are effectively constrained by world market prices and the price at which New Zealand commodity products can be imported into Australia. The existence of back to back pricing is merely the mechanism for applying the prices which have been achieved through the competitive process which is heavily subject to these determining factors.

**11.3 Regional factors ensure that there is no industry wide pricing**

Prices differ by reason of the differing value of milk to ACF in each of the regional milk pools. The value of milk as reflected in the prices ACF is willing to pay for it are determined by the product mix for each individual ACF processing facility and ACF's strategic imperatives. Once again, the existence of back to back pricing is merely the mechanism for applying the prices which have been achieved through the competitive process which is heavily subject to these determining factors.

**11.4 The MSA obliges ACF to pay a commercial price for milk**

Clause 5.1.1 of the MSA states that the commercial price of milk, which is the price agreed between ACF and DFMC, will be the market value or price of milk. Clause 5.1.2 of the MSA then sets out the relevant factors that may be taken into account in determining that commercial price, which includes the effective competitive price for milk paid to farmers in the relevant geographical areas by other processors with a similar product mix and supply pattern to that of ACF and the cost of transporting and handling the milk.

If the parties are unable to agree on the commercial price, in accordance with clauses 5.4.3 and 14 of the MSA the issue may be resolved by mediation and then expert determination.

These terms ensure that these commercial prices for raw milk, to be agreed between DFMC and ACF, are the same as the market price of raw milk in each region. This means that authorisation of the conduct would not result in raw milk prices that do not reflect market forces.

**11.5 The numbers of DFMC farmer members within each relevant region who are the subject of the conduct are small compared to the total number of dairy farmers**

The number of DFMC farmer members in each of the relevant regions, except Far North Queensland, who are the subject of this application comprise a relatively small proportion of the total number of dairy farmers in each region.

**11.6 Membership of DFMC is voluntary and DFMC members can supply other processors including ACF**

Farmer members are free to join DFMC and do not need, for this purpose to enter into any supply contract. Further, subject only to the terms of their respective supply contracts,

farmer members are free to supply ACF directly (once the Restraint is removed) or any other processor. The terms of the supply agreements are relatively short and at any one time (as is demonstrated by the table which is **Appendix F** to this submission), a material proportion of farmer members' contracts are due to expire.

This means that if farmer members can receive a higher price for raw milk from an alternate supplier, then they will be likely to enter into a supply contract with that alternate supplier. This ensures the price for raw milk will not become artificially low post-completion

Any existing barriers to entry will not be affected by the conduct.

**11.7 ACF is free to acquire from other suppliers**

ACF will be free to acquire milk from sources other than DFMC once the Restraint falls away.

If ACF can acquire raw milk more cheaply from sources other than from DFMC, then ACF will only offer DFMC that lower price. This ensures the price for raw milk will not become artificially high post-completion of the sale of ACF.

**11.8 Farmer members of DFMC will continue to compete**

Farmer members currently compete, and will continue to compete in terms of quality and volumes of milk produced.

**11.9 Grocery retailers exert considerable countervailing power**

The countervailing power of the major grocery channel, and in particular the large supermarkets, imposes a significant constraint on retail pricing in the dairy industry. This countervailing power has increased in recent years with the increase in the importance of the retail grocery channel as a sales channel, the consolidation of the supermarket industry and the rapid growth in sales of privately branded dairy products.

**(a) The growing importance of the major grocery channel**

Supermarket sales of dairy products have grown steadily in recent years, with the large supermarket chains now accounting for around 55 percent of total sales in the Australian dairy market.<sup>33</sup> ACF itself sells 45 percent of its dairy products through the retail grocery channel.<sup>34</sup> Woolworths, Coles and Metcash are the top three customers for ACF's retail grocery channel, making up 93 percent of ACF's sales in this channel.

**(b) The growth of private labels**

In recent years there has been a considerable increase in the sales of private label dairy products, primarily as a result of the growth in sales of private label fresh drinking milk:

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<sup>33</sup> Dairy Australia 'Australian Dairy Industry In Focus 2007' at p8

<sup>34</sup> ACF Management

**Table 6: Supermarket sales of private label and branded milk 2000-2001 to 2006-2007<sup>35</sup>**

Year	Private Label		Branded Milk		Total
	Volume	%	Volume	%	
2000-2001	425	41.83%	591	58.17%	1016
2001-2002	508	48.57%	539	51.53%	1046
2002-2003	546	50.37%	538	49.63%	1084
2003-2004	598	53.25%	525	46.75%	1123
2004-2005	631	54.49%	527	45.51%	1158
2005-2006	650	55.04%	531	44.96%	1181
2006-2007	661	54.36%	554	45.56%	1216
Total % change in volume 2000-2001 to 2006-2007		55.53%		-6.26%	19.69%

Volume is in millions of litres; % is the percentage of total milk sales for each year

The table above shows that private label milk sales have grown from a 42 percent share of the total Australian supermarket fresh milk sales in 2000-2001, to a 54 percent share in 2006-2007. This corresponded with a 56 percent increase in the total annual volume of sales of private label fresh milk. During the same period, the volume of sales of branded milk fell more than 6 percent. This demonstrates the growing importance of private label milk in the sale of dairy products.

In relation to fresh milk, the growth in sales of private labels has come at the expense of branded products. Dairy Australia predicts that retailers will now seek to replicate this trend of increased sales of private labels of drinking milk in other dairy products, such as cheese and yoghurt.<sup>36</sup>

**(c) The ability of supermarkets to constrain pricing**

Supermarkets therefore possess considerable countervailing power, both as a result of their dominant position in relation to the retail of dairy products and as a result of the growing importance of private label dairy products.

The ability of supermarkets to exercise countervailing power has been considered and accepted by the New Zealand Commerce Commission (**NZCC**) in relation to the New Zealand dairy market. It has found that for a supermarket to exercise countervailing power it is necessary that there be at least one other credible alternative source of supply or that the supermarket is able to leverage buyer power across the contracted suppliers' portfolio of products.<sup>37</sup> In relation to ACF,

<sup>35</sup> Dairy Australia 'Australian Dairy Industry In Focus' reports 2003-2007 at Appendix 3.

<sup>36</sup> Dairy Australia 'Australian Dairy Industry In Focus 2007' at p8

<sup>37</sup> New Zealand Commerce Commission, Decision No. 574 "Fonterra Co-operative Group Limited and Kapiti Fine Foods Limited and United Milk Limited " 23 February 2006 at [222];

the large supermarkets have both alternative sources for the supply of dairy products and are able to leverage their power across the wide ranges of dairy products supplied by ACF.

The NZCC noted that supermarkets can exercise their countervailing power by:<sup>38</sup>

- using house brands to keep downward pressure on the prices of branded players;
- encouraging contestability for house brand contracts;
- facilitating entry or expansion by existing or potential competitors through allocating shelf space and promotional spots; and
- 'playing off' suppliers against one another for promotional spots.

These observations are equally applicable in Australia, where "the competitive tendering process for the rights to supply private label lines to each of the major chains drives the market share and returns of the major dairy producers".<sup>39</sup>

**(d) The relationship between the pricing of private branded and producer branded products**

As suggested above, private label prices in Australia operate as effective constraints on the pricing of branded products in the dairy industry.

**Table 7: Price per litre for Australian supermarket sales of private label and branded milk**

Year	Private Label	Branded Milk
2000-2001	1.07	1.48
2001-2002	1.11	1.59
2002-2003	1.15	1.65
2003-2004	1.14	1.70
2004-2005	1.14	1.74
2005-2006	1.16	1.81
2006-2007	1.18	1.88

Source: Dairy Australia 'Australian Dairy Industry In Focus' reports 2003-2007 at Appendix 3.

The annual average prices per litre for private label and branded milk, as set out in the table above, exhibit a strong positive correlation. Indeed the two sets of pricing

<sup>38</sup> New Zealand Commerce Commission, Decision No. 562 "Fonterra Co-operative Group Limited and New Zealand Dairy Foods Limited" 9 November 2005 at [168]-[175]; New Zealand Commerce Commission, Decision No. 574 "Fonterra Co-operative Group Limited and Kapiti Fine Foods Limited and United Milk Limited" 23 February 2006 at [217]-[227] and [256]-[257];

<sup>39</sup> Spencer S, Dairy 2004: Situation and Outlook, June 2004.

data have a correlation coefficient of 0.94, which is indicative of prices that are highly positively correlated.

The table shows how the price of private label milk has acted as a constraint on the pricing of branded milk. This occurs because consumers are prepared to switch from branded to private label dairy products given a sufficient price incentive. This demand for private label products further adds to the countervailing power of supermarkets.

**11.10 Dairy farmers will continue to have direct access to ACF to enhance their competitiveness**

Dairy farmers will continue to have direct access to ACF through the provision of field advisory services which ACF is obliged to provide under the MSA: clause 8. These services are directed at ensuring that farmers are both efficient and competitive, for example by assisting them to produce high quality milk and high volumes. Through the provision of these services farmers are directly made aware of ACF's strategic issues and imperatives.

**11.11 ACF's co-operative status has not detracted from long term competitive investment in its business**

The Commission has previously expressed a concern that milk supply cooperatives may sometimes raise milk prices at the expense of deployment of capital at the factory level, and that this may dilute overall returns to farmers in the longer term if deployment of capital at the factory level would have been more profitable.<sup>40</sup>

This has not been ACF's experience. ACF has invested heavily in its business in recent years, increasing both its efficiency and sales. The benefits of this investment have accrued to farmer members.

**(a) Marketing and Innovation**

ACF's marketing and innovation department has over 40 full time employees, providing a holistic approach to product development and launch.

Since 2004 Dairy Farmers has embarked on revitalising its brand portfolio. This has involved:

- Repositioning the Dairy Farmers umbrella brand, including a \$3 million investment in main media, positioning Dairy Farmers as 'The Fresh Taste of Country Goodness';
- Development of the unique process and product proposition behind the success of Dairy farmers Thick & creamy, as recognised in the 2007 award of "Fresh New Line Launch of the Year" from Woolworths;
- Establishing local community marketing groups throughout Australia to run grassroots marketing events and sponsorships in their respective local

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<sup>40</sup> Australian Competition and Consumer Commission 'Impact of farmgate deregulation on the Australian milk industry: study of prices, costs and profits' April 2001 at 4.3.3 (p39)

communities as part of the 'Australia's Milk' campaign, building on positive associations of the brand with the country;

- Producing Australia's first freshness seal on bottled milk; and
- Producing Australia's first yogurt range in squeezie pouches for easy portability.

The ongoing campaign has seen other successful results including:

- Being awarded the 2007 'Grand Dairy Award' by Dairy Australia – ahead of all other milks and premium dairy products;
- Rating as one of the most trusted brands in Australia in the annual Readers' Digest Brand Survey; and
- Winning the International Dairy Federation's 2006 award for best worldwide Dairy Marketing campaign.

**(b) Customer Engagement**

Dairy Farmers has over 25 full-time employees dedicated to working with customers to improve supply chain efficiency. In particular, Dairy Farmers has made a significant investment in its e-business capability, with more than 80% of retail direct store deliveries now able to be ordered electronically. These initiatives have consistently been rated 'Excellent' by key client Woolworths for each of the past three years, and have resulted in Dairy Farmers being the partner of choice for major retailers for electronic enablement of supply chain integration.

**(c) Manufacturing capabilities**

Dairy Farmers has engaged in a consistent campaign to improve its business efficiency by reducing costs and simultaneously improving business performance. Recent measures include:

- \$61 million in capital expenditure has been spent on manufacturing sites from FY05 to FY07 to align capacity to value-add markets;
- Substantial manufacturing cost improvements delivered through the Step Change program, including over the period from FY06 to forecast FY08 Conversion Cost is expected to have fallen by 24% on an average cents per litre average;
- A recent increase in the capacity and technology platform of Wetherill Park (dairy and desserts) of more than 40% to launch Dairy Farmers Thick & Creamy and provide spare capacity for future growth;
- A capacity increase at key sites - upgrades to the strategically located Class A milk processing facility at Lidcombe has increased capacity by 30%, and Booval has increased by capacity by 20%; and
- Introducing a 'Step Change' program for logistics centred on freight, warehousing and distribution networks, including initiating a national freight tender which delivered the business \$5.9m in annualised savings.

### **11.12 Existing supply contracts**

Authorisation is sought to give effect to the existing supply contracts until their expiration. While some of these contracts will require authorisation for a period of up to three years, others will require authorisation for lesser periods.

Authorisation of existing supply contracts would not bring about any lessening of competition because:

1. as demonstrated in section 11.1 above, historically these arrangements have not led to raw milk prices that were either artificially high or low;
2. as demonstrated in section 11.4 above the terms of the MSA ensure that the commercial price to be agreed by DFMC and ACF under the MSA will be the same as the market price for raw milk. Therefore to continue to give effect to these prices post-completion would not bring about any lessening of competition, as the prices themselves are inherently competitive.; and
3. the prices and other terms agreed upon in the existing supply contracts were negotiated in a competitive market. and
4. competition between farmers, particularly in respect of matters such as quality of milk. remains unaffected.

### **11.13 Future supply contracts**

Authorisation of future supply contracts would not bring about any lessening of competition because:

1. as demonstrated in section 11.1 above historically these arrangements have not led to raw milk prices that were either artificially high or low;
2. as demonstrated in section 11.4 above the terms of the MSA ensure that the commercial price to be agreed by DFMC and ACF under the MSA will be the same as the market price for raw milk;
3. Raw milk prices in the future will continue to be the subject of market discipline and therefore will not be either:
  - (a) artificially low, as farmer members will be almost entirely free to supply other acquirers; or
  - (b) artificially high, as ACF will be free to acquire milk from sources other than DFMC.

## **12. Public Benefits**

As ACF and DFMC submit that there is no, or little, lessening of competition resulting from the authorisation sought, it is not necessary to demonstrate significant public benefits to outweigh the competitive detriment.

However, ACF and DFMC submit that there are a number of significant public benefits that arise from the authorisation sought.



## **12.1 Public benefits of authorising the conduct**

ACF and DFMC submit that authorising the conduct gives rise to the following **public benefits**:

### **(a) Certainty for existing supply contracts**

- it ensures that DFMC, ACF and farmers can continue to rely on and enforce the prices already agreed on and inserted into the supply contracts for the duration of those existing contracts following completion of the sale of ACF;
- it provides farmers and ACF (including the potential purchaser of ACF) with certainty that existing supply contracts will be enforceable;

### **(b) Certainty for future milk supply arrangements provides farmers with security necessary to plan and grow production**

- it provides farmers and ACF (including the potential purchaser of ACF) with certainty for milk supply arrangements in the future for the period of the authorisation whilst at the same time not restricting movement of farmer members as they come off contract, should they wish;
- certainty of pricing and milk off-take for the period of the authorisation will enable DFMC's farmer members to plan their production and provides the potential for them to increase their production including growing their herds to meet current high demand, including for exports. This is particularly important during a period of extended drought and high feed, fertilizer, fuel and other input costs, to provide the necessary basis for farmers to invest in growing their milk production capacity;
- it encourages the maintenance of high quality standards for raw milk;

### **(c) Security of milk supply benefits farmers and consumers**

- it ensures that farmer members concerns about pricing, production costs and other specific regional concerns are given appropriate weight and communicated to ACF. This, in turn, ensures the avoidance of disruption to milk supply, and enhances security of milk supply, to the benefit not only of farmers and ACF but also consumers;
- it enables DFMC's farmer members to continue to avail themselves of DFMC's comprehensive, timely and accurate gathering of information on trends and pricing for dairy products both in the Australian market and the world market, and so avoids asymmetries arising from the disparity in the relative positions and resources of the parties. This is particularly important for small to mid sized and individual farmers who do not have the time, resources or expertise to gather information in a time critical, efficient and comprehensive manner (as referred to in section 5 above), which is essential to ensure that a competitive milk price is negotiated, whether in the current period of upward world commodity prices or any future downturn. Without this access, farmers would need to engage consultants

to provide the information which would increase their transaction costs and which, for many small to mid sized farmers is impractical in terms of time and cost. There are few consultants who could perform this role. Consumers are the ultimate beneficiaries of prices which are commercially negotiated in such a competitive environment;

- it ensures that ACF has security of milk supply across regions which will enable it to competitively tender for supply of milk and milk products to major grocery retailers. These contracts with retailers and, in addition, Quick Service restaurant chains, often run for three or more years so it is essential that milk security is improved in comparison to the situation where supply contracts may be renegotiated every year.
- It ensures a more efficient coordination of milk supply because security of the milk pool allows ACF to enter into milk swap arrangements as discussed in section 4 above which in turn enables it to reduce the costs of production.

**(d) Encouragement is given to farmers to remain in or enter the industry**

- it significantly reduces transaction costs to farmers who do not have to have price negotiations with DFMC or ACF. Price negotiations take place only between DFMC and ACF. At the same time farmer members have input into the terms of their supply contracts through their membership of DFMC ;
- it maintains the low barriers to entry to dairy farming by providing new dairy farmers with the option to join, and gain support from, DFMC (including the benefits referred to in section 4 above) and obtain certainty and security of milk off-take;

**(e) The freedom of farmers to choose to deal with ACF other than through DFMC will be unaffected**

**(f) Possible growth of exports by ACF is facilitated**

- security of the existing milk pool, coupled with the ability to grow the pool which arise from the removal of the Restraint will allow ACF (or the potential purchaser of ACF) with the option to grow the export market (which is a market in which ACF currently supplies and which generates approximately 5% of sales revenue).

### **13. Conclusion**

In the light of all of the above, DFMC submits that the public benefits that would arise as a result of authorisation of both the existing and the future supply contracts outweigh the detriments that would arise from any lessening of competition.

If the Commission requires further information regarding any aspect of this application, reference can be made to:

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## Appendix A: DFMC Rules

Co-operatives Act 1992  
A Co-operative limited by shares

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**RULES OF**  
**DAIRY FARMERS MILK CO-OPERATIVE LIMITED**  
**(ARBN 108 690 384)**

These Rules were Registered on \_\_\_\_\_ 2007



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**Note:** Each term defined in rules 109 and 110 is marked in the text of the rule with “\*” before it. There are exceptions to this procedure: the terms “the Act”, “the Board”, “the Co-operative”, “CCU”, “may”, “member”, “person” and “rule” are not marked with “\*” because they appear so often throughout these rules.

## Part 1 Rules

---

### 1. Rules

- (1) The rules of the Co-operative have the effect of a contract under seal governed by the laws in force in New South Wales from time to time:
  - (a) between the Co-operative and each member;
  - (b) between the Co-operative and each Director, the principal executive officer and the \*secretary of the Co-operative; and
  - (c) between a member and each other member.
- (2) Under the contract referred to in rule 1(1), each of those persons agrees to observe and perform the provisions of the rules as in force for the time being so far as those provisions are applicable to that person, and agrees to submit to the jurisdiction of the courts of New South Wales.
- (3) A member may obtain a copy of the rules from the Co-operative free of charge.
- (4) A member may inspect a copy of the rules free of charge at the office where the registers are kept, during all reasonable hours.

### 2. Rule Alterations

- (1) The rules may be \*altered by a \*special resolution, by a resolution of the Board in accordance with section 112 of the Act or as otherwise permitted by the Act. No \*alteration to these rules takes effect until the \*alteration is registered by the \*Registrar.
- (2) Where any rule is \*altered, by way of a Board resolution under section 112, the Co-operative must cause the \*alteration to be notified, in \*writing, to members as soon as practicable after the \*alteration is registered and, in any event, not later than the date on which notice is given to the members of the next annual general meeting of the Co-operative, following the registration of the \*alteration.

## Part 2 The Co-operative

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### 3. Name

- (1) The name of the Co-operative is Dairy Farmers Milk Co-operative Limited.
- (2) The Co-operative may, in accordance with section 259, change its name by way of a \*special resolution to a name approved of by the \*Registrar.

### 4. Trading Co-operative

- (1) The Co-operative is a trading Co-operative with limited liability and shall comply with section 14 of the Act.
- (2) The objects of the Co-operative include all of the objects from time to time contained in Section 7 of the Co-operation Act 1923.

### 5. Change of Registered Office

The Board shall notify the \*Registrar of any change of address of the registered office of the Co-operative within 28 days after the change, and on the form approved by the \*Registrar.

### 6. Notification of Office Address at which Registers are Kept

If the registers required by section 249(1) to be kept by the Co-operative are not kept at the registered office, the Co-operative must lodge with the \*Registrar a notice of the address at which the register is kept within 28 days after the register is:

- (1) established at an office which is not the Co-operative's registered office; or
- (2) moved from one office to another.

### 7. Powers

The Co-operative shall have, both within and outside the \*State, the legal capacity of a natural person and have all the powers allowed by or under the Act, including, both within and outside the \*State, power:

- (a) to issue and allot fully or partly paid \*shares in the Co-operative; and
- (b) to issue debentures of the Co-operative; and
- (c) to issue co-operative capital units in accordance with Rule 40; and

- (d) to distribute any of the property of the Co-operative among the members, in kind or otherwise; and
- (e) to borrow money; and
- (f) to give security by charging uncalled capital; and
- (g) to grant a floating charge on property of the Co-operative; and
- (h) to procure the Co-operative to be registered or recognised as a body corporate in any place outside the \*State; and
- (i) to exercise its powers generally, whether incidentally to its primary activities or otherwise; and
- (j) to do any other act that it is authorised to do by any other law (including a law of a place outside the \*State).

**8. Loans by Members to the Co-operative**

The Co-operative may, in accordance with section 268 of the Act, require its members to lend money to the Co-operative, with or without security, in accordance with a proposal approved by the members by \*special resolution.

**9. Dealings of Members with the Co-operative**

- (1) The Co-operative may, in accordance with section 78 of the Act, make a contract with a member requiring the member to have specified dealings with the Co-operative for a fixed period, including, without limitation, a contract between the Co-operative and a member who is a \*milk processor under which the member is required to purchase \*milk produce for a fixed period.
- (2) The provisions of the contract may require a member:
  - (a) to sell products through or to the Co-operative; or
  - (b) to obtain supplies or services through or from the Co-operative; or
  - (c) to pay to the Co-operative specified sums as liquidated damages for any failure to comply with a requirement authorised by this rule.
- (3) The sum, if any, specified as liquidated damages is to be considered as a debt due to the Co-operative and in respect of such debt, the Co-operative has, pursuant to section 80 of the Act, a charge on each of the following :
  - (a) the \*share or interest in the capital and the credit balance and deposits of the member or past member;
  - (b) any dividend, interest, bonus or rebate payable to the member or past member;
  - (c) any entry and periodic fees required to be repaid to a member when the member ceases to be a member.
- (4) The charge created pursuant to section 80 of the Act shall be enforced in accordance with that section.
- (5) Nothing in this rule shall be interpreted as restricting the powers of the Co-operative to enter into contracts with a member or members other than pursuant to the provisions of this rule.

**10. Seal**

- (1) The Co-operative shall, as required by section 258(1)(a) of the Act, have the name of the Co-operative appear in legible characters on its common seal and on any official seal and the Australian Registered Body Number of the Co-operative, if required under the \*Corporations Act. The common seal shall be kept at the registered office in such custody as the Board shall direct.
- (2) The Co-operative may, pursuant to section 49 of the Act, have for use in place of its common seal outside the \*State, one or more official seals. Each of the additional seals must be a facsimile of the common seal with the addition on its face of the name of the place where it is to be used.
- (3) The common seal or the official seal of the Co-operative may not be affixed to any instrument except under the authority of the Board or a committee of the Board and shall be attested by the signatures of one Director and one \*secretary, or a second Director or such other person as the Board authorises.
- (4) The person affixing the official seal must certify in \*writing on the instrument to which it is affixed, the date and place at which it is affixed.
- (5) A contract or other document executed, or purporting to have been executed, under the common seal of the Co-operative is not invalid merely because a person attesting the affixing of the common seal was in any way, whether directly or indirectly, interested in that contract or other document or in the matter to which that contract or other document relates.

**11. Co-operative May Authorise Agent or Attorney to Execute Deeds**

- (1) The Co-operative may, by \*writing under its common seal, empower its agent or attorney (either generally or in respect of a specified matter or specified matters) to execute deeds on its behalf.

- (2) A deed signed by such an agent or attorney on behalf of the Co-operative and under the agent's or attorney's seal, or under the appropriate official seal of the Co-operative, binds the Co-operative and has effect as if it were under the common seal of the Co-operative.
- (3) The authority of such an agent or attorney, as between the Co-operative and a person dealing with the agent or attorney, continues during the period (if any) mentioned in the instrument conferring the authority or, if no period is so mentioned, until notice of the revocation or termination of the agent's or attorney's authority has been given to the person dealing with the agent or attorney.
- (4) Where an agent or attorney affixes an official seal to an instrument, that person must comply with rule 10(4).

## **12. Records and Registers**

### **12.1 Custody and Inspection**

- (1) The Co-operative must have at the office where the registers are kept and available during all reasonable hours for inspection by any member free of charge the following:
  - (a) a copy of the Act and the \*regulation;
  - (b) a copy of the rules of the Co-operative;
  - (c) a copy of the minutes of each general meeting of the Co-operative;
  - (d) a copy of the last annual report of the Co-operative;
  - (e) the register of Directors, members and \*shares;
  - (f) the register of names of persons who have given loans or deposits to or hold securities, debentures or CCUs given or issued by the Co-operative;
  - (g) the register of any loans made by or guaranteed by the Co-operative, and of any securities taken by the Co-operative;
  - (h) the register of memberships cancelled under Part 6 of the Act;
  - (i) the register of notifiable interests;
  - (j) the register of subordinated debt;
  - (k) such other registers as the \*regulation provides are to be open for inspection.
- (2) If a register is not kept on a computer, the person inspects the register itself.
- (3) If the register is kept on a computer, the person inspects a hard copy of the information on the register unless the person and the Co-operative agree that the person can access the information by computer.
- (4) A member is entitled to make a copy of entries in a register specified in sub-rule (1) and to do so free of charge.
- (5) The Co-operative must:
  - (a) permit a member to inspect a document or make a copy of a document that the member is entitled to inspect or make under this section; and
  - (b) give the member all reasonable assistance to inspect the document or make the copy.
- (6) The Co-operative must have at the registered office and available during all reasonable hours for inspection by any such person such documents in relation to the Co-operative as are \*prescribed including:
  - (a) a copy of the Act and the \*regulation;
  - (b) a copy of the rules of the Co-operative;
  - (c) a copy of the last annual report of the Co-operative.

### **12.2 Access by Officers**

- (1) The Co-operative must keep in secured custody at its principal places of business all papers, documents and other information relating to the affairs of the Co-operative (whether in hard copy or electronic form) to which an officer or former officer is legally entitled to have access as an officer or former officer of the Co-operative. It must do so during any period the officer is an officer of the Co-operative and for a period of 7 years after the date on which the officer ceases to be an officer of the Co-operative. It must use its best efforts to ensure that these records are kept in chronological order (where applicable).
- (2) Subject to sub-rules (3) and (4) of this rule 12, the Co-operative must promptly allow an officer having the right to do so to inspect and take copies of any paper, document or other information relating to the Co-operative's affairs.
- (3) After the officer ceases to be an officer, the following rules apply to the officer's right of access:
  - (a) The right of access continues for 7 years after the date on which the officer ceases to be an officer of the Co-operative, but only in relation to a paper, document or other information to which the officer has a lawful right of access.

- (b) The right of access is limited to information the officer reasonably believes may be relevant to a claim or proceeding or potential claim or proceeding against the officer in the capacity of officer of the Co-operative, or to a proceeding that the officer proposes in good faith to bring. However, an officer has no right of access under this sub-rule in relation to a circumstance, claim or proceeding or potential proceeding that the officer is considering or proposes to bring against the Co-operative or a circumstance, claim or proceeding or potential proceeding that the Co-operative is considering or proposes to bring against the officer.
- (4) Officers, both during their tenure in office and after they have ceased to be an officer, owe the Co-operative fiduciary duties in relation to exercising the right of access. An officer must not use the right of access except in connection with acting in the capacity of officer or dealing with a circumstance, claim or proceeding in relation to acting in that capacity. Where a former officer exercises a right of access under this rule, the officer shall:
- (a) consent to any order of a court sought by the Co-operative as that which the Co-operative would have been entitled to if the former officer was still an officer of the Co-operative at the time the order is sought or made; or
  - (b) enter into enforceable undertakings in or to the same or substantially the same effect (as reasonably determined by the Co-operative) as the orders referred to in paragraph (a) above.

### **Officers' notes and records**

- (5) Each of the officers must keep all notes and records that relate to the officer's officership of the Co-operative (including membership of committees) made by the officer in the capacity of officer of the Co-operative. An officer must keep the notes and records during any period the officer is an officer of the Co-operative and for at least 7 years after the date on which the officer last ceases to be an officer of the Co-operative. This duty ends in relation to a note or record if it is handed over to the Co-operative when the officer ceases to be an officer of the Co-operative. On request by the Co-operative, an officer must promptly allow it to inspect and take copies of any note or record.

## **Part 3 Membership and \*Shares**

---

### **Division 1 Active Membership**

#### **13. Primary Activity Rule and Active Membership Provisions**

##### **13.1 Primary Activity**

The primary activities of the Co-operative are:

- 13.1.1 to dispose of \*milk acquired from members (Primary Activity A);
- 13.1.2 to supply \*milk to a member for processing (Primary Activity B);
- 13.1.3 to acquire, hold or deal with \*Processor Shares (Primary Activity C)

##### **13.2 Active Membership Rules**

A member of the Co-operative will be an \*active member of the Co-operative on a particular day (the "test day"):

- 13.2.1 in connection with the carrying on of Primary Activity A, if the member complies with at least one of the following paragraphs:

**(a) The Direct Supply Rule:**

the member has supplied at least 200 litres of \*milk (not acquired from a third party) to the Co-operative in any 7 day period during the \*relevant period;

**(b) The Indirect Supply Rule:**

- (i) the member has supplied at least 200 litres of the \*milk (not acquired from a third party) to a \*milk receival depot in any 7 day period during the \*relevant period, and
- (ii) such \*milk receival depot has supplied at least 10,000 litres of \*milk to the Co-operative in the same 7 day period;

**(c) The \*Milk Receival Depot Rule:**

- (i) the member carries on business as a \*milk receival depot; and
- (ii) such \*milk receival depot has supplied at least 40,000 litres of \*milk to the Co-operative in any 7 day period during the \*relevant period;

**(d) The \*Sharefarmer Rule:**

- (i) the member is a \*sharefarmer who during a \*relevant period has worked on a dairy farm; and
- (ii) such dairy farm complies with the tests set out in either the Direct Supply Rule, the Indirect Supply Rule, or the \*Merging Co-operative Rule (paragraphs (ii) and (iii)) on the basis that 'dairy farm' is substituted for 'member';

(e) **The \*Merging Co-operative Rule:**

- (i) the member was a member of a \*merging Co-operative; and
- (ii) the member supplied at least 200 litres of the \*milk (not acquired from a third party) to the \*merging Co-operative in any 7 day period during the 6 \*months before the \*merger date, and
- (iii) the \*merger date is not more than 8 weeks before the \*test date;

(f) **The Transitional Rule**

- (i) the member was a member of \*ACF ("former \*ACF member") immediately prior to the date on which he she or it became a member of the Co-operative ("the joining date"); and
- (ii) the former \*ACF member was an \*active member of \*ACF under the active membership rules of \*ACF on any day during the period of 18 \*months ending on the joining date;

provided always that this transitional rule shall only operate for a period of 14 days from the joining date ("the transitional period") and in the event that a former \*ACF member has not qualified as an \*active member under any of paragraphs (a) to (e) above prior to the expiry of the transitional period, the former \*ACF member shall cease to be an \*active member of the Co-operative.

13.2.2 in connection with the carrying on of Primary Activity B, if the member

- (a) carries on the business of a \*milk processor;
- (b) has entered into a contract with the Co-operative to acquire from the Co-operative \*milk for a fixed term; and
- (c) has acquired from the Co-operative at least 5,000,000 litres of \*milk in any 7 day period during the \*relevant period.

13.3 Active Membership at General Meetings or Postal Ballots

13.3.1 where the \*test day is a day on which a meeting (including any adjourned meeting) of members of the Co-operative is held for the purpose of considering and, if thought fit, passing any \*special resolution to amend the rules of the Co-operative by the adoption of active membership provisions (within the meaning of the Act), the day being the date of the original notice of such meeting shall be substituted for the \*test day for the purposes of identifying the relevant periods of 8 weeks or 6 \*months referred to in rule 13.2.

13.3.2 where the \*test day is a day on which any other general meeting (or the recommencement of an adjourned general meeting) is held or is a date relating to a postal ballot, the date of the original notice of such meeting or the date of issue of the postal ballot shall be substituted for the \*test day for the purposes of identifying the relevant periods of 8 weeks or 6 \*months referred to in rule 13.2.

13.4 Change in basis of active membership

If the basis on which a member qualifies as an \*active member changes by reason of the member ceasing to qualify under any one of the paragraphs (a) to (e) inclusive in Rule 13.2.1 (the original paragraph) and instead commences to qualify as a member under any one of the said paragraphs (not being the original paragraph) notice of that fact must be given to the Co-operative by the member within 14 days of the change occurring.

13.5 Interpretation of Active Membership Rules

13.5.1 In Rule 13.2.1 (a) a reference to a \*milk supplied to the Co-operative is deemed to include \*milk purchased by the Co-operative from the member.

13.5.2 In Rules 13.2.1 (b)(ii) and 13.2.1 (c)(ii) a reference to \*milk supplied to the Co-operative is deemed to include \*milk purchased by the Co-operative from the \*milk receival depot.

13.5.3 In these rules "**relevant period**" means :

- (i) where the \*test day occurs during the 8 weeks commencing on the \*Implementation Date, the period commencing on the \*Implementation Date and ending on the day 1 day before the \*test day, and
- (ii) where the \*test day occurs after 8 weeks from the \*Implementation Date, the period commencing on the day 8 weeks prior to and ending on the day 1 week prior to the day before the \*test day.

13.5.4 Joint supply by two or more members will constitute supply by each of such members in equal proportions of the total milk supplied unless written notice signed by each joint supplier (informing the Co-operative of the proportions in which the milk is supplied) is received by the Co-operative.

**14. Forfeitures and Cancellations Relating to Inactive Members**

- (1) After giving notice in accordance with section 132 of the Act the Board must declare the membership of a member cancelled if:
  - (a) the whereabouts of the member are not presently known to the Co-operative and have not been known to the Co-operative for a period of 1 year before the date of cancellation; or
  - (b) the member is not presently an \*active member and has not been an \*active member at any time during the \*required period.
- (2) The Board is to declare the \*shares of a member forfeited at the same time as the membership is cancelled and the amounts due in respect of that cancellation and forfeiture shall be dealt with and repaid in accordance with the Act and rule 28 of these Rules.
- (3) The Co-operative shall, in a form approved of by the \*Registrar, keep a register of memberships cancelled under paragraph (1) of this rule.

**15. Qualifications For Membership**

A person is not qualified to be admitted to membership of the Co-operative unless:

- (a) the Board has reasonable grounds for believing that the person will be an \*active member under rule 13; and
- (b) the Board has reasonable grounds for believing that the person will acquire such minimum number of \*shares as is provided by these rules within such reasonable time as the Board may determine; and
- (c) where the person is a \*sharefarmer, the members of the Co-operative who supply \*milk from the dairy farm on which such person works as a \*sharefarmer consent in \*writing to the person becoming a member.

**Part 3**

**Division 2 Becoming a Member**

**16. \*Shares not to be Quoted**

- (1) \*Shares of the Co-operative shall not be quoted for sale or purchase at any stock exchange or in any other public manner whatever, within the meaning of the Income Tax Assessment Act 1936 (Cth).
- (2) This rule may be \*altered by resolution of the Board pursuant to section 112 of the Act.

**17. Application For Membership and \*Shares**

- (1) The Co-operative must satisfy the requirements of the Act and the \*Corporations Act including sections 76A and 146A-D and in particular shall provide each person intending to become a member and shareholder of the Co-operative with:
  - (a) a disclosure statement which sets out:
    - (i) the rights and liabilities attaching to \*shares of the Co-operative;
    - (ii) a copy of the last annual report of the Co-operative required under section 252;
    - (iii) any other relevant information concerning the financial position and prospects of the Co-operative if there has been a significant change since the date of such last annual report; AND
    - (iv) any other information that the \*Registrar directs.
  - (b) a consolidated copy of the rules of the Co-operative; and
  - (c) a copy of all \*special resolutions applicable to the member passed by the members of the Co-operative, except \*special resolutions providing for an \*alteration of the rules of the Co-operative.
- (2) Applications for membership and \*shares shall be lodged at the registered office in such form as the Board may approve. Each such application shall be lodged with such evidence of qualification for membership as the Board may require together with, if applicable, the consideration (whether in cash or property) required to pay the \*shares fully, or if the \*shares are to be issued partly paid, an amount (of not less than 10 cents per \*share) equal to the part payment in respect of each \*share applied for.
- (3) No \*share shall be issued or transferred to two or more persons jointly except:
  - (a) pursuant to the \*Scheme;
  - (b) where each of such persons being a member of the Co-operative holds no other \*shares in the Co-operative in his or her own name; or
  - (c) in the case of an alteration required to be made to the register for the purposes of Section 82 of the Act (transmission on death) or agreed by the Co-operative to be made for the purposes of Division 3 of Part 7 of the Act (including

registration as trustee etc on death of owner of \*shares; registration as administrator of estate on incapacity of shareholder); or

- (d) in the case of the issue of further \*shares to a joint shareholding pursuant to an issue of \*shares required to be taken up by members under Section 155 or issue of bonus \*shares under Section 151, 156 or 282; or
  - (e) in order to comply with the Act or where the Board otherwise determines.
- (4) Every application for membership shall be considered by the Board. If the Board approves of the application the information required by the Act and these rules shall be entered in the register of members. The applicant must be notified in \*writing of the entry in the register.
- (5) The Board may in its absolute discretion refuse any application for membership or \*shares (other than additional \*shares the subject of a compulsory issue under section 155 of the Act) and need assign no reasons for such refusal and upon refusal any application monies or property lodged by the applicant shall be refunded or returned without interest.
- (6) The Co-operative may issue fully paid up \*shares to an \*active member of the Co-operative where the consideration for such issue is real or personal property of at least the value of the equivalent cash consideration.
- (7) The Co-operative may serve a notice ("the joint shareholders' notice") on joint shareholders of the Co-operative, other than joint shareholders referred to in Rule 17(3)(b). The joint shareholders' notice shall identify the persons recorded in the register of members as the joint shareholders and the number of \*shares so held ("the jointly held \*shares") and shall invite the joint shareholders to transfer the jointly held \*shares to one or more members of the Co-operative severally.
- (8) In considering an application for membership pursuant to this rule, the Board must ensure that a person who is not qualified for membership of the Co-operative under rule 15 is not admitted as a member.

### **Part 3**

#### **Division 3 Members**

#### **18. Members of the Co-operative**

- (1) The members of the Co-operative are:
- (a) those persons who signed the application for registration of the Co-operative;
  - (b) those persons admitted to membership in accordance with rule 17; and
  - (c) those persons who become members by:
    - (i) a transfer of engagements to the Co-operative; or
    - (ii) a scheme of arrangement of the Co-operative; or
    - (iii) a scheme of arrangement of another co-operative where the Co-operative has consented to its terms; or
    - (iv) operation of law; or
    - (v) a transfer of \*shares under rule 34 or rule 35.
- (2) Membership of the Co-operative of persons admitted to the Co-operative in accordance with rule 17 cannot be joint.
- (3) Each application for membership which is made jointly shall be deemed to be a separate application by each of the applicants therein named and each such joint application which is approved by the Board shall result in a separate membership granted to each applicant and accordingly the name of each applicant so approved shall be separately entered in the register of members.
- (4) Membership of the Co-operative is distinct from shareholding in the Co-operative and, subject to the active membership requirements of these rules, there is only one class of membership. A member of the Co-operative is not entitled to exercise any rights of membership until:
- (a) the member's name appears in the Register of Members; and
  - (b) the member has made such payment to the Co-operative in respect of membership or acquired such number of \*shares in the Co-operative as are provided for in these rules.

#### **19. Liability of Members to the Co-operative**

- (1) A member is liable to the Co-operative for the amount, if any, unpaid on the \*shares held by that member, together with any charges payable by the member to the Co-operative as required by these rules.
- (2) On the death of a member, the member's estate is subject to the same liability as the member would have been until the member's personal representative or some other person is registered in the member's place.
- (3) The joint holders of a \*share shall be jointly and severally liable in respect of any such amount unpaid on \*shares and to any such charges referred to in paragraph (1).
- (4) Each member authorises the Co-operative to:



- (a) deduct from and set off against any amount payable by the Co-operative to the member, any amount due and owing by the member to the Co-operative on any account; and
- (b) deduct from any amount payable by the Co-operative to the member, any amount due and owing by the member to \*ACF on any account and to pay that amount to \*ACF (or to apply such amount at the direction of \*ACF).

## **20. Ceasing Membership**

A person ceases to be a member of the Co-operative in any of the following circumstances:

- (1) if the member's membership is cancelled under rule 14;
- (2) if the member is expelled in accordance with rule 21;
- (3) if the member becomes bankrupt or becomes subject to control under the law relating to bankruptcy.
- (4) on death of the member;
- (5) if the contract of membership is rescinded on the ground of misrepresentation or mistake;
- (6) if all of the member's \*shares are transferred to another person and the transferee is registered as the holder of the \*shares in accordance with these rules;
- (7) if all of the member's \*shares are forfeited in accordance with the \*provisions of the Act or the provisions of these rules, other than a forfeiture to remedy a contravention of rule 22(4);
- (8) if all of the member's \*shares are purchased by the Co-operative in accordance with rule 27;
- (9) if the amount paid up on all of the member's \*shares is repaid to the member in accordance with the provisions of these rules; and
- (10) in the case of a body corporate, if the body corporate is in liquidation, dissolved, wound-up or deregistered.

## **21. Expulsion of Members**

### **21.1 By members**

- (1) A member may be expelled from the Co-operative by \*special resolution to the effect:
  - (a) that the member has failed to discharge the member's obligations to the Co-operative, whether \*prescribed by these rules or arising out of any contract; or
  - (b) that the member has been guilty of conduct detrimental to the Co-operative.
- (2) \*Written notice of the proposed resolution must be forwarded to the member at least 21 days before the date of the meeting at which the \*special resolution is to be moved.
- (3) A member who is liable to expulsion must be given a reasonable opportunity of being heard at the meeting which considers the \*special resolution to expel.

### **21.2 By the Board**

- (1) Subject to compliance with the requirements of this rule 21.2, the Board may expel a member from the Co-operative by a 75% majority resolution to the effect:
  - (a) that the member has failed to discharge an obligation to the Co-operative whether \*prescribed by the Act or by the \*regulation or by these rules or arising out of any contract ; or
  - (b) that the member has failed to comply with the terms of either of the following:
    - (i) a requirement to take up additional \*shares in the Co-operative under Section 155 of the Act; or
    - (ii) a requirement to make a loan to the Co-operative under Section 268 of the Act.
- (2) For the purposes of sub-rule 21.2(1), a member shall not have failed to discharge an obligation nor have failed to comply with any terms unless and until the member has been informed by notice in \*writing of the particulars of any such failure and such failure is not rectified within thirty (30) days after service of such notice.
- (3) In the event that it is proposed that the Board exercise its powers under this rule 21.2, written notice of the proposed resolution shall be forwarded to the member not less than 14 days before the date of the meeting at which the resolution is to be moved, and the member shall be given a reasonable opportunity of being heard at the meeting.
- (4) In the event that a member is expelled under this rule 21.2, the expulsion shall not take effect until the later of:
  - (i) 21 days after the date on which the member is notified of the Board's resolution; or
  - (ii) the closure of a meeting of members required to be convened under sub-rule (5).
- (5) In the event that a member (including a member expelled under sub-rule (1)) requests the Board to do so prior to the date described in sub-rule (4)(i), the Board shall convene a meeting of members at which a resolution ratifying the decision of the Board and no other business shall be considered.
- (6) In the event that a meeting of members convened for the purposes of sub-rule (5) fails to ratify the resolution of the Board to expel the member, such resolution shall have no force or effect.

**21.3 Repayment of capital on expulsion**

- (1) The Co-operative must pay to a person expelled under this rule the amount of capital paid up on the person's \*shares at the time of the person's expulsion (less any amount owing to the co-operative).
- (2) Payment to the expelled person must be made at such time as shall be determined by the Board in its discretion but not later than 12 \*months from the date of the person's expulsion.
- (3) Notwithstanding rule 21.3(2), where:
  - (a) the Board considers that the repayment of the former member's share capital within the 12 \*month period would adversely affect the financial position of the Co-operative; or
  - (b) the former member consents in \*writing,the Board may defer payment or appropriate the amount and rule 28.2 shall apply.
- (4) After repayment is made the \*shares of an expelled person must be cancelled.
- (5) An expelled person will not be re-admitted as a member unless re-admission is approved by \*special resolution. A member re-admitted will not have the \*shares restored which were cancelled on the member's earlier expulsion.

**Part 3**

**Division 4 \*Shares Generally**

**22. Capital and \*Shares**

- (1) The capital of the Co-operative will be raised by the issue of \*shares which shall be of one class, all ranking equally, and be of nominal value of \$1.00 each:
- (2) The capital of the Co-operative shall vary in amount according to the nominal value of \*shares from time to time subscribed.
- (3) No \*share is to be allotted (other than a bonus \*share) unless at least 10% of the nominal value of the \*share has been paid. A \*share is not to be issued at a discount.
- (4)
  - (a) The number of \*shares which may be held by or on behalf of any one member of the Co-operative shall not exceed a number having the nominal value of five million dollars (\$5,000,000.00).
  - (b) No member shall hold, or have a \*relevant interest in \*shares the nominal value of which exceeds one twentieth of the total nominal amount of issued share capital of the Co-operative.
  - (c) Where a person holds, or has a \*relevant interest in, \*shares in contravention of rules 22(4)(a) or 22(4)(b), such person shall be deemed to have
    - (i) requested the Co-operative to repurchase, and
    - (ii) consented to the repayment of the whole of the amount paid up on, sufficient of those \*shares to remedy the contravention being those \*shares nominated by the person for that purpose or, in the absence of such a nomination, those \*shares which have been held, or in which a \*relevant interest has been held, for the shortest time.
- (5) Where a person holds, or has a \*relevant interest in, \*shares in contravention of section 289 of the Act, the Board shall, pursuant to section 290 of the Act, declare to be forfeited sufficient of those \*shares to remedy the contravention being those \*shares nominated by the person for that purpose or, in the absence of such a nomination, those \*shares which have been held, or in which a \*relevant interest has been held, for the shortest time.

**23. Minimum Shareholding**

- (1) The \*secretary shall allocate to and maintain for each member (other than a member who is a \*milk processor), and record in the register of members, a registration number, identifying the farm or receival depot by reason of the member's association with which the member is qualified to be an \*active member.
- (2) The \*secretary of the Co-operative shall give to different members the same registration number where in the opinion of the \*secretary those members are qualified to be \*active members by reason of their association with the same farm or receival depot as the case may be.
- (3) The applicant's name together with the number of \*shares allotted, the date of allotment and any other information required by or under the Act shall be entered in the register of members. The applicant shall be notified in \*writing of the allotment and of the entry in the register.
- (4) Subject to the following provisions of this rule, each member shall hold at least 2,000 \*shares before such member may exercise his or her rights of membership.
- (5) Where the number of members having the same registration number is greater than 1, no member having that registration number may hold less than 100 \*shares.

- (6) Where the applicant for new membership is allocated the same registration number as an existing member or existing members, such applicant and those members with the same registration number shall collectively comply with sub-rule (4) and individually comply with sub-rule (5).
- (7) Subject to sub-rule (6) the provisions of sub-rules (4) and (5) shall not apply to members of the Co-operative to whom equivalent sub-rules of \*ACF in force immediately before the \*Implementation Date did not apply.
- (7A) The provisions of sub-rules (4), (5) and (6) shall not apply prior to the Implementation Date until when each member shall hold at least 10 \*shares before such member may exercise his or her rights of membership.
- (7B) The provisions of sub-rules (4), (5) and (6) shall not apply after the Implementation Date to members who were members of ACF immediately prior to the Implementation Date and in respect of such members the minimum number of shares to be held shall be one (1).
- (8) No rights of membership shall be exercisable unless or until the member has made such payment to the Co-operative in respect of membership or acquired such minimum number of \*shares as is provided by these rules, but thereafter the member shall be entitled to the privileges and subject to the obligations attaching to membership of the Co-operative as \*prescribed or as provided for under these rules.

**24. Notice to be Given of Substantial Share Interest and Substantial Change in Share Interest**

- (1) A person must give notice in \*writing to the Co-operative within 5 \*business days after becoming aware that the person has a substantial share interest in the Co-operative.
- (2) A person who has a substantial share interest in the Co-operative must give notice in \*writing to the Co-operative within 5 \*business days after becoming aware that a substantial change has occurred in that interest.
- (3) A person who has ceased to have a substantial share interest in the Co-operative must give notice in \*writing to the Co-operative within 5 \*business days after becoming aware that the person has ceased to have that interest.
- (4) For the purposes of this rule:
  - (a) a person has a substantial share interest in the Co-operative if the nominal value of the \*shares in which the person has a \*relevant interest represents 5% or more of the nominal value of the issued share capital of the Co-operative;
  - (b) a substantial change takes place in a person's share interest in the Co-operative if there is an increase or decrease in the number of \*shares in which the person has a \*relevant interest and the increase or decrease represents at least 1% of the nominal value of the issued share capital of the Co-operative;
  - (c) "Notice" means a notice in the form approved by the \*Registrar, specifying the particulars \*prescribed by the \*regulation.

**25. Bonus \*Shares**

Bonus \*shares may be issued by the Co-operative in accordance with the Act.

**26. Compulsory \*Share Acquisition**

- (1) The Board may require a member to take up, or subscribe for, additional \*shares in accordance with a proposal approved by a \*special resolution of the Co-operative in accordance with section 155 of the Act.
- (2) (a) In respect of a proposal implemented pursuant to Section 155 of the Act where any member fails expressly to authorise the deduction of monies for such purpose out of monies due to the member for the sale of produce; or
  - (b) in respect of a proposal implemented pursuant to Section 268 of the Act, where any member fails expressly to authorise the deduction of monies for such purpose out of money due to the member for the sale of produce, the member shall be taken to have authorised the \*secretary for the time being of the Co-operative to sign as the member's Attorney such form of authority as the Board of the Co-operative may determine to be appropriate.
- (3) (a) In respect of a proposal implemented pursuant to Section 155 of the Act, where any member fails to subscribe for additional \*shares; or
  - (b) in respect of a proposal implemented pursuant to Section 268 of the Act, where any member fails to lend money to the Co-operative,  
such failure shall be an infringement of these rules and the sum unpaid from time to time shall constitute a debt due by the member to the Co-operative. The Board may, if it thinks fit, require the member to pay interest upon the sum or sums unpaid in respect of any such proposal at a rate determined by the Board but not exceeding twenty per cent (20%) per annum from the last day the said sum or sums were payable together with any charges payable by the member to the Co-operative as required by these rules.

**27. Purchase of Members' \*Shares**

- (1) Subject to section 172 of the Act the Co-operative may:
  - (a) purchase any \*share of a member at the request of the member; and
  - (b) repay to a member, with the member's consent, the whole or any part of the amount paid up on any \*share held by the member when the sum repaid is not required for the activities of the Co-operative.
- (2) The Co-operative must cancel any \*share purchased or repaid in full by the Co-operative.
- (3) The Co-operative must not, in any \*financial year, repurchase \*shares or repay the amount paid up on \*shares, or both, if the amount to be paid by the Co-operative exceeds the sum of:
  - (a) 5% of the nominal value of the issued share capital of the Co-operative immediately before the commencement of that \*financial year; and
  - (b) the amount of any additional share capital of the Co-operative subscribed for during that year, unless exempted by \*written order made in accordance with the Act, either unconditionally or subject to conditions.
- (4) The amount paid for a \*share when it is repurchased may be an amount determined by the Board which is less than the nominal value of the \*share if the books of the Co-operative disclose that the amount paid is the net shareholder's equity per \*share in the undertaking of the Co-operative.
- (5) Where:
  - (a) the Board considers that the payment of the purchase price would adversely affect the financial position of the Co-operative; or
  - (b) the Board and the member agree,the Board may, in accordance with the requirements of section 173 of the Act, instead of paying the purchase price to the member allot or issue debentures or CCUs of the Co-operative to the member in satisfaction of the amount.
- (5) All such purchases or repayments shall be made on the resolution of the Board, which shall be noted in the register of \*shares.

**28. Repayment of Former Member's Share Capital**

**28.1 Cancellation under rule 14**

- (1) Where the \*shares of a former member are cancelled under rule 14, the Co-operative must, within 12 \*months after the date of the cancellation:
  - (a) repay the former member the amount due to the member in respect of the cancellation; or
  - (b) apply the amount in accordance with rule 28.1(2).
- (2) Where:
  - (a) the Board considers that repayment within the 12 \*month period would adversely affect the financial position of the Co-operative, or where the Board and the former member so agrees, the Board may allot or issue debentures or CCUs of the Co-operative to the former member in satisfaction of the amount. The term of the debenture or CCU shall be such period as the Board may determine provided that:
    - (i) the period is not greater than 10 years from the date of the cancellation, or
    - (ii) such greater period as is determined by the Co-operatives Council;
  - (b) the former member consents in \*writing, the Board may appropriate the amount as a donation to the Co-operative.

**28.2 Debentures or CCUs in satisfaction of amount**

- (1) Where payment of the amount owing to the former member is deferred in accordance with the rules, the Co-operative may allot or issue debentures or CCUs of the Co-operative to the former member in satisfaction of the amount.
- (2) Notwithstanding rule 28.2(1), where:
  - (a) a former member cannot be found, after the use of all due diligence by the Co-operative to find the former member, and
  - (b) the amount otherwise required to be paid under this rule is less than \$50 (or any other amount that may be \*prescribed by the \*regulation),the Co-operative may retain the amount.

**28.3 Payment of Interest to Former Members on Debentures or CCUs**

- (1) In respect of the amount due to a former member where the Co-operative allots or issues debentures or CCUs to the former member in satisfaction of the amount, the debenture or CCU bears interest during any period:

- (a) at the rate (or, if there is more than one rate, at the higher or highest rate) of dividend payable in respect of that period on the share capital of the Co-operative, or
- (b) if the rate of dividend payable in respect of that period has not been determined, at the rate (or the higher or highest rate) payable in respect of the immediately preceding period for which a rate has been determined, or
- (2) A former member may agree to the rate of interest being less than that which would otherwise be payable under this rule or may agree to waive the payment of interest.

#### **28.4 Repayment of Debenture or CCU to Former Member**

- (1) A debenture or CCU allotted or issued to a former member in satisfaction of amounts owing to former members is to be repaid to the former member as soon as repayment would not, in the opinion of the Board, adversely affect the financial position of the Co-operative.
- (2) The debenture or CCU must, in any case be repaid, within 10 years or such shorter period as may be imposed as a condition of any exemption granted by the Co-operatives Council.

#### **29. Confirmation of \*shares held by members**

- (1) Every person whose name is entered as a member in the register of members shall be given, after application and without payment, a share statement certifying the number and class of \*shares held by the person and the amount paid up on those \*shares. Unless otherwise determined by the Board generally or in a particular case, the effective date of the share statement shall be the first day of the \*month in which the share statement was issued.
- (2) Where \*shares are held jointly by several persons the Co-operative shall not be bound to issue more than one share statement, and delivery of a statement to one of the joint holders shall be sufficient delivery to all.
- (3) If a share statement is requested more frequently than twice every 12 \*months, in respect of every share statement issued after the second the Co-operative may require payment of a fee, not exceeding \$10.00.
- (4) In the event of a discrepancy between the register and a share statement, the register shall prevail.

### **Part 3**

#### **Division 5 Calls on \*Shares**

#### **30. Calls on \*Shares**

- (1) The Board may make calls upon the members for any amounts unpaid on the \*shares of members (whether on account of the nominal value of the \*shares or by way of premiums) which are not required by the terms of issue to be paid at fixed times. A call is not valid unless the Board gives at least 14 days notice to the members, specifying the time or times of payment. No call shall exceed one-quarter of the nominal value of the \*shares or be payable at less than one \*month from the last call.
- (2) Each member, on receiving notice under this rule, must pay to the Co-operative at the time(s) specified the amount called on the member's \*shares.
- (3) The joint holders of a \*share are jointly and severally liable to pay all calls in respect of that \*share.
- (4) If a sum called is not paid on or before the day appointed for payment, the person from whom the sum is due is liable to interest on the outstanding sum at the rate of 10% per annum from the day appointed for the payment to the time of actual payment. The Board may waive some or all of the interest at its discretion.
- (5) The Board may, on the issue of \*shares, differentiate between the shareholders in the amount of calls to be made and in the times of payment.
- (6) The Board may revoke or postpone a call.
- (7) The Board may accept from any member willing to advance, all or any part of the money uncalled and unpaid upon any \*shares held by that member. Upon all or any of the money advanced, the Board may pay interest to cover the time between the advancement and the time that the money would otherwise have been payable on the \*shares. The rate of interest can be agreed between the member and the Board.

#### **31. Default in Payment of Calls**

- (1) If a member fails to pay any call or instalment of a call by the day appointed for payment, the Board may, while any part of the call or instalment remains unpaid, serve a notice on the member requiring payment of the unpaid amount together with any interest which may have accrued.
- (2) The notice must name a further day which is at least 14 days from the date of the notice by which payment is to be made. The notice must also state that if there is no payment by that day the \*shares for which the call was made may be forfeited.

- (3) If the requirements of the notice are not complied with by the member, then any \*share for which the notice has been given, may at any time afterwards (but before the payment required by the notice has been made), be forfeited by a resolution of the Board.

**32. Non Payment of Subscription Deemed to be a Call**

- (1) Any sum that, by the terms of issue of a \*share, becomes payable on allotment or at a fixed date, whether on account of the nominal value of the \*share or by way of premium, shall for the purposes of these rules be deemed to be a call duly made and payable on the date on which by the terms of issue the sum becomes payable.
- (2) In the case of non-payment, the provisions of rules 30 and 31 as to payment of interest and expenses, forfeiture or otherwise apply as if the sum had become payable by virtue of a call duly made and notified.

**33. Forfeited \*Shares on Default in Payment of Calls**

- (1) A person whose \*shares have been forfeited for a default in payment of calls shall cease to be a member in respect of the forfeited \*shares but that person shall nevertheless remain liable to pay to the Co-operative all moneys which (as at the date of forfeiture) were payable by him or her to the Co-operative in respect of the \*shares.
- (2) A statutory declaration by a Director of the Co-operative stating that a \*share in the Co-operative has been forfeited on a date stated in the declaration is conclusive evidence of that fact.
- (3) Pursuant to section 80 of the Act the Co-operative has a charge on the paid up amounts of the forfeited \*shares and may appropriate those amounts pursuant to that section

**34. Sale of \*Shares by Board**

- (1) The Co-operative shall, as provided in section 80 of the Act, have a charge upon the \*share or interest in the capital and on the credit balance and deposits of a member or past member, and upon any dividend, interest, bonus or rebate payable to a member or past member in respect of any debt due from the member or past member to the Co-operative, and upon any entry and periodic fees required to be repaid to a member when the member ceases to be a member and the Co-operative may set off any amount paid on account of that \*share or other thing or any amount credited or payable to such member or past member in or towards payment of the debt.
- (2) The charge referred to in sub-rule (1) may be enforced at any time after 7 days notice to the member or past member, by the appropriation by the Co-operative of the thing that is subject to the charge and any \*share in respect of which capital has been appropriated shall be cancelled.
- (3) The Co-operative may sell in such manner as the Board thinks fit all or any \*shares on which the Co-operative has a charge which has become enforceable. No sale shall be made unless some sum in respect of which the charge exists is payable at the date of the sale and until the expiration of 14 days after a notice in \*writing (stating, and demanding payment of, such part of the amount in respect of which the charge exists as is payable at the date when notice is given) has been given to the registered holder of the \*share or the person entitled to it by reason of death or bankruptcy. The notice shall indicate that upon failure to make payment of the sum demanded within the time stipulated the \*shares will be sold by the Board.
- (4) Where the highest offer received by the Board is less than the amount paid up on \*shares to be sold, the Board shall before accepting the offer notify the member of the receipt of such offer and the amount of it and of the Board's intention to accept the offer at the expiration of 14 days if no payment is made before then to the Co-operative of all moneys in respect of which the charge exists.
- (5) From the proceeds of any such sale the Co-operative may deduct the expenses, if any, associated with the sale and may apply the balance to reduce the liability of the member, and if \*surplus remains after such deduction the \*surplus shall be payable to the member whose \*shares were sold.
- (6) For giving effect to any such sale the Board may authorise some person to transfer the \*shares sold to the purchaser of them.

**Part 3**

**Division 6 Transfer and Transmission of \*Shares**

**35. Transfer of \*Shares**

- (1) The instrument of transfer of any \*share shall be the share transfer form in Form A (which appears at the end of these rules) or any other form which the Board approves.
- (2) The share transfer form must be executed by the transferor and the transferee or by their attorneys. The transferor remains the holder of the \*share until the name of the transferee is entered in the register of members.

- (3) A \*share may not be sold or transferred except:
  - (a) in accordance with rule 36 on the death of a member;
  - (b) to a person appointed to administer the estate of a shareholder under a law relating to the administration of the estates of persons who, through mental or physical infirmity, are incapable of managing their affairs; or
  - (c) with the consent of the Board, to any person if there are reasonable grounds for believing that the person will be an \*active member of the Co-operative.
- (4) A member who sells or transfers or disposes of the beneficial interest in any \*shares held by him or her, or enters into an agreement to do so, shall, within 14 days of the sale, transfer, disposal or the agreement being entered into (as the case may be), notify the Co-operative of that fact.
- (5) The instrument of transfer must be left for registration at the registered office of the Co-operative together with the certificate of the \*shares to which it relates and such other information as the Directors may require to show the right of the transferor to make the transfer and the qualification of the transferee to accept the transfer.
- (6) The Board may decline to register any transfer of \*shares for any reason including but not limited to:
  - (a) a transfer of \*shares in breach of these rules or a \*provision of the Act;
  - (b) a transfer of \*shares on which the Co-operative has a lien or charge, or
  - (c) a transfer which has not been duly stamped under the Duties Act 1997 (NSW),and shall be under no liability to assign any reason for such declination. If the Board declines to register a transfer of \*shares it shall send notice of the declination to the transferee within 3 \*months after the date on which all requirements of sub-rule (5) in relation to the transfer have been complied with.
- (7) The Board shall cause a record of all transfers to be made in the books of the Co-operative.
- (8) The registration of transfers may be suspended during the 42 days preceding any general meeting and in addition at such other times and for such periods not exceeding in the whole 60 days in any year as the Board from time to time determine.
- (9) (a) If it may reasonably be expected (having regard to all relevant circumstances) that on registration of a transfer of \*shares the transferee will hold some or all of the \*shares non-beneficially, the instrument of transfer must include a "non-beneficial ownership notice".
  - (b) A non-beneficial ownership notice is a notice that:
    - (i) contains a statement to the effect that, on registration of the transfer, the transferee will hold particular \*shares non-beneficially;
    - (ii) sets out particulars of those \*shares; and
    - (iii) is signed by or on behalf of the transferee.
- (10) (a) If on the registration of an instrument of transfer of \*shares the transferee holds non-beneficially any of the \*shares transferred, notice of that fact must be given to the Co-operative except in respect of any \*shares for which particulars were set out in a non-beneficial ownership notice under sub-rule (9) included in the instrument of transfer.
  - (b) The notice must:
    - (i) set out the name and address of the transferee;
    - (ii) contain a statement to the effect that, as from registration of the transfer, the transferee holds the \*shares non-beneficially;
    - (iii) set out particulars of those \*shares; and
    - (iv) be signed by or on behalf of the transferee.
  - (c) The notice must be given within 14 days after the registration of the transfer (even if before the end of that 14 days the transferee begins to hold any of the relevant \*shares beneficially).
- (11) (a) If an instrument of transfer of \*shares lodged with a Co-operative includes a non-beneficial ownership notice (sub-rule (9)) in respect of particular \*shares ("the relevant \*shares") but on registration of the transfer the transferee holds some or all of the relevant \*shares beneficially, notice of that fact must be given to the Co-operative.
  - (b) The notice must:
    - (i) set out the name and address of the transferee;
    - (ii) contain a statement to the effect that, as from registration of the transfer, the transferee holds the relevant \*shares beneficially;
    - (iii) set out particulars of the relevant \*shares; and
    - (iv) be signed by or on behalf of the transferee.
  - (c) The notice must be given within 14 days after the registration of the transfer (even if before the end of that 14 days the transferee begins to hold any of the relevant \*shares non-beneficially).

- (12)(a) If the nature of a person's shareholding in the Co-operative changes by reason of the person commencing to hold any \*shares beneficially that the person currently holds non-beneficially or commencing to hold any \*shares non-beneficially that the person currently holds beneficially, the person must notify the change to the Co-operative.
- (b) The notice must:
  - (i) set out the name and address of the person;
  - (ii) contain a statement to the effect that, as from the time of the change, the person holds the \*shares beneficially or non-beneficially (as appropriate);
  - (iii) specify the time of the change and set out particulars of the \*shares affected; and
  - (iv) be signed by or on behalf of the person.
- (c) The notice must be given within 14 days after the change (even if before the end of that 14 days another such change affecting any of the \*shares occurs).
- (13)(a) A person is to be taken to hold particular \*shares non-beneficially whenever the person:
  - (i) holds the \*shares in a capacity other than that of sole beneficial owner; or
  - (ii) without limiting paragraph (i), holds the \*shares as trustee for, as nominee for, or otherwise on behalf of or on account of, another person.
- (b) A person is to be considered to hold \*shares beneficially at a particular time unless the person holds the \*shares non-beneficially at that time.
- (14)(a) The register of members kept by the Co-operative must contain a statement of the \*shares that each member holds beneficially and of the \*shares that each member holds non-beneficially.
- (b) In determining for the purposes of an entry in the register whether a member of the Co-operative holds \*shares beneficially or non-beneficially, regard is to be had only to the following information:
  - (i) information contained in a non-beneficial ownership notice under sub-rule (9) included in an instrument of transfer registered by the Co-operative;
  - (ii) information contained in a notice given to the Co-operative under sub-rules (10), (11) or (12).

### **36. Death of Member**

- (1) On the death of a member the Co-operative will deal with the member's \*shares or interests in \*shares in the following manner:
  - (a) if the \*shares were held jointly the Co-operative will only recognise the surviving holder(s) as shareholders;
  - (b) if the \*shares were held solely by the deceased member the \*shares may be transferred to one of the following:
    - (i) the administrator or executor; or
    - (ii) at the request of the administrator or executor and with the consent of the Board, another person provided there are reasonable grounds for believing that the person will be an \*active member of the Co-operative.
- (2) Where the total value of a deceased member's \*shares or interest in the Co-operative does not exceed \$10,000.00 (or such other amount as may be \*prescribed) the Board may, subject to its aforesaid discretion, give effect to section 83 of the Act by transferring the \*share to the person appearing to the Board to be entitled thereto. Where necessary such value shall be determined by the auditor.
- (3) The Co-operative may purchase the \*shares of the deceased member in accordance with rule 27.

### **37. Registration of Official Trustee in Bankruptcy**

- (1) Where a member is declared bankrupt, the official trustee in bankruptcy may be registered as the holder of the \*share held by the bankrupt member.
- (2) The Board may register the official trustee in bankruptcy as the holder of a \*share in which a bankrupt member has an entitlement in equity, with the consent of the holder of the \*share.

### **38. Registration as Administrator of Estate on Incapacity of Member**

A person appointed under a law of a state or territory to administer the estate of another person who, through mental or physical infirmity, is incapable of managing his or her affairs, may be registered as the holder of a \*share held by the incapable person whose estate the appointed person is administering.

### **39. Entitlements and Liabilities of Person Registered as Trustee, Administrator etc**



- (1) A person who is entitled to a \*share by reason of the death, bankruptcy or the incapacity of the holder is also entitled to the dividends and other advantages to which that person would be entitled if the person were the registered holder of the \*share.
- (2) A person registered pursuant to rules 36, 37 and 38 is, while so registered, subject to the same liabilities in respect of the \*share as those to which that person would have been subject if the \*share had remained, or had been registered in the name of the deceased person, the incapable person or the bankrupt person.

### **Part 3**

#### **Division 7 Co-operative Capital Units**

##### **40. Co-operative Capital Units**

- (1) The Co-operative may issue co-operative capital units (herein called "CCUs") to a person (whether or not a member of the Co-operative) pursuant to Section 273 of the Act, where:
  - (a) the terms of issue have been approved by a \*special resolution of the Co-operative;
  - (b) the issue is made pursuant to an offer accompanied by a copy of a statement approved by the \*Registrar for the purposes of the issue;
  - (c) the \*Registrar approves the terms of the issue;
  - (d) the statement approved by the \*Registrar sets out:
    - (i) the terms of issue of the CCUs;
    - (ii) the rights of the holders of the CCUs;
    - (iii) the terms of redemption of the CCUs; and
    - (iv) the manner of transferability of the CCUs.
  - (e) the terms of issue detail whether or not there is any of the following entitlements:
    - (i) entitlement to repayment of capital;
    - (ii) entitlement to participate in surplus assets and profits;
    - (iii) entitlement to interest on capital (whether cumulative or non cumulative interest);
    - (iv) entitlement to priority of payment of capital and dividend in relation to \*shares in the Co-operative.
- (2) Any of the following terms may be included in the terms of issue of any CCUs issued by the Co-operative:
  - (a) Unless the Co-operative and the registered holder of CCUs agree otherwise any principal and interest payable in cash in respect of CCUs must be paid by a cheque drawn in favour of the registered holder and sent by pre-paid post to the registered address of the registered holder or such other place as is agreed by the registered holder and the Co-operative.
  - (b)
    - (i) The Co-operative must establish and maintain a register of holders of CCUs in Sydney and such other places as the Co-operative determines.
    - (ii) Every person whose name is entered as a holder of a CCU in the register of holders of CCUs shall be given after application and without payment, a CCU statement certifying the number of CCUs held by the person and the face value thereof. Unless otherwise determined by the Board generally or in a particular case, the effective date of the CCU statement shall be the first day of the \*month in which the CCU statement was issued.
    - (iii) Where CCUs are held jointly by several persons the Co-operative shall not be bound to issue more than one CCU statement, and delivery of a statement to one of the joint holders shall be sufficient delivery to all.
    - (iv) If a CCU statement is requested more frequently than twice every 12 \*months, in respect of every statement issued after the second the Co-operative may require payment of a fee, not exceeding \$10.00.
    - (v) In the event of a discrepancy between the register and a CCU statement the register shall prevail.
  - (c) The Co-operative must enter on the register the date of the resolution approving the terms of issue; names and addresses and occupations of the holders of CCUs; the number and series of the CCU; the face value of CCUs held by each holder; the rate of interest and the nature of the interest (whether cumulative or non-cumulative); the date of payment of interest; the ranking for priority of payment of capital and interest on a winding up of the Co-operative; the entitlement (if any) to surplus assets and profits on a winding up of the Co-operative; if transferred, the name, address and occupation of the transferee; the redemption value (if known); and the date and manner of redemption.
  - (d) Any change of name or address of a holder of a CCU must immediately be notified in \*writing to the Co-operative. Any change of name must be accompanied by such evidence as the Directors of the Co-operative reasonably require. Once notice under this clause has been received, the Co-operative must amend the register accordingly.
  - (e) The register will be open at all reasonable times during normal business hours for inspection by the registered holder of CCUs or any person authorised in \*writing by the registered holder, or any creditor free of charge.

- (f) The Co-operative may from time to time close the register for any period or periods not exceeding sixty (60) days in any one year.
- (g) No notice of any express, implied or constructive trust will be entered in the register.
- (h) Subject to sub-rule (3), each registered holder of CCUs may transfer his or her CCUs or any one of them by an instrument in \*writing in a form approved by the Co-operative.
- (i) No fee will be charged on the registration of any transfer of CCUs.
- (j) Subject to sub-clause (m) and (r) the Co-operative will recognise the registered holder of a CCU as the absolute owner of the CCU and will not be bound to take notice or see to the execution of any trust whether expressed, implied or constructive to which any CCUs may be subject. The receipt of the registered holder of CCUs or in the case of joint registered holders the receipt of any one of them for the interest from time to time accruing in respect of those CCUs and for any monies payable on redemption of those CCUs shall be a good discharge to the Co-operative notwithstanding any notice the Co-operative may have whether expressed or otherwise of the right, title and interest of any person to or in those CCUs or those monies.
- (k) Every holder of CCUs registered pursuant to a transfer will be recognised by the Co-operative as entitled to his or her CCUs free from any equity set off or cross claim on the part of the Co-operative against the original or any intermediate holder.
- (l) The executors or administrators of a deceased registered holder of CCUs (not being one of several joint holders) will be the only person recognised by the Co-operative as having any title to those CCUs.
- (m) In case of the death of any joint registered holder of CCUs the survivor or survivors will be the only person or persons recognised by the Co-operative as having any title to or interest in those CCUs.
- (n) Every instrument of transfer must be executed by the transferor and by the transferee. The transferor will be deemed to remain the owner of any CCUs until the name of the transferee is entered in the register in respect of those CCUs.
- (o) Every instrument of transfer must be left at the registered office of the Co-operative or such place as the Co-operative from time to time directs for registration accompanied by any certificate of CCUs to be transferred, if any, and such other evidence as the Directors of the Co-operative may require to prove the title of the transferor or his or her right to transfer CCUs.
- (p) All registered instruments of transfer must be retained by the Co-operative.
- (q) No transfer will be registered during the fourteen (14) days immediately preceding the days fixed for payment of interest on CCUs or such shorter period as the Co-operative may decide.
- (r) Any person becoming entitled to CCUs because of the death or insolvency of any registered holder of those CCUs may upon producing such evidence of his or her title as the Directors of the Co-operative require, either be registered himself or herself as the holder of those CCUs or subject to the conditions as to transfer may transfer those CCUs. This clause includes any case in which a person becomes entitled as a survivor of persons registered as joint holders.
- (s) The Directors of the Co-operative may retain the interest payable on any CCUs to which any person under rule 40(2)(r) is entitled until that person has been registered or duly transfers those CCUs.
- (t) All CCUs repaid, redeemed, or purchased by the Co-operative shall by that fact be cancelled and shall not be re-issued.
- (u) If CCUs are held by or on behalf of a person resident outside Australia then it is a condition precedent to the right of the holder of these CCUs to receive the payment of the principal sum represented by his or her CCUs, that all necessary approvals under any statutory requirements which may then be in existence are obtained.
- (3) Notwithstanding the terms of issue of any CCUs the Board may decline to register the transfer of any CCUs and shall be under no liability to assign any reason for such refusal. If the Board declines to register a transfer of CCUs it shall send notice of the declination to the transferee within three (3) \*months after the date on which the Board is notified that the transferee has complied with all the requirements to transfer the CCUs.
- (4) A reference in this rule to the payment of interest includes, subject to the terms of issue, the payment of interest from \*surpluses or from retained profits of the Co-operative.

#### **41. Rights Attaching to CCUs**

- (1) Each holder of a CCU is entitled to one vote only at a meeting of the holders of CCUs.
- (2) The rights of holders of CCUs may be varied:
  - (a) only in the manner and extent permitted by their terms of issue; and
  - (b) only with the consent of at least 75% of the holders of CCUs given in \*writing or at a meeting of CCU holders;
- (3) The holder of a CCU has, in his, her or its capacity as such a holder, none of the rights and entitlements of a member of the Co-operative.

- (4) The holder of a CCU is entitled to receive notice of all meetings of the Co-operative and all other documents in the same manner as the holder of a debenture of the Co-operative.
- (5) In discharging their duties it is proper for the Directors of the Co-operative to take into account that the holders of CCUs have none of the rights and entitlements of, and are not to be regarded as, members of the Co-operative.

### Part 3

#### Division 8 Debentures

##### 42. Terms of Issue of Debentures

- (1) Subject to the \*provisions of the Act and in particular to sections 266 and 266A the Co-operative may issue debentures.
- (2) Any of the following terms may be included in the terms of issue of any debentures issued by the Co-operative:
  - (a) Unless the Co-operative and the registered holder of debentures agree otherwise:
    - (i) Any principal and interest payable in cash in respect of debentures must be paid by a cheque drawn in favour of the registered holder and sent by pre-paid post to the registered address of the registered holder or such other place as is agreed by the registered holder and the Co-operative.
    - (ii) The registered holder of a debenture must surrender the certificate, if any, relating to that debenture if that debenture is redeemed by the Co-operative whether by payment of cash or by issue of a new debenture.
  - (b) (i) The Co-operative must establish and maintain a register of holders of debentures in Sydney and such other places as the Co-operative determines.
  - (ii) Every person whose name is entered as a holder of debentures in the register of debenture holders shall be given, after application and without payment, a debenture statement of holding certifying the number of debentures held by the person and the face value thereof. Unless otherwise determined by the Board generally or in a particular case, the effective date of the statement shall be the first day of the \*month in which the statement was issued.
  - (iii) Where debentures are held jointly by several persons the Co-operative shall not be bound to issue more than one statement of holding, and delivery of a statement to one of the joint holders shall be sufficient delivery to all.
  - (iv) If a statement of holding is requested more frequently than twice every 12 \*months, in respect of every statement issued after the second the Co-operative may require payment of a fee, not exceeding \$10.00.
  - (v) in the event of a discrepancy between the register and a debenture statement, the register shall prevail.
  - (c) The Co-operative must enter on the register the date of the resolution approving the terms of issue; names and addresses and occupations of the holders of debentures; the number and series of the debenture; the face value of debentures held by each holder; the rate of interest and the nature of the interest (whether cumulative or non-cumulative); the date of payment of interest; if transferred, the name, address and occupation of the transferee; the redemption value (if known); and the date and manner of redemption.
  - (d) Any change of name or address of a holder of a debenture must immediately be notified in \*writing to the Co-operative. Any change of name must be accompanied by such evidence as the Directors of the Co-operative reasonably require. Once notice under this clause has been received, the Co-operative must amend the register accordingly.
  - (e) The register will be open at all reasonable times during normal business hours for inspection by the registered holder of debentures or any person authorised in \*writing by the registered holder, or any creditor free of charge.
  - (f) The Co-operative may from time to time close the register for any period or periods not exceeding sixty (60) days in any one year.
  - (g) No notice of any express, implied or constructive trust will be entered in the register.
  - (h) Subject to sub-rule (3), each registered holder of debentures may transfer his or her debentures or any one of them by an instrument in \*writing in a form approved by the Co-operative.
  - (i) No fee will be charged on the registration of any transfer of debentures.
  - (j) Subject to sub-clause (m) and (r) the Co-operative will recognise the registered holder of a debenture as the absolute owner of the debenture and will not be bound to take notice or see to the execution of any trust whether expressed, implied or constructive to which any debentures may be subject. The receipt of the registered holder of debentures or in the case of joint registered holders the receipt of any one of them for the interest from time to time accruing in respect of those debentures and for any monies payable on redemption of those debentures shall be a good discharge to the Co-operative notwithstanding any notice the Co-operative may have whether expressed or otherwise of the right, title and interest of any person to or in those debentures or those monies.
  - (k) Every holder of debentures registered pursuant to a transfer will be recognised by the Co-operative as entitled to his or her debentures free from any equity set off or cross claim on the part of the Co-operative against the original or any intermediate holder.

- (l) The executors or administrators of a deceased registered holder of debentures (not being one of several joint holders) will be the only person recognised by the Co-operative as having any title to those debentures.
  - (m) In case of the death of any joint registered holder of debentures the survivor or survivors will be the only person or persons recognised by the Co-operative as having any title to or interest in those debentures.
  - (n) Every instrument of transfer must be executed by the transferor and by the transferee. The transferor will be deemed to remain the owner of any debentures until the name of the transferee is entered in the register in respect of those debentures.
  - (o) Every instrument of transfer must be left at the registered office of the Co-operative or such place as the Co-operative from time to time directs for registration accompanied by any certificate of debentures to be transferred and such other evidence as the Directors of the Co-operative may require to prove the title of the transferor or his or her right to transfer debentures.
  - (p) All registered instruments of transfer must be retained by the Co-operative.
  - (q) No transfer will be registered during the fourteen (14) days immediately preceding the days fixed for payment of interest on debentures or such shorter period as the Co-operative may decide.
  - (r) Any person becoming entitled to debentures because of the death or insolvency of any registered holder of those debentures may upon producing such evidence of his or her title as the Directors of the Co-operative require, either be registered himself or herself as the holder of those debentures or subject to the conditions as to transfer may transfer those debentures. This clause includes any case in which a person becomes entitled as a survivor of persons registered as joint holders.
  - (s) The Directors of the Co-operative may retain the interest payable on any debentures to which any person under rule 42(2)(r) is entitled until that person has been registered or duly transfers those debentures.
  - (t) All debentures repaid, redeemed, or purchased by the Co-operative shall by that fact be cancelled and shall not be re-issued.
  - (u) If debentures are held by or on behalf of a person resident outside Australia then it is a condition precedent to the right of the holder of these debentures to receive the payment of the principal sum represented by his or her debentures, that all necessary approvals under any statutory requirements which may then be in existence are obtained.
- (3) Notwithstanding the terms of issue of any debentures the Board may decline to register the transfer of any debentures and shall be under no liability to assign any reason for such refusal. If the Board declines to register a transfer of debentures it shall send notice of the declination to the transferee within three (3) \*months after the date on which the Board is notified that the transferee has complied with all the requirements to transfer the debentures.

## **Part 4 General Meetings**

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### **Division 1 Convening General Meetings**

#### **43. Annual General Meetings**

##### **43.1 Time and location**

- (1) The annual general meeting of the Co-operative must be held within 5 \*months after the end of each \*financial year or within such further time as may be \*prescribed or permitted by the \*Registrar.
- (2) Each annual general meeting will be held at a place or places nominated by the Board.

##### **43.2 Requisition by members of resolution to be considered by AGM**

- (1) On the requisition of at least 10 active members (or such other number as may be specified in the Act), if the requisition is made in accordance with this rule and the Act, the Co-operative must:
  - (a) give notice of any resolution specified in the requisition which is intended to be moved at the next annual general meeting and which may be properly moved at that meeting; and
  - (b) circulate any statement of not more than 1000 words with respect to the matter specified in the proposed resolution or the business to be dealt with at the next annual general meeting,to those members entitled to receive notice of any general meeting by serving a copy of the resolution and/or statement on those members in the manner permitted under these rules for the service of notices of general meetings.
- (2) A statement or notice required to be served or given under this rule is to be served or given at the same time as notice of the annual general meeting, or if it is not practicable to do so, the statement or notice is to be served or given as soon as practicable after that time.
- (3) Unless the Board resolves otherwise the cost of complying with rule 43.2(1) is to be paid by the requisitioning members.
- (4) The Co-operative is not bound under this rule to give notice of any resolution or to circulate any statement unless:

- (a) a copy of the requisition signed by the requisitioning members (or signed copies of the requisition that between them contain the signatures of the required number of active requisitioning members) is (or are) deposited at the registered office of the Co-operative:
    - (i) in the case of a requisition requiring that notice of a resolution be given to members – not less than 6 weeks before the meeting, and
    - (ii) in the case of any other requisition - not less than 1 week before the meeting, and
  - (b) subject to sub-rule (3), there is deposited or tendered with the requisition a sum reasonably sufficient to meet the Co-operative's expenses in giving effect to the requisition.
- (5) Notwithstanding the requirements of sub-rule 4(a)(i), if, after the requisition requiring notice of a resolution has been deposited at the registered office of the Co-operative, an annual general meeting is called for a date 6 weeks or less after the requisition has been deposited, the requisition though not deposited within the time required by sub-rule (4)(a)(i) is to be considered to have been properly deposited for the purposes of this rule.
- (6) The Co-operative is not bound under this rule to circulate any statement if, on the application either of the Co-operative, or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this rule and the Act are being abused to secure needless publicity for defamatory matter.
- (7) The business that may be dealt with at an annual general meeting includes any resolution of which notice is given in accordance with this rule, and, for the purposes of this rule and rule 49(2), notice is to be considered to have been so given despite any accidental failure to give notice to a member or members.

**44. Special General Meetings**

- (1) All general meetings of the Co-operative, other than annual general meetings, are special general meetings.
- (2) Each special general meeting will be held at a place or places nominated by the Board.

**45. Convening General Meetings**

- (1) The Board may, whenever it thinks fit, convene a special general meeting of the Co-operative.
- (2) If an annual general meeting is not held in accordance with Rule 43.1 (1) or Rule 43.1(2), the members may requisition such a meeting in accordance with the Act and Rule 46.

**46. Requisition of General Meetings**

- (1) The Board must convene a general meeting of the Co-operative on the requisition in \*writing by either 200 or more \*active members, or any \*active members who together are able to cast at least 10% of the total number of votes to be cast at a meeting of the Co-operative, whichever is the lesser.
- (2) The requisition must:
  - (a) state the objects of the meeting; and
  - (b) be signed by the requisitioning members (and may consist of several documents in like form each signed by one or more of the requisitioning members); and
  - (c) be served on the Co-operative by being lodged in person at the registered office of the Co-operative.
- (3) A meeting requisitioned by members must be held as soon as practicable and, in any case, must be held within 2 \*months after the requisition is served.
- (4) Where the Board does not convene a meeting 21 days after the requisition is served, the following provisions apply:
  - (a) the requisitioning members (or any of them representing at least half their aggregate voting rights) may convene the meeting in the same manner as nearly as possible as meetings are convened by the Board;
  - (b) for that purpose they may request the Co-operative to supply a \*written statement setting out the names and addresses of the persons entitled when the requisition was served to receive notice of general meetings of the Co-operative;
  - (c) the Board must send the requested statement to the requisitioning members within 7 days after the request for the statement is made.
  - (d) the meeting convened by the requisitioning members must be held not later than 3 \*months after the requisition is served;
  - (e) any reasonable expenses incurred by the requisitioning members because of the Board's failure to convene the meeting must be paid by the Co-operative;
  - (f) any such amount required to be paid by the Co-operative is to be retained by the Co-operative out of any money due from the Co-operative by way of fees or other remuneration in respect of their services to such of the Directors as were in default.

**47. Notice of General Meetings**

- (1) Subject to the requirements of these rules for notice of \*special resolutions, and subject to the requirements of rule 92, at least 14 days' notice must be given of any general meeting.
- (2) Any member who has a resolution which may lawfully be put to a general meeting must give \*written notice of the terms of the resolution to the Co-operative at least 40 days prior to the date of the meeting.
- (3) The Board must insert into the next notice convening a general meeting any business which a member has notified of his or her intention to move and for which notification has been given in accordance with this rule.
- (4) The notice of a general meeting must specify the place or places, the day and the hour of the meeting and, in the case of special business, the general nature of that business.
- (5) Notice of every general meeting must be provided to:
  - (a) every member of the Co-operative; and
  - (b) every person entitled to a \*share in consequence of the death, incapacity or bankruptcy of a member, who, but for that member's death, incapacity or bankruptcy, would not be entitled to receive notice of the meeting; and
  - (c) the auditors and solicitors of the Co-operative.
- (6) Except as provided in this rule, no other persons are entitled to receive notices of general meetings.
- (7) The non-receipt of the notice of a general meeting by any member does not invalidate the proceedings at such general meeting.

**Part 4**

**Division 2 Conduct of General Meetings**

**48. Conduct of General Meeting in Multiple Locations**

- (1) The Board may convene a general meeting in more than one location but the members in each of the locations must be linked by closed-circuit television, video conference, telephone conference, or other means of instantaneous audio or visual communication.
- (2) If a general meeting is conducted in more than one location:
  - (a) any person who speaks at the general meeting must be able to be heard by all other persons present at each location;
  - (b) at least one Director or officer of the Co-operative or other person nominated by the Board must be present at each location; and
  - (c) at least two scrutineers, who are not otherwise entitled to participate in the meeting, must be present at each location.
- (3) The chairperson of the general meeting must appoint a Director, or officer or other person at each location to introduce members who speak on a matter before the meeting.
- (4) If the chairperson, in his or her absolute discretion, considers there to have been an unacceptable breakdown in audible communication between any two or more locations the chairperson must adjourn the meeting in accordance with rule 52 (but the chairperson does not need the consent of the majority of members present to adjourn).
- (5) For the purposes of rule 48(4) a declaration by the chairperson of the meeting that there has been an unacceptable breakdown in audible communication between any two or more locations is conclusive evidence of that fact.

**49. Business of Annual and Special General Meetings**

- (1) The ordinary business of the annual general meeting is:
  - (a) to confirm the minutes of the last general meeting;
  - (b) to receive from the Board, auditors, or any officers of the Co-operative reports upon the transactions of the Co-operative during the \*financial year, including balance sheet, trading account, profit and loss account, statement of source and application of funds, and the state of affairs at the end of that year; and
  - (c) to determine the rates or quantum of any dividend, bonus and rebate; and
  - (d) if applicable, to elect or to declare the results of an election of Directors and determine the remuneration of Directors.
- (2) A general meeting including the annual general meeting may transact special business of which notice has been given to members in accordance with these rules.
- (3) All business of an annual general meeting, other than business of an annual general meeting that is by this rule termed ordinary business, should be deemed special business.

**50. Quorum at General Meetings**

- (1) No item of business shall be transacted at any general meeting unless a quorum of members is present at the place or places of the meeting at the time when the meeting is considering that item.
- (2) Twenty five (25) \*active members present in person (whether at one or more than one places at which the general meeting is convened) and entitled to vote constitute a quorum provided always that prior to the Implementation Date the quorum shall be five (5) such members.
- (3) If a quorum is not present within half an hour of the scheduled start of a general meeting:
  - (a) if convened by the requisition of members, the chairperson must dissolve the meeting;
  - (b) in any other case, the chairperson must adjourn the meeting in accordance with rule 52 (but in this case the chairperson does not need the consent of the majority of members present to adjourn under Rule 52(2)).

**51. Chairperson at General Meetings**

- (1) The chairperson, if any, of the Board will be the chairperson at every general meeting of the Co-operative.
- (2) If there is no chairperson, if the chairperson is more than 15 minutes late or is unwilling to act as chairperson, then the deputy chairperson shall act as chairperson but in his or her absence the members present must choose someone from their number to be chairperson until the chairperson attends or is willing to act.

**52. Adjournment and Recommencement of General Meetings**

- (1) The chairperson may adjourn the meeting from time to time and from place to place.
- (2) Before the chairperson may adjourn a general meeting the consent of a majority of the members present must be obtained, except in the event of a breach of the peace or in the event of other circumstances where in the opinion of the chairperson it is not practical to obtain such consent.
- (3) If a majority of the members present direct the chairperson to adjourn a general meeting then the chairperson must do so.
- (4) The only business which may be considered at the recommencement of an adjourned general meeting is the business that was left unfinished at the general meeting from which the adjournment took place.
- (5) If a general meeting is adjourned there is no requirement to notify members of the recommencement unless the adjournment is for more than 21 days.

**53. Standing Orders at General Meetings**

The following standing orders shall be observed at all meetings of the Co-operative, subject to any suspension of, or amendment of, or addition to, these orders adopted for the purposes of a meeting by the members present and entitled to vote at that meeting:

- (1) Any member wishing to speak shall rise and wait to be recognised by the chairperson before speaking. The chairperson shall be heard without interruption.
- (2) Motions and Rules of Debate
  - (a) If required by the chairperson, the proposer of any motion or amendment shall submit it in \*writing.
  - (b) No motion or amendment may be debated until it has been seconded by a member other than the proposer. Only the proposer of the motion or amendment shall speak to it until it has been seconded.
  - (c) The proposer of the motion or amendment may speak for a maximum of 10 minutes with all other speakers limited to 5 minutes. The proposer of every motion (but not of an amendment) has the right of reply. and may reply for a maximum of 5 minutes and must not introduce new material. A proposer may forego the right to speak to the motion when moving it but still retain the right of reply.
  - (d) The seconder of the motion may speak to the motion or amendment, or may reserve the right to speak later.
  - (e) Except for the proposer, no member shall speak more than once to the motion or amendment. The chairperson will call for speakers for and against in order, where practical.
  - (f) Only one amendment to a motion shall be submitted to the meeting at a time. Whenever an amendment to an original motion is put forward, no second amendment shall be considered until the first amendment is disposed of. If the amendment is passed, then the rules of debate apply to the motion as amended. If an amendment is defeated, further amendments to the original motion may be moved.
  - (g) Any member may raise a "Point of Order" which takes precedence over all other business. A decision by the chairperson on a point of order shall be final.

- (h) Any discussion may be closed by the resolution "That the question be now put". This resolution must be duly moved and seconded by members who have not participated in the debate, and put to the vote without debate. If passed, the original proposer of the motion still has the right of reply after which the motion is put to the vote.
- (i) A motion or amendment shall not be withdrawn except by its mover and with the consent of the chairperson. A motion cannot be withdrawn while an amendment is being discussed.
- (3) In addition to the power given to the chairperson under sub-rule 53(2), these standing orders may be suspended for a time on a motion duly moved and seconded and passed by a simple majority of the meeting. This motion may be debated.
- (4) In addition to the right of the representative of the Co-operative's auditor to speak at all meetings of the Co-operative, or answer questions at such a meeting, any visitor (including, without limitation, a representative of the Co-operative's legal advisers or other consultants, or a member of senior management) invited by the Board to attend the meeting, may speak on any issue at such a meeting with the permission of the chairperson, provided that the permission may be conditional.
- (5) The chairperson may in his or her absolute discretion permit a departure from these standing orders where to do so will, in the opinion of the chairperson, be for the benefit of the members and the Co-operative as a whole.
- (6) Every director is entitled to be present and to speak at all meetings of the Co-operative and a director who is not a member may, with the approval of the Board, propose any motion or amendment.
- (7) Any matters not dealt with in the above standing orders shall be determined by the chairperson who may first consult with the Co-operative's legal advisers, if available.

## **Part 4**

### **Division 3 Voting**

#### **54. One Member One Vote**

- (1) A member of the Co-operative has one vote only in respect of any question or motion arising at or for the purposes of a general meeting of the Co-operative or arising in connection with the election of Directors or otherwise arising for determination by postal ballot.
- (2) (a) A member's right to vote attaches to and is conferred by membership of the Co-operative and is not attached to, or conferred by, any \*share held by the member in the Co-operative.  
(b) A member is entitled to vote in respect of any resolution notwithstanding that the member has an interest in the subject matter of the resolution or may benefit from the passing of the resolution.
- (3) At any meeting of the Co-operative a member, whose membership is required to be cancelled under the Act, is not entitled to attend and is not entitled to vote and in any postal ballot of the Co-operative a member, whose membership is required to be cancelled under the Act, is not entitled to vote.
- (4) A member of the Co-operative is not entitled to vote at a meeting of the Co-operative or in a postal ballot of the Co-operative:
  - (a) if the person is not an \*active member of the Co-operative;
  - (b) the person is excluded from voting under the Act or these rules.

#### **Attendance and Voting at General Meetings**

- (5) At any general meeting a resolution put to a vote of the meeting must first be decided on a show of hands. A proxyholder may not vote in respect of any proxy held on a show of hands but a corporate representative appointed under section 68 may vote on a show of hands.
- (6) A resolution shall be determined by a poll if the chairperson in his or her absolute discretion calls for a poll or if a poll is demanded by 10 or more members before or on the declaration of the result of the show of hands. On a poll a proxyholder may vote any proxies held.
- (7) If no poll is required by the chairperson or no poll is demanded, a declaration by the chairperson that a resolution has, on a show of hands, been carried, carried unanimously, by a particular majority or lost and an entry to that effect in the book of the proceedings of the Co-operative is evidence of the fact. No proof is needed of the number or proportion of the votes recorded in favour of, or against, that resolution.
- (8) If a poll is demanded it must be taken in a manner which the chairperson directs. The chairperson shall appoint a returning officer and at least 2 scrutineers for the purpose of taking a poll. Unless the meeting is adjourned the result of the poll is taken to be the resolution of the meeting at which the poll was demanded.
- (9) A poll demanded on the election of a chairperson, or on a question of adjournment, must be taken immediately and without debate.
- (10) A demand for poll may be withdrawn.
- (11) All resolutions, except \*special resolutions, are determined by a simple majority.



**55. Effect of \*Relevant Interest and Transfer of Beneficial Interest on Voting Rights**

- (1) A member is not entitled to vote if another person (whether or not a member of the Co-operative) has a \*relevant interest in any \*share held by the member or in the right to vote of the member, unless an order to the contrary is made in accordance with the Act.
- (2) A member who has sold or transferred, or disposed of the beneficial interest in, that member's \*shares, or has agreed to do any of those things, is not entitled to vote at any meeting of the Co-operative.

**56. Notice to be Given of Voting Interest**

- (1) A person (whether or not a member of the Co-operative) must give notice in \*writing to the Co-operative within 5 \*business days of becoming aware that the person has, or has ceased to have, a \*relevant interest in the right to vote of a member in the Co-operative.
- (2) For the purposes of this rule, "notice" means a notice in accordance with the \*regulation.

**57. Proxy Votes and Corporate Representative Votes**

- (1) Voting at a general meeting may be by proxy or by corporate representative.
- (2) (a) An instrument appointing a proxy must be signed by the member and in the form of the proxy form in Form B (which appears at the end of these rules) or any other form which the Board approves.
  - (b) No person shall act as a proxy unless the person is an \*active member.
  - (c) No person shall act as proxy for more than 10 persons on any one occasion. This sub-rule does not apply if the proxy acts under an instrument of proxy which specifies the manner in which a proxy is to vote in respect of a particular resolution.
  - (d) A proxy shall not be entitled to vote on a show of hands but may vote in any poll.
- (3) (a) A body corporate which is a member of the Co-operative may appoint a person to represent it in respect of its membership by an instrument in the form of the corporate representative form in Form C (which appears at the end of these rules) or any other form which the Board approves.
  - (b) A body corporate must not appoint a person to represent the body corporate as a member of the Co-operative if such person is a member of the Co-operative or is the representative of another body corporate member.
  - (c) A person is not qualified to be appointed as the representative of a company that is not a listed corporation (within the meaning of the \*Corporations Act) unless the person is an officer, member or employee of the company.
  - (d) A person appointed in accordance with the Act and this rule to represent a member who is a body corporate is to be considered to be that member for the purpose of voting at meetings of the Co-operative.

**58. Lodgment of Proxy Form and Corporate Representative Form**

- (1) A proxy form or corporate representative form is not valid unless it is lodged at the Co-operative's registered office, or at such other place as is specified for that purpose in the notice convening the meeting. A proxy form or corporate representative form may be lodged at the specified place by post or by delivering it in person.
- (2) If the proxy form or corporate representative form is signed by the member's attorney the authority under which the form was signed, or a notarially certified copy of the authority, must be lodged with the proxy form or corporate representative form.
- (3) The documents required under this rule must be deposited at the specified place or specified places at least 24 hours before
  - (a) the meeting at which the form may be used; or
  - (b) the closing of the ballot for which the form may be used,or such later time as the chairperson shall permit.

**59. Revocation of Proxy**

- (1) A vote given in accordance with the terms of a proxy form, or of a power of attorney, is valid even if the member dies, is of unsound mind, the appointment of the proxy is revoked or the authority of the attorney who signed the proxy form is revoked.
- (2) Rule 59(1) does not apply where the Co-operative has received \*written notice of any of the things in rule 59(1) before the commencement of the meeting or adjourned meeting at which the instrument is used or the power is exercised. If the Co-operative has received \*written notice then the vote is invalid.

### 60. Restriction on Voting Entitlement Under Power of Attorney

A person is not entitled to exercise a member's right to vote under a power of attorney if that person has a power of attorney to vote in respect of another member.

## Part 4

### Division 4 Other Provisions for passing Resolutions

#### 61. Postal Ballot

The Co-operative may hold a postal ballot to determine any issue or proposal by the members in the manner set out in the \*regulation.

#### 62. Notice of \*Special Resolutions

Notice of a \*special resolution must be given to any person entitled to receive notice under rule 47 at least 21 days before the general meeting and must specify the intention to propose the resolution as a \*special resolution at that meeting, the reasons for the making of the \*special resolution and the effect of the \*special resolution being passed.

#### 63. Passing Resolutions

- (1) A \*special resolution means a resolution of which notice has been given of the intention to propose the resolution as a \*special resolution and which is passed by:
  - (a) two-thirds of the members who vote at a general meeting in person or by proxy;
  - (b) two-thirds of the members who vote in a postal ballot; or
  - (c) three-quarters of the members who cast votes in a special postal ballot of members.
- (2) A special postal ballot for the purposes of passing a \*special resolution must be conducted in relation to all items of business required by the Act to be passed by a \*special resolution conducted in a special postal ballot, including without limitation, the following items of business:
  - (a) a conversion of the Co-operative to a non-trading Co-operative;
  - (b) transfer of incorporation;
  - (c) an acquisition or disposal of assets referred to in section 285 (unless by order in \*writing the Co-operative has been exempted from compliance with all or specified \*provisions of section 285 and or section 194);
  - (d) maximum permissible level of share interest in the Co-operative,
  - (e) takeover,
  - (f) merger,
  - (g) transfer of engagements,
  - (h) members' voluntary winding up.
- (3) A \*special resolution has effect from the date it is passed except in the following circumstances:
  - (a) the removal of an auditor,
  - (b) the expulsion of a member,
  - (c) the \*alteration of a rule,
  - (d) any matter for which a \*special resolution is required by the Act to be passed by special postal ballot (other than a special postal ballot in favour of a voluntary winding up).

in which case it has effect from the time it is registered by the \*Registrar.

## Part 5 Management and Control

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### Division 1 The Board

#### 64. Board of Directors

Subject to Rules 68(1) and 67(3), the Board will be constituted by:

- (a) 11 \*regional Directors (or such other number of \*regional Directors between eight (8) and fourteen (14) as the Board may determine under rule 67(5));
- (b) 1 independent director (or such other number of independent Directors not exceeding three (3) as may be permitted by the Act and are elected to hold office under these rules).

**65. Powers and Duties of the Board**

- (1) The business of the Co-operative is to be managed and controlled by the Board of Directors, and for that purpose the Board may exercise all the powers of the Co-operative that are not, by the Act or these rules, required to be exercised by the Co-operative in general meeting.
- (2) The acts of a Director are valid despite any defect that may afterwards be discovered in the appointment or qualification of the Director
- (3) The Board must arrange insurance against loss, damage to or liability of the Co-operative by reason of fire, accident or otherwise as the Board shall think fit.
- (4) The Board must arrange for the custody of the documents of the Co-operative, including title deeds and securities.
- (5) The Board shall adopt a policy to encourage the establishment of a communication system with members which divides the Regions referred to in Part 5 Division 2 of these Rules into wards and districts, and which provides for ward representatives and district chairperson and for meetings of such representatives and chairmen, to the intent that the ward system can be used to receive information from members, and to distribute information to members and third parties.
- (6) **Requirements for Disposal of \*Processor Shares at the initiative of the Board**
  - (a) The Co-operative shall not be entitled to and shall not dispose of any \*Processor Shares unless and until
    - (i) a resolution of the Board is passed recommending the disposal of a specified number or proportion of the Processor Shares on such terms as the Board may determine ("the Directors' Processor Shares Sale Recommendation"), and
    - (ii) the \*Directors' Processor Shares Sale Recommendation has been approved by a Plebiscite Resolution.
  - (b) The disposal must be completed:
    - (i) within such period as may be specified in the \*Directors' Processor Shares Sale Recommendation or if no such period is so specified within 12 months of the date of the passing of the Plebiscite Resolution; and
    - (ii) in accordance with the \*Directors' Processor Shares Sale Recommendation.
  - (c) In addition to any other requirements of the Act and these rules, the information provided to members in connection with the Plebiscite must include particulars of the method by which the Board intends to distribute the net proceeds of sale of the \*Processor Shares referred to in the \*Directors' Processor Shares Sale Recommendation.
  - (d) Nothing in this sub-rule (6), restricts the power of the Board to purchase shares in \*ACF at any time and from time to time whether pursuant to the Co-operative's rights as a shareholder of \*ACF or otherwise.
  - (e) This sub-rule (6) shall not apply where sub-rule (7) or sub-rule (8) of this Rule 65 applies.
- (7) **Dealings with \*Processor Shares on the happening of a \*Processor Share Event**
  - (a) **\*Processor Share Offer**
    - (i) The Co-operative shall not accept any \*Processor Share Offer unless and until the \*Processor Share Offer has been approved by a Plebiscite Resolution.
    - (ii) Subject to rule 65(7)(d), the Co-operative shall not reject any \*Processor Share Offer unless and until the \*Processor Share Offer has been approved by a Plebiscite Resolution.
    - (iii) The Board shall cause the Plebiscite for the purposes of paragraphs (i) and (ii) to take place as soon as practicable after receipt of a \*Processor Share Offer.
    - (iv) In the event that the \*Processor Share Offer is approved by a Plebiscite Resolution and in the event that the \*Processor Share Offer remains open at the time the result of the Plebiscite is declared, the Board shall forthwith cause the Co-operative to accept the \*Processor Share Offer.
    - (v) In the event that the \*Processor Share Offer is not approved by a Plebiscite Resolution and in the event that the \*Processor Share Offer remains open at the time the result of the Plebiscite is declared, the Board shall ensure that the Co-operative does not accept the \*Processor Share Offer.
  - (b) **\*Processor Share Notice**
    - (i) Subject to rule 65(7)(d), the Co-operative shall not vote in relation to any resolution or proposal referred to in a \*Processor Share Notice unless and until the \*Processor Share Notice has been approved by a Plebiscite Resolution.
    - (ii) The Board shall cause the Plebiscite for the purposes of paragraph (i) to be conducted as soon as practicable after receipt of the \*Processor Share Notice.
    - (iii) In the event that the \*Processor Share Notice is approved by a Plebiscite Resolution, and in the event that voting in respect of the \*Processor Share Notice has not closed at the time that the result of the Plebiscite is declared,

the Board shall forthwith cause the Co-operative to vote in such a way as to indicate that the Supply Co-operative approves the relevant scheme or schemes.

- (iv) In the event that the \*Processor Share Notice is not approved by a Plebiscite Resolution, and in the event that voting in respect of the \*Processor Share Notice has not closed at the time that the result of the Plebiscite is declared, the Board shall forthwith cause the Co-operative to vote in such a way as to indicate that the Supply Co-operative does not approve the relevant scheme or schemes.
- (v) In the event that voting in respect of the resolutions referred to in the \*Processor Share Notice must close before the earliest day on which a plebiscite seeking approval for the proposal that the Co-operative vote in favour of the proposed scheme or schemes can close, the Board shall cause the Co-operative to vote in such a way as to indicate that the Supply Co-operative does not approve such scheme or schemes.
- (c) In addition to any other requirements of the Act and these rules, the information disclosed to members in connection with a Plebiscite held for the purposes of this sub-rule (7) must include particulars of the method by which the Board intends to distribute the net proceeds of sale of the \*Processor Shares, and if a \*Processor Share Offer includes consideration other than cash, particulars of the way in which the Board proposes to deal with such consideration.
- (d) The provisions of sub-rule (7)(a)(ii) will not apply and the provisions of sub-rule (7)(b)(i) will not apply unless in the case of each \*Processor Share Offer and each \*Processor Share Notice received, arrangements satisfactory to the Board have been made for payment to the Co-operative of the \*Ballot Expenses and in this respect the Board may require payment in advance.

**(8) \*Scheme Proposals**

- (a) Subject to rule 65(8)(d), the Board shall not take any action in respect of a \*Scheme Proposal, except to carry out its obligations under this sub-rule (8), unless and until approval for a proposal that the Co-operative take all steps necessary for the Co-operative to propound the scheme or schemes of arrangement to which the \*Scheme Proposal refers has been given in a Plebiscite Resolution.
- (b) The Board shall cause the Plebiscite for the purposes of paragraph (a) to be conducted as soon as practicable after receipt of the \*Scheme Proposal.
- (c) In the event that the aforesaid approval is given in a Plebiscite Resolution, the Board shall:
  - (i) forthwith cause the Co-operative to enter into bona fide negotiations with such person or persons as may be interested in the outcome of such scheme of arrangement with a view to complying with the requirements of Part 13 of the Act and of the Regulation;
  - (ii) take all steps reasonably necessary to have the \*Scheme Proposal described and documented as required by the Act, considered by the Supreme Court of New South Wales, and approved by members by special resolution in a special postal ballot and subsequently approved by the Supreme Court of New South Wales.
- (d) The provisions of sub-rule (8)(a) will not apply unless arrangements satisfactory to the Board have been made for payment to the Co-operative of the \*Ballot Expenses and in this respect the Board may require payment in advance.
- (9) In the event that section 285 of the Act applies in respect of a disposal to which this rule applies, the requirement of this rule to hold a plebiscite shall be satisfied by the holding of a special postal ballot for the purposes of section 285.
- (10) For the avoidance of doubt, nothing in this rule shall prevent, limit or restrict the directors from:
  - (i) obtaining legal and financial advice or an independent expert's report in respect of the Processor Share Notice, Processor Share Offer or Scheme Proposal; or
  - (ii) making a recommendation in respect of or commenting on the Processor Share Notice, Processor Share Offer or Scheme Proposal.

**(11) In this rule:**

**"ACF Scheme Shares"** means the shares in the capital of \*ACF which are issued to the Co-operative for the purposes of the Scheme but does not include any other shares in the capital of \*ACF which may be acquired by the Co-operative;

**"Ballot Expenses"** means all expenses incurred in carrying out a ballot or a plebiscite for the purposes of this Rule 65 and includes all expenses incurred in obtaining legal and financial advice and independent expert's reports and all expenses including legal expenses incurred in the preparation and despatch to members of all statutory and other necessary or appropriate disclosure or information statements in respect of the subject matter of the ballot or plebiscite.

**"Company"** means the entity resulting from the conversion of \*ACF into a company.

**"Directors' Processor Shares Sale Resolution"** has the meaning given by rule 65(6).

**"Plebiscite"** means a postal ballot of members conducted as if the ballot were a special postal ballot and the provisions of the Act relating to special postal ballots applied provided always that duties or obligations required by the Act in relation to lodgments with or approvals by the Registrar or the Co-operatives Council shall be ignored and provided

further that the board may at its discretion abridge the period of notice of the postal ballot to such period as it considers to be reasonable in the circumstances.

**"Plebiscite Resolution"** means a resolution of members voting in a Plebiscite which is passed by a three-quarters majority.

**"Processor Share Event"** means either the receipt by the Co-operative of a \*Processor Share Offer or a \*Processor Share Notice.

**"Processor Share Notice"** means a notice of a meeting of members of ACF or a notice of a special postal ballot of the members of ACF relating to a lawful scheme or schemes of arrangement or to a proposal for a lawful scheme or schemes of arrangement between ACF and its members which is not an offer to purchase shares to which section 299(1) of the Act applies and which, if implemented, would:

- (i) involve the cancellation of 20% or more of the nominal value of the issued share capital of ACF or involve the cancellation of 20% or more of the issued share capital of the Company, or
- (ii) involve the Co-operative in disposing of any of the Processor Shares; or
- (iii) involve a person in obtaining a \*relevant interest in any of the \*Processor Shares.

**"Processor Share Offer"** means an offer or invitation to treat to the Co-operative relating to the disposal of any of the \*Processor Shares.

**"Processor Shares"** means the \*ACF Scheme Shares including such of those shares as become shares in the \*Company, and includes any other shares in the capital of \*ACF or the \*Company which may be issued to or acquired by the Co-operative.

**"Scheme Proposal"** means a proposal that the Co-operative enter into a lawful scheme or schemes of arrangement with its members which is not an offer to purchase shares to which section 299(1) of the Act applies and which, if implemented, would:

- (i) involve the cancellation of 20% or more of the nominal value of the issued share capital of the Co-operative, or
- (ii) involve the members of the Co-operative in aggregate disposing of 20% or more of the nominal value of the issued share capital of the Co-operative; or
- (iii) involve a person obtaining a \*relevant interest in 20% or more of the nominal value of the issued share capital of the Co-operative,

which proposal is communicated in writing to the Board in circumstances where the Board is not obliged to keep such proposal confidential, or in respect of which proposal any obligations to keep such proposal confidential have ceased.

#### **66. \*EBL Accreditation Scheme**

Without limiting the generality of rule 65(1) the Board has power:

- (a) to implement and maintain an \*EBL Accreditation Scheme;
- (b) to raise funds for such implementation by imposing (on such terms and conditions as it thinks fit) upon members generally a levy or levies ("the \*EBL levy") on all or part of the \*milk produce supplied by each member to the Co-operative provided always that in any one \*financial year no member shall be required to pay by way of an \*EBL levy an amount in excess of the greater of:
  - (i) the maximum payable under an industry or government based scheme;
  - (ii) \$0.04 per litre of \*milk produce supplied by such member during such year; and
- (c) to exempt from liability to pay an \*EBL levy any one or more members, or a class of members, who attain and maintain a status specified in the terms and conditions of an \*EBL Accreditation Scheme applicable to each such member or members or class of members;
- (d) to exempt from liability to pay an \*EBL levy any one or more members, or a class of members, who comply with certain specified terms and conditions of an \*EBL Accreditation Scheme applicable to each such member or members or class of members;
- (e) to vary, modify, add or delete any or all of the terms and conditions of \*EBL Accreditation Scheme;
- (f) to increase or decrease any \*EBL levy provided always that members given not less than 3 \*months' notice of such increase and in any one \*financial year no member shall be required to pay by way of an \*EBL levy an amount in excess of the greater of:
  - (i) the maximum payable under an industry or government based scheme;
  - (ii) \$0.04 per litre of \*milk produce supplied by such member during such year; and
- (g) to deduct the amount of any \*EBL levy from any monies payable by the Co-operative or any of its subsidiaries to the member or members liable to pay such levy;

- (h) to arrange for the separate collection of the \*milk produce of a member or members who do not attain a status specified in the terms and conditions of, or do not comply with certain specified terms and conditions of a \*EBL Accreditation Scheme;
  - (i) to deduct charges payable for the separate collection of the \*milk produce of a member or members referred to in paragraph (h) above, from any monies payable by the Co-operative or any of its subsidiaries to the member or members from who separate collection is made;
- (j) to require members to provide such information as is deemed necessary (in the absolute discretion of the Board) to implement and maintain an \*EBL Accreditation Scheme or Schemes; and
- (k) to require members to authorise (in \*writing if requested) a third party to release to the Co-operative such information as is deemed necessary (in the absolute discretion of the Board) to implement a \*EBL Accreditation Scheme or Schemes;
- (l) In this rule, \*EBL Accreditation Scheme means a scheme or schemes approved and implemented by the Board of the Co-operative that is or are for any or all of the following purposes:
  - (i) to maintain or improve the quality of \*milk produce supplied to the Co-operative by a member or members;
  - (ii) to treat, control or eradicate any disease or illness suffered by any cows whose \*milk produce is supplied or intended for supply to the Co-operative; or
  - (iii) to support (financially or otherwise) any person who is involved in or concerned with activities with the same or substantially the same or similar purpose or purposes referred to in paragraphs (i) and (ii) above.
- (m) Any such scheme may (without limitation) adopt (in whole or part) a scheme or schemes for similar or substantially the same purposes as those referred to above that is recommended adopted or implemented by:
  - (i) the federal government or any state or territory government;
  - (ii) any semi or quasi governmental body (corporate or otherwise) of any of the governments referred to in the immediately preceding paragraph; or
  - (iii) a dairy or other industry body (corporate or otherwise), association or organisation of which the Co-operative is a member or with which the Co-operative is associated.

## Part 5

### Division 2 Election of Directors

#### 67. Classification of Members and \*Regional Directors

- (1) For the purposes of electing \*regional Directors the members of the Co-operative are classified as members of one of the following regions:
  - (a) Region One - South-East Queensland and Northern NSW (SEQ & NNSW);
  - (b) Region Two - Central New South Wales (CNSW);
  - (c) Region Three - Far North Queensland (FNQ);
  - (d) Region Four - Central South Australia (CSA);
  - (e) Region Five - Riverina / Victoria (R/V).
  - (f) Region Six - Western Victoria and South East South Australia (WV & SESA)
- (2) The Regions are defined geographically as follows:
  - (a) **Region One (SEQ & NNSW) is that part of Queensland which is south of the Tropic of Capricorn, the whole of the Northern Territory, that part of Western Australia which is north of the Tropic of Capricorn, and that part of New South Wales which is north of an imaginary line which runs from Red Rock on the coast west to Walgett and thence west to the New South Wales / South Australia border;**
  - (b) Region Two (Central New South Wales) is that part of Australia which is not in Regions One, Three, Four, Five or Six;
  - (c) Region Three (Far North Queensland) is that part of Queensland which is north of the Tropic of Capricorn;
  - (d) Region Four (Central South Australia) is that part of South Australia that is not in Region Six;
  - (e) Region Five (Riverina / Victoria) is that part of Victoria which is not in Region Six and that part of New South Wales as lies to the south of an imaginary line running due north from the New South Wales / Victorian border to Tumbarumba, thence west to Holbrook, thence north-west to Griffith, and then due west to the New South Wales / Victorian border; and

- (f) Region Six (Western Victoria and South East South Australia) is that part of Victoria which is west of the City of Melbourne and south of the Western Highway joining the towns of Ballarat, Ararat, Horsham, Nhill and Bordertown and that part of South Australia that is south and east of an imaginary line joining the towns of Bordertown and Kingston.

Note: Rule 67(3) is now obsolete. See Rule 67A.

- (3) From the 2004 annual general meeting, the Board shall consist of eleven (11) regional Directors representing each of the five (5) regions in the following numbers:
- |                             |          |
|-----------------------------|----------|
| (a) Region One (SEQ & NNSW) | 3        |
| (b) Region Two (CNSW)       | 4        |
| (c) Region Three (FNQ)      | 1        |
| (d) Region Four (SA)        | 2        |
| (e) Region Five (R/V)       | <u>1</u> |
| Total *regional Directors   | 11       |
- (4) The classification of members which is made for the purposes of this rule shall be made by the Board by reference to the location of the most relevant farm or receival depot and for the purposes of this rule relevance shall be determined by reference to volume of \*milk. The basis of classification shall be as approved by a resolution passed by a three-quarters majority of the Board and shall be published by notice to all members or by an advertisement in a newspaper circulating generally throughout each of those states and territories of Australia where any member's farm or receival depot is located. If the Board does not pass such a resolution as to the basis of classification then
- (a) the basis of classification in force for the immediately preceding election shall apply to that and any other subsequent election unless and until the Board alters the basis of classification by a resolution passed by a three-quarters majority of the Board as provided by this rule, and
- (b) if no relevant classification has been previously made by the Board in respect of a member, such member shall be deemed to be a member of the region in which is located the member's address for service of notices as it appears in the register of members (and, if more than one, as it so first appears).
- (5) The boundaries of any region or the number of Directors representing any region or the name of any region may be altered by a resolution passed by a three-quarters majority of the Board provided that:
- (a) notice of such alteration is given to members not less than eight weeks before the annual general meeting at which an election of Directors shall occur; and
- (b) the Board must be satisfied that the regions so altered shall give fair regional representation of members in terms of the number of farms located in each region and the number of Directors representing each region.
- (6) In altering the boundaries of any region, the Board may by a resolution passed by a three-quarters majority create a new region.
- (7) In altering the number of Directors representing any region the Board may by a resolution passed by a three-quarters majority of the Directors increase the total number of \*regional Directors by three (3) taking the maximum to fourteen (14) Directors or decrease the total number of \*regional Directors by up to three (3) Directors taking the maximum number to eight (8) Directors.
- (8) The Board shall at intervals not exceeding five (5) years review the boundaries of all regions and the number of Directors representing all regions.

#### **67A. Directors**

- (1) The Directors of the Co-operative on and from the 2007 Annual General Meeting shall consist of ten persons being:
- |   |           |
|---|-----------|
| (a) Two Region One (SEQ & NNSW) Directors | 2         |
| (b) Three Region Two (CNSW) Directors     | 3         |
| (c) One Region Three (FNQ) Director       | 1         |
| (d) One Region Four (CSA) Director        | 1         |
| (e) One Region Five (R/V) Director        | 1         |
| (f) One Region Six (WV & SESA) Director   | 1         |
| (g) One Independent Director              | <u>1</u>  |
| Total Directors                           | <u>10</u> |

Note: Rules 68(1)(2)(3) and Rules 68(5)(a)(b) are now obsolete. See Rules 67A, 68(3A) and 68(3B).

#### **68. Appointment, Retirement and Rotation of \*Regional Directors**

- (1) The Directors of the Co-operative on and from the incorporation of the Co-operative shall consist of nine (9) persons being the eight (8) persons who hold the following offices as Directors of \*ACF on such date:

- (a) Two Region One Directors
- (b) All four Region Two Directors
- (c) The sole Region Three Director
- (d) The sole Region Four Director

In addition ACF shall nominate one (1) person to be an independent Director of the Supply Co-operative to take office as soon as practicable after the incorporation of the Co-operative.

The person who holds the office of the Managing Director of \*ACF from time to time, and the persons who hold office as independent directors or employee directors of \*ACF shall not be qualified at any time to be a Director of the Co-operative.

- (2) The independent Director shall hold office until an election for a replacement independent Director, or such shorter period as the Board may determine. The election for a replacement independent Director shall be held as soon as practicable after the \*Implementation Date.
- (3) An election shall be held as soon as practicable after the \*Implementation Date to fill the following \*regional Director vacancies on the Board of Directors:
- (a) One Director for Region One (SEQ & NNSW);
  - (b) One Director for Region Four (SA); and
  - (c) One Director for Region Five (R/V).
- (3A) Following the resignation effective on 12 December 2006 of one of the existing Region Two (CNSW) Directors, the term of office of the remaining three (3) existing Region Two Directors shall continue for the balance of their term namely, until the 2009 annual general meeting and despite any other rule to the contrary, no person shall be elected or appointed to fill the casual vacancy caused by the resignation referred to in this sub-rule.
- (3B) Following the resignation effective on 11 December 2006 of one of the existing Region Four (South Australia) Directors the term of office of the one remaining Region Four Director shall continue for the balance of his term namely until the 2009 Annual General Meeting representing Central South Australia from the conclusion of the 2007 Annual General Meeting and despite any other rule to the contrary, no person shall be elected to fill the casual vacancy caused by the resignation referred to in this sub-rule.
- (4) Subject to retirement by rotation in accordance with the requirements set out hereunder, all \*regional Directors must retire at the annual general meeting held 4 years after their last election.
- (5) \*Regional Directors are to retire in accordance with the following rotation:
- (a) In 2005 All four Region Two (CNSW) Directors will retire at the 2005 annual general meeting and an election will be held to elect four Region Two Directors.  
The two Region Four (SA) Directors will retire at the 2005 annual general meeting and an election will be held to elect two Region Four Directors.
  - (b) In 2006 There will be no elections.
  - (c) In 2007 The three Region One (SEQ & NNSW) Directors will retire at the 2007 annual general meeting and an election will be held to elect two Region One Directors.  
The one Region Three (FNQ) Director will retire at the 2007 annual general meeting and an election will be held to elect one Region Three Director.  
The one Region Five (R/V) Director will retire at the 2007 annual general meeting and an election will be held to elect one (1) Region Five Director.  
An election will be held at the 2007 annual general meeting to elect one (1) Region Six Director.  
The independent Director will retire at the 2007 annual general meeting and an election will be held to elect one independent Director.
  - (d) In 2008 There will be no elections.
  - (e) In 2009 The three Region Two (CNSW) Directors will retire at the 2009 Annual General Meeting and an election will be held to elect three (3) Region Two Directors.  
The one Region Four (CSA) Director will retire at the 2009 Annual General Meeting and an election will be held to elect one (1) Region Four Director.
  - (f) In 2010 There will be no elections.
  - (g) In 2011 The two Region One (SEQ and NNSW) Directors will retire at the 2011 annual general meeting and an election will be held to elect two Region One Directors.



The one Region Three (FNQ) Director will retire at the 2011 annual general meeting and an election will be held to elect one Region Three Director.

The one Region Five (R/V) Director will retire at the 2011 annual general meeting and an election will be held to elect one Region Five Director.

The one Region Six (WV & SESA) Director will retire at the 2011 annual general meeting and an election will be held to elect one Region Six Director.

The Independent Director will retire at the 2011 annual general meeting and an election will be held to elect one Independent Director.

- (h) Thereafter all of the Directors elected for each Region shall retire at four-yearly intervals following the respective dates of their election.

**69. Conduct of Elections for \*Regional Directors**

- (1) Where required under these rules, before the annual general meeting at which regional Directors are to retire, the election or elections of \*regional Directors shall be conducted as nearly as practicable in the following manner:
- (a) Not less than twenty-four (24) weeks before the annual general meeting in each year, a notice shall be circulated to all members or an advertisement shall be published in such newspaper or newspapers circulated generally throughout each of those Regions in respect of which the election is to be held specifying the election or elections to be held and inviting nominations of qualified shareholders as candidates for election as Directors.
- (b) Nominations shall be:
- (i) in a form approved by the Board incorporating appropriate privacy warnings and authorities;
- (ii) signed by two or more members from the same Region as the candidate (other than the candidate or, where the candidate represents a corporate member, the corporate member);
- (iii) accompanied by a notice in \*writing under the candidate's hand consenting to his or her candidature for office;
- (iv) accompanied by a completed candidate profile document in a form approved by the Board, and
- (v) lodged at the registered office of the Co-operative before the date fixed by the notice or advertisement (which shall not be less than four (4) weeks after the giving of the notice or publication of the advertisement, as the case may be).
- (c) Retiring directors who are standing for re-election must comply with the nomination process specified in this Rule.
- (d) The board shall request the Co-operative's solicitors to review the profiles lodged by the candidates prior to their publication and distribution to members and in so doing the Co-operative's solicitors may:
- (i) edit the profile to remove any material or statements which in the opinion of such solicitors (in their absolute discretion):
- (A) contain defamatory or offensive material; or
- (B) that have the effect of bringing discredit upon the co-operative or any of its directors or officers; or
- (C) fall outside the nature of a candidate's profile; or
- (D) are misleading or deceptive or that are likely to be misleading or deceptive; and
- (ii) make such other changes as in their opinion clarify the text of the profile; and
- (iii) request the candidate to provide evidence or supporting material for statements made in the profile.
- (e) All decisions of the Co-operative's solicitors relating to the profile shall be final and binding on the candidates. Where the profile is edited in accordance with this rule, the candidate shall be informed in \*writing.
- (f) If the number of candidates nominated is equal to or less than the number of vacancies occurring in the Board then and in each case such person shall be deemed to have been duly elected as a Director.
- (g) Where the number of candidates exceeds the number of vacancies, the Board may send particulars of the candidates including any profiles or other information provided by the candidate to a third party for the purpose of checking veracity, obtaining police reports, obtaining an assessment or other report by a human resources specialist, or for any other purpose which the Board deems appropriate.
- (h) In respect of every election where the number of candidates exceeds the number of vacancies a postal ballot shall be taken in the following manner:
- (i) a printed ballot paper containing the names of all candidates in respect of the election concerned indicating the retiring Directors and the Region into which each such candidate is classified shall be posted to every member entitled to vote at the election;
- (ii) each ballot paper shall have printed or stamped on it the initials of the returning officer or such other identifying mark or number as the Returning Officer shall approve;

- (iii) each ballot paper shall be sent at least thirty-five days before the annual general meeting at which the results of the election will be announced; and
- (iv) the order in which such names appear in the ballot paper shall be determined by lot.
- (i) The Board shall determine whether, and if so, to what extent, personal profiles and other election material provided by each candidate, or other information relevant to the election, shall be distributed to, or made available to, members prior to any election or with the ballot paper.

**70. Conduct of Elections for Independent Directors**

- (1) Subject to 70(3), independent Directors shall hold office for a period of four years from the date of their election or for such shorter period as the Board may determine in accordance with sub-rule (2) and shall be elected by postal ballot in the following manner:
  - (a) a printed ballot paper containing the names of any person nominated by the Board for the election by the members of the Co-operative as an independent Director ("the candidate") shall be posted to every member entitled to vote either for or against the candidate;
  - (b) each ballot paper shall have on it the initials of the returning officer, which may be imprinted;
  - (c) a candidate for the office of independent Director shall be declared elected to office if the number of formal votes cast in the ballot in favour of the candidate exceeds the number of formal votes cast in the ballot against the candidate; and
  - (d) the results of the election shall be declared at the Board meeting immediately following the date of return of the ballot papers and such results shall be circulated to all members as soon as practicable after the Board meeting.
- (2) The Board shall have the power to bring the term of office of an independent Director to an end with the consent in \*writing of such Director on such date earlier than the expiration of the period for which the Director was elected as the Board may determine and as is agreed to by the Director. The independent Director whose term of office is brought to an end under this sub-rule is eligible to stand to be re-elected under sub-rule 70(1).
- (3) Where the term of office of an independent Director comes to an end earlier than the expiration of the period for which the Director was elected, no casual vacancy is created.

**71. Conduct of Elections Generally**

In all elections of Directors, except those elections following the removal of Directors at a general meeting, the following rules shall apply:

- (1) A returning officer shall be appointed by the Board and in default of such appointment the \*secretary shall be the returning officer.
- (2) The functions of the returning officer may be delegated by the returning officer to any other person who is engaged by the returning officer to assist in the conduct of an election.
- (3) A person shall not be appointed as a returning officer, or exercise any of the functions of a returning officer, whilst the person is a director of the Co-operative.
- (4) The Board may cause to be issued ballot papers in such manner and form that they may on their return be checked against the register of members without the contents of the ballot papers being disclosed at the time of such checking, and so that after such checking the votes may be counted without the identity of the voter being disclosed.
- (5) Each ballot paper:
  - (a) is to be returned to the registered office or a post office box nominated by the Board:
    - (i) before the time stated on such ballot paper; or
    - (ii) where the time stated on the postal ballot paper has been extended by the board, before the time stated in the notice given by the board notifying members of the extension of time,in each case being a time which is not less than 72 hours before the time fixed for commencement of the Annual General Meeting (or Board meeting, if appropriate), and
  - (b) is to be checked by the returning officer as to the time of its receipt by the Co-operative.
- (6) If requested by a candidate at least seven days before the close of the ballot, the Board shall appoint two representatives of the auditors of the Co-operative, or such other organisation as the Board may determine, to act as scrutineers and attend the checking of envelopes and the counting of votes.
- (7) The returning officer, in the presence of the two scrutineers, if appointed, shall count the votes and notify the result of each separate election to the chairperson of the Annual General Meeting. The chairperson may publish such result or results of the election prior to the Annual General Meeting. The chairperson shall announce such result or results to the Annual General Meeting and upon the entry thereof in the minutes of the meeting the result or results shall thereupon be deemed to have the

purpose and effect of a resolution duly passed at such meeting. The decision of the returning officer as to the formality or informality of any ballot paper or ballot papers shall be final.

- (8) In any election for \*regional Directors where a ballot is required the person or persons elected to fill the vacancy or vacancies for which the election is held shall be the person or persons who receives or receive the greatest number of formal votes.

## **Part 5**

### **Division 3 Directors**

#### **72 Qualifications of Directors**

- (1) A person is not eligible to be elected as Director of the Co-operative unless:
- (a) if the person is standing for election as a \*regional Director, the person:
    - (i) is classified as a member of that region; and
    - (ii) has been nominated as a candidate for election by two or more members of that region; and
    - (iii) is an \*active member of the Co-operative or a representative of a body corporate which is an \*active member of the Co-operative.
  - (b) if the person is standing for election as an independent Director, he or she is a person of professional, business or general management or other experience or standing in the community and is nominated by the Board.
- (2) A person is not eligible to be elected as an independent Director of the Co-operative if such person is, or has been a director or member or employee of \*ACF within the preceding five (5) years, or such shorter period as the Board may determine in a particular case.

#### **73. Directors' Duties**

- (1) In accordance with the Act Directors have the following duties in relation to the Co-operative:
- (a) to act honestly in accordance with section 221 of the Act;
  - (b) to exercise his or her powers and to discharge his or her duties with the degree of care and diligence that a reasonable person in a like position in a co-operative would exercise in the Co-operative's circumstances, in accordance with section 222 of the Act;
  - (c) not to make improper use of information or position, in accordance with section 223 of the Act;
  - (d) to act in accordance with the \*provisions of the \*Corporations Act adopted by section 229 of the Act.
  - (e) to declare the nature and extent of the Directors' interest to the Board where the Director is or becomes in any way interested in a contract or proposed contract with the Co-operative, as more particularly described in sub-rule (2) of this rule, in accordance with Section 234 of the Act.
- (2) Disclosure of Directors' interests
- (a) Any candidate for election to the Board of the Co-operative shall lodge with the Co-operative, before the time fixed for the purpose in the notice of election, a notice setting out information regarding any
    - (i) material association the candidate has or may acquire with any co-operative or company in direct competition with any business or activity of the Co-operative;
    - (ii) any interest in a contract or a proposed contract with the Co-operative; or
    - (iii) any office or interest in property whereby, whether directly or indirectly, duties or interests might be created that could conflict with the candidate's duties or interest as Director;and the Board shall cause such information to be distributed with the ballot paper sent to members.
  - (b) Any Director who comes to have a material association with any co-operative or company in direct competition with the Co-operative must, at the next meeting of Directors after that interest is acquired inform that meeting of that interest.
  - (c) Without limiting the generality of sub-rules 2(a) and 2(b), a person has a material association with a co-operative or company if that person:
    - (i) is a Director or employee of, or holds, or has a \*relevant interest in, greater than five per cent of the nominal issued capital of, that co-operative or company; or
    - (ii) is a Director or employee of, or holds, or has a \*relevant interest in, greater than 5 per cent of the nominal issued capital of, a body corporate that:
      - (A) holds, or has a \*relevant interest in, greater than five per cent of the nominal issued capital of that co-operative or company; or
      - (B) has the right to appoint a Director to the Board of that co-operative or company.

- (d) Subject to paragraph (n) of this sub-rule 73(2), any Director who is or becomes in any way (whether directly or indirectly) interested in a contract, or proposed contract with the Co-operative must declare the nature and extent of the interest to the Board.
- (e) In the case of a proposed contract, the declaration must be made:
  - (i) at the meeting of the Board at which the question of entering into the contract is first considered, or
  - (ii) if the Director was not at that time interested in the proposed contract, at the next meeting of the Board held after the Director becomes interested in the proposed contract.
- (f) If a Director becomes interested in a contract with the Co-operative after it is made, the declaration must be made at the next meeting of the Board held after the Director becomes interested in the contract.
- (g) For the purposes of this rule, a general written notice given to the Board by a Director to the effect that the Director:
  - (i) is a member of a specified entity, and
  - (ii) is to be regarded as interested in any contract which may, after the giving of the notice, be made with the entity, is a sufficient declaration.
- (h) Subject to paragraph (n) of this sub-rule 73(2), a Director who holds an office or has an interest in property whereby, whether directly or indirectly, duties or interests might be created that could conflict with a Director's duties or interests as Director must declare at a meeting of the Board the fact and the nature, character and extent of the conflict.
- (i) A declaration required by sub-rule (h) in relation to holding an office or having an interest must be made by a person:
  - (i) if the person holds the office or has the interest when he or she becomes a Director, at the first meeting of the Board held after:
    - (A) the person becomes a Director, or
    - (B) the relevant facts as to holding the office or having the interest come to the person's knowledge,
  - (ii) if the person starts to hold the office or acquires the interest after the person becomes a Director, at the first meeting of the Board held after the relevant facts as to holding the office or having the interest come to the person's knowledge.
- (j) If a Director has made a declaration under this rule, then unless the Board otherwise determines, the Director must not:
  - (i) be present during any deliberation of the Board in relation to the matter, or
  - (ii) take part in any decision of the Board in relation to the matter.
- (k) For the purposes of the making of a determination of the Board under paragraph (j) of this sub-rule 73(2) in relation to a Director who has made a declaration under this rule, the Director must not:
  - (i) be present during any deliberation of the Board for the purpose of making the determination, or
  - (ii) take part in the making by the Board of the determination.
- (l) This sub-rule 73(2) (except for paragraphs (o) and (p)) does not extend to or in respect of a vote relating to a transaction referred to in paragraph (n) hereof.
- (m) Any vote cast in contravention of this sub-rule 73(2) is not to be counted.
- (n) The interest in a contract or proposed contract that a Director is required by this sub-rule 73(2) to declare does not include an interest in:
  - (i) a contract or proposed contract for the purchase of goods by a Director from the Co-operative, or
  - (ii) a lease of land to a Director by the Co-operative, or
  - (iii) a contract or proposed contract for the sale of agricultural products or livestock by a Director to the Co-operative, or
  - (iv) a contract or proposed contract that, pursuant to the rules of the Co-operative, may be made between the Co-operative and a member, or
  - (v) a contract or proposed contract of a class of contracts \*prescribed but only if the contract is made in good faith, in the ordinary course of the business of the Co-operative, and on such terms as are usual and proper in similar dealings between the Co-operative and its members.
- (o) Provided that a declaration (if any) as required by this Rule has been duly made but subject to the Act:
  - (i) a director may be a director or other officer of any other body corporate or may otherwise be interested in any other body corporate; or
  - (ii) a director may contract with the Co-operative and no contract or arrangement entered into by or on behalf of the Co-operative in which any Director may be in any way interested is avoided or rendered voidable; or

(iii) a director is not accountable to the Co-operative for any profit realised by a contract with the Co-operative or for any remuneration or other benefits received by the Director as a director or officer of any other body corporate or from having an interest in any other body corporate.

(p) Subject to paragraphs (j) and (k) of this sub-rule 73(2), a Director who is in any way interested in a contract or arrangement or proposed contract or arrangement may, despite that interest:

- (i) be counted in determining whether or not a quorum is present at any meeting of directors considering that contract or arrangement or proposed contract or arrangement;
- (ii) sign or countersign any document relating to that contract or arrangement or proposed contract or arrangement to which the common seal of the Co-operative is affixed; and
- (iii) vote in respect of the contract or arrangement or proposed contract or arrangement.

**(3) Co-operative Principles**

To the full extent permitted under the Act and the general law the Board of the Co-operative may, in the exercise of its powers and in the discharge of its duties:

- (i) adopt policies that enhance the value of active membership in the Co-operative and maintain active member control; and
- (ii) do all other things necessary to preserve the rights and interests of active members; or
- (iii) organise the affairs of the Co-operative in a manner that is consistent with the Co-operative Principles.

**74. Directors' Remuneration**

- (1) Directors receive the remuneration for their services as Directors which has been determined from time to time at a general meeting provided that the total remuneration shall not exceed the amount recommended by the Board.
- (2) The chairperson and the deputy chairperson receive any additional remuneration for their services as chairperson and as deputy chairperson respectively as determined from time to time at a general meeting provided that the total additional remuneration shall not exceed the amount recommended by the Board.
- (3) All necessary expenses incurred by Directors in the business of the Co-operative must be refunded to them. These expenses include travelling and accommodation expenses.
- (4) For the purposes of this rule "remuneration" means any money, consideration or benefit, including a contribution to a superannuation fund, but does not include amounts in payment or reimbursement of out-of-pocket expenses incurred for the benefit of the Co-operative or any subsidiary of the Co-operative.
- (5) Notwithstanding the foregoing provisions of this rule, until the annual general meeting to be held in 2004, a Director of the Co-operative who is also a Director of \*ACF, shall not receive Directors' fees from the Co-operative but shall be entitled to have all necessary expenses incurred in the business of the Co-operative refunded to him or her.

**Part 5**

**Division 4 Board Meetings**

**75. Requisition and Notice of Board Meeting**

- (1) A meeting of the Board may be called by a Director giving notice individually to every other Director or by the \*secretary giving such notice if so requested by the chairperson or deputy chairperson.
- (2) Except in special circumstances determined by the chairperson, at least 48 hours notice must be given to the Directors of all meetings of the Board.
- (3) If notice of a Board meeting is not given to every Board member the meeting is still valid so long as every Director who did not receive notice subsequently receives notice and consents in \*writing to waive the right to receive that notice.
- (4) Meetings of the Board must be held at least once every 3 \*months and may be held as often as may be necessary for properly conducting the business and operations of the Co-operative.
- (5) There must be at least 4 Board meetings in each \*financial year.

**76. Proceedings of the Board**

- (1) Save as provided for in Rule 83(1), questions arising at any Board meeting must be decided by a majority of votes but a majority of votes must include the votes of at least 2 \*regional Directors.
- (2) In the case of an equality of votes, the chairperson has a casting vote.

**77. Transaction of Business Outside Board Meetings**

- (1) The Board may transact any of its business:

- (a) by the circulation of papers among all the Directors and a resolution in \*writing (on one or more counterparts) by a majority of those members is to be taken to be a decision of the Board;
  - (b) at a meeting at which Board members (or some Board members) participate by telephone, closed-circuit television or other means, but only if any Board member who speaks on a matter before the meeting, can be heard by the other members of the Board.
- (2) For the purposes of this rule the chairperson of the Board and each member of the Board have the same voting rights as they have at an ordinary meeting of the Board.
- (3) A resolution approved under this rule is to be recorded in the minutes of the meetings of the Board.
- (4) The \*secretary or a Director may circulate papers among members of the Board for the purposes of this rule by facsimile or other transmission of the information in the papers concerned.

**78. Quorum for Board Meetings**

The quorum for a meeting of the Board shall be 50% of the Directors holding office on the day of the Board meeting of whom at least three (3) shall be \*regional Directors from different regions.

**79. Appointment of Directors to Constitute a Quorum**

- (1) The continuing Directors may act even though there is a vacancy on the Board.
- (2) If at any time the number of Directors of the Co-operative is the same as or less than the number of Directors required to constitute a quorum of the Board:
  - (a) the Board may appoint sufficient Directors so that the number of Directors is 1 more than a quorum; and
  - (b) for the purpose only of enabling the Board to make such an appointment, the number of Directors required to constitute a quorum is the number of Directors at that time.

**80. Chairperson and Deputy Chairperson of Board**

- (1) The chairperson and the deputy chairperson of the Board shall be \*regional Directors and elected by the Board and the Board shall determine their respective terms of office.
- (2) If no chairperson is elected, or if at any Board meeting the chairperson is more than 5 minutes late or is unwilling to act as chairperson of the meeting, the deputy chairperson shall chair the meeting and if the deputy chairperson is more than 5 minutes late or is unwilling to act as chairperson of the meeting, the Directors present may choose one of their number to be chairperson of the meeting, until such time as the chairperson or deputy chairperson attends and is willing to act in that capacity.

**81. Minutes of Board Meetings**

- (1) Minutes of each general meeting, Board meeting and sub committee meeting must be:
  - (a) kept in the English language; and
  - (b) drafted and entered in the appropriate records within 28 days after the meeting to which they relate; and
  - (c) confirmed and signed by the chairperson at the next succeeding meeting.
- (2) The minutes of each general meeting must be made available for inspection by members.
- (3) The minutes of a meeting will be deemed to be in draft form in the absence of:
  - (a) the chairperson's signature or any notation on the minutes signed and dated by the chairperson or \*secretary, indicating that the minutes have been verified or confirmed; and
  - (b) any notation in the minutes of the next succeeding meeting that the minutes of the previous meeting have been verified and confirmed.

**Part 5**

**Division 5 Delegation by the Board**

**82. Delegation and Board Committees**

- (1) The Board may by resolution delegate the exercise of such of the Board's functions (other than this power of delegation) as are specified in the resolution:
  - (a) to a Director, or
  - (b) to a committee of 2 or more Directors.

- (2) The Co-operative or the Board may by resolution revoke wholly or in part any such delegation.
- (3) A delegated power may be exercised from time to time in accordance with the terms of the delegation.
- (4) A delegation under this rule may be made subject to conditions or limitations as to the exercise of any of the powers delegated, or as to time or circumstances.
- (5) Even though a power has been delegated under this rule, the Board may continue to exercise all or any of the powers delegated and may revoke a delegation at any time.

**83. Exercise of Delegated Power by Directors**

- (1) Where a power is exercised by a Director (either alone or with other Directors) and the exercise of the power is evidenced in \*writing, signed by the Director in the name of the Board or in the Director's own name on behalf of the Board, then the power is deemed to have been exercised by the Board. This is so whether or not a resolution delegating the exercise of the power to the Director was in force when the power was exercised, and whether or not any conditions or limitations referred to in rule 82(4) were observed by the Director exercising the powers.
- (2) An instrument purporting to be signed by a Director as referred to in sub-rule (1) of this rule is in all courts and before all persons acting judicially to be received in evidence as if it were an instrument executed by the Co-operative under seal. Unless the contrary is proved, the instrument is to be taken to be an instrument signed by a delegate of the Board.
- (3) A committee may elect a chairperson of its meetings. If no chairperson is elected or at any meeting the chairperson is more than 15 minutes late then the members present may choose one of their number to be chairperson of the meeting.
- (4) A committee may meet and adjourn as it thinks proper. Questions arising at any meeting must be determined by a majority of votes of the committee members present and voting and in case of an equality of votes the committee chairperson has a casting vote.

**84. Other Committees**

- (1) The Board may by resolution appoint committees comprising
  - (a) members, or
  - (b) members and other persons, provided that the members comprise the majority of persons on the committee, to act in an advisory role to the Board and to any committees of Directors.
- (2) The provisions of rule 83(2) and 83(3) apply to committees appointed under this rule, subject to any variations approved of by the Board.
- (3) The quorum for any meeting of a committee is 2, unless the Board otherwise determines in the resolution effecting the delegation or by the terms of the instrument of delegation.

**Part 5**

**Division 6 Directors Ceasing to Hold Office**

**85. Removal of Director From Office**

The Co-operative may, by ordinary resolution, remove any Director before the expiration of the Director's period of office, and may by a simple majority appoint another person in place of the Director. The person so appointed shall retire at the same time as the removed Director would have done if not removed.

**86. Vacation of Office of Director**

The office of a Director is vacated:

- (a) if the person is an insolvent under administration (as defined in the \*Corporations Act);
- (b) if the person is mentally incapacitated or the subject of an order under a law of another state or of a territory relating to mental health;
- (c) if the person has been convicted of an offence and that conviction disqualifies a person from being a Director, as provided by section 208(2) of the Act;
- (d) if the Director absents himself/herself from 3 consecutive ordinary meetings of the Board without its leave;
- (e) if the Director resigns from office by notice in \*writing given by the Director to the Co-operative;
- (f) if the Director is removed from office by ordinary resolution of the Co-operative;
- (g) if the person ceases to hold the qualification by reason of which the person was qualified to be a Director;
- (h) if the Director becomes an employee of the Co-operative, unless elected under section 216 of the Act;
- (i) if an administrator of the Co-operative's affairs is appointed under Division 6 of Part 12 of the Act;

- (j) as provided by section 217 of the Act;
- (k) if the Director is removed from office, by a voluntary administrator of the Co-operative appointed under Part 5.3A of the \*Corporations Act, as applying under section 332 of the Act;
- (l) if the Director is removed from office by a resolution passed by a three quarter majority of the Directors to the effect:
  - (i) that the Director has breached one or more of the statutory duties referred to in rule 73(1); or
  - (ii) that the Director has failed to make proper disclosure in accordance with rule 73(2); or
  - (iii) that the Director has failed to discharge the Director's obligations to the Co-operative as a member or as the corporate representative of a member, whether those obligations to the Co-operative are provided for by these rules or arise out of any contract; or
  - (iv) that the Director has been guilty of conduct detrimental to the Co-operative provided always that
    - (A) written notice of the proposed resolution is forwarded to the Director at least 14 days before the date of the Board meeting at which the resolution is moved; and
    - (B) a Director who is liable to be removed from office under this rule 86(l) must be given a reasonable opportunity of being heard at the meeting which considers the said resolution.

#### **87. Filling of Casual Vacancies**

- (1) For the purposes of this rule, a casual vacancy arises where the office of a Director is vacated in accordance with rule 86 except that, where the term of office of any employee Director or an independent Director comes to an end earlier than the expiration of the period for which the Director was elected no casual vacancy is created.
- (2) A casual vacancy occurring in the office of a \*regional Director shall be filled by a person from the same region as that of the former \*regional Director who caused the casual vacancy to occur, either by:
  - (a) an election which the Board shall cause to be held within six \*months of the date of the vacancy occurring, and the person elected to fill the vacancy shall be subject to retirement at the same time as the director in whose place the person has been elected; or by
  - (b) the Board of directors appointing a person and the person appointed to fill the vacancy shall be subject to retirement at the next annual general meeting.
- (3) The election referred to in Clause 87(2)(a) shall be conducted as nearly as practicable to the manner provided by rules 69 and 71 provided that the Board may set the timetable for the lodgement of nominations and may announce the result of the postal ballot held for the election, at a Board meeting or at the next annual general meeting.
- (4) Not less than 14 days after the announcement of the result of the postal ballot or the appointment by the Board as the case may be, an advertisement shall be published stating the full name and contact details of the person elected by the members or appointed by the Board to be a director and stating the term of that person's office as a director. The advertisement shall be published, in such newspaper or newspapers circulated generally throughout each of those States and Territories of Australia where any member's farm or receival depot is located as the Board may from time to time determine.

### **Part 5**

#### **Division 7 Officers**

#### **88. Officers**

Without prejudice to the general powers conferred on the Board by the Act or these rules, the Board has power to appoint, remove or suspend officers, servants, agents and contractors, and to fix their powers, duties and remuneration.

#### **89. \*Secretary and Principal Executive Officer**

- (1) \*Secretary
  - (a) The Board must appoint at least one \*secretary.
  - (b) Each \*secretary performs all the functions and duties required by the Act, the \*regulation, these rules and the law to be performed or undertaken by the \*secretary of the Co-operative.
  - (c) A \*secretary:
    - (i) may be appointed to the office on such terms and conditions as the Board may determine; and
    - (ii) holds office until the \*secretary resigns, dies or is removed by the Board
- (2) Principal Executive Officer.
  - (a) The Board may appoint a principal executive officer.



- (b) A principal executive officer:
  - (i) may be appointed to the office on such terms and conditions as the Board may determine; and
  - (ii) holds office until the principal executive officer resigns, dies or is removed by the Board.

## **90 Indemnity and Indemnity Insurance**

### **90.1 Officers' Indemnities**

- (1) Subject to sub-rule (2), the Co-operative shall continually indemnify each of its officers against liability (including liability for costs and expenses) for an act or omission in the capacity of an officer of the Co-operative. Such liabilities shall include but are not limited to the following:
  - (a) Any liability incurred (including liability for costs and expenses) in the capacity of an officer of the Co-operative in defending any proceedings, whether civil or criminal, in which:
    - (i) judgment is given in the officer's favour; or
    - (ii) the officer is acquitted; or
    - (iii) the Court either wholly or partly relieves the officer from liability in proceedings against the officer for negligence, default or breach of duty where, the officer acted honestly and reasonably, notwithstanding a finding that the officer is or may be liable in respect of the negligence, default or breach of duty.
  - (b) Any liability incurred (including liability for costs and expenses) in the capacity of an officer of the Co-operative where the officer applies to the Court for relief in respect of any claim which the officer has reason to believe will or might be made against him or her in respect of any negligence, default or breach of duty in relation to the Co-operative, and where:
    - (i) the Court makes an order in the officer's favour; or
    - (ii) the Court either wholly or partly relieves the officer from liability, where the officer acted honestly and reasonably, notwithstanding a finding that the officer is or may be liable in respect of the negligence, default or breach of duty.
- (2) Sub-rule (1) of rule 90.1 or any part of it does not apply to the extent that it would be unlawful or void in any particular case, circumstance or respect, or, without limiting the generality of the foregoing, to the extent that the indemnity in sub-rule (1) of rule 90.1 relates to:
  - (a) a liability (excluding legal costs) owed to the Co-operative or a related body corporate (as defined in the Corporations Act);
  - (b) a liability (excluding legal costs) that is owed to someone other than the Co-operative or a related body corporate (as defined in the Corporations Act) and did not arise out of conduct in good faith;
  - (c) legal costs incurred in defending an action for a liability incurred as an officer of the Co-operative if the costs are incurred:
    - (i) in defending or resisting proceedings (and any appeal in relation to the proceedings) in which the person is found to have a liability for which they could not be indemnified under sub-rules (2)(a) and (2)(b) of rule 90.1 above; or
    - (ii) in defending or resisting criminal proceedings in which the person is found guilty; or
    - (iii) in defending or resisting proceedings (and any appeal in relation to the proceedings) brought by the \*Registrar or a liquidator (excluding costs incurred in responding to actions taken by the \*Registrar or a liquidator as part of an investigation before commencing proceedings) for a court order if the grounds for making the order are found by the court to have been established; or
    - (iv) in connection with proceedings (and any appeal in relation to the proceedings) for relief to the person under the Act in which the Court denies the relief.

### **Period of indemnity**

- (3) The Co-operative must continually indemnify each of its officers during any period the officer is an officer of the Co-operative and for a period of 6 years after the date on which the officer ceases to be an officer of the Co-operative. This indemnity applies to any proceeding commenced but not determined or settled within that 6 year period.
- (4) For the purposes of this rule, an officer will not be regarded as having ceased to be an officer of the Co-operative if the officer retires and is re-elected by the Co-operative's members in general meeting or by postal ballot.

### **Notification of circumstances**

- (5) An officer must give the Co-operative notice as soon as the officer becomes aware of any circumstance, claim or proceedings which may give rise to the officer being entitled to an indemnity.
- (6) The Co-operative must take all reasonable steps to give an officer notice as soon as it becomes aware of any claim or proceeding, or any circumstance, which may give rise to a liability of the officer to the Co-operative or which may give rise to a claim against the officer. The Co-operative is not required to notify an officer in this manner if the Co-operative is

making the claim or commencing the proceeding against the officer or if the Co-operative is considering the question of whether it will take such steps.

**Conduct of proceedings**

- (7) An officer must promptly comply with all reasonable directions by the Co-operative in relation to dealing with any circumstance, claim or proceeding which may give rise to an officer being entitled to an indemnity under this rule. The Co-operative is entitled to take over the handling of a claim and to take over or commence any proceedings, or related procedures, and settle any claim or proceeding which may give rise to an officer being entitled to an indemnity. Where any claim or proceeding may give rise to an officer being entitled to an indemnity and criminal liability is or may be an issue, the Co-operative must consult with the officer with a view to determining an appropriate course of action. All dealings between the Co-operative and the officer must be in good faith.

**Disagreement over conduct of proceedings**

- (8) In the event of actual or potential criminal liability, if the Co-operative and an officer cannot agree on an appropriate course of action, then either party may give the other a notice asking the other party to agree to appoint a Queen's Counsel or equivalent senior counsel to resolve the dispute. If the parties do not agree on a particular Queen's Counsel or equivalent senior counsel within 7 days after the notice is given, the person is to be appointed by the Co-operative. The parties are bound by his or her advice.

**Advances and payments**

- (9) The Co-operative may (in its absolute discretion) advance money to an officer to meet any costs and expenses incurred by the officer that are covered by the indemnity in sub-rule (1) of rule 90.1. The advance may be on terms that the Co-operative considers appropriate.

**Repayment by officer**

- (10) An officer must repay the Co-operative within 14 days money received under this rule if:
- (a) the money relates to a liability incurred by the officer which is not covered by the indemnity in sub-rule (1) of rule 90.1; or
  - (b) the money relates to a liability incurred by the officer, and the officer has received an equivalent payment in relation to that liability under an insurance policy or another indemnity.

**Related Entities**

- (11) The Co-operative may also indemnify officers of related entities as defined in the Corporations Act in terms of this rule 90.1 for a period of 6 years or for the relevant maximum period required by law whichever is the longer.

**90.2 Insurance**

- (1) The Board shall effect, and maintain, a policy of insurance for the indemnity of the Co-operative against any pecuniary loss to the Co-operative resulting from any act of fraud or dishonesty committed:
- (a) by any officer of, or other person employed by, the Co-operative in connection with his duties; or
  - (b) where a person contracts to provide a secretarial or administrative service to the Co-operative - by that person or any of his employees in connection with the provision of any such service.
- (2) The Board shall arrange such insurance against loss, damage to or liability of the Co-operative by reason of fire, accident or otherwise as the Board shall think fit.
- (3) The Co-operative must arrange and maintain insurance, with a reputable insurer authorised under the Insurance Act 1973 (Cth), insuring each officer of the Co-operative against each of the following:
- (a) liability (including liability for costs and expenses) for an act or omission by the officer in the capacity of officer of the Co-operative, in relation to any negligence, default, breach of duty or breach of trust in relation to the Co-operative or any subsidiary Co-operative of the Co-operative; and
  - (b) liability (including liability for costs and expenses) incurred by the officer in the capacity of officer of the Co-operative in defending proceedings, whether the proceedings are civil or criminal, and whatever their outcome.
- (4) The insurance must be on the usual terms and for a level of cover which in the opinion of the directors is commercially prudent in all the circumstances.
- (5) The Co-operative must not, whether by an act or omission, do or permit to be done anything which prejudices any part of the insurance or renders it void, voidable or unenforceable. However, if it does so it must immediately take all reasonable steps to remedy that defect.
- (6) An officer must not, whether by an act or omission, do or permit to be done anything which prejudices any part of the insurance or renders it void, voidable or unenforceable. However, if the officer does so the officer must immediately take all reasonable steps to remedy that defect.

- (7) The Co-operative must (upon becoming aware) immediately notify each relevant officer in \*writing if, for any reason, the insurance is cancelled or not renewed.
- (8) The insurance in respect of each officer must be maintained during any period such officer is an officer of the Co-operative and for a period of 6 years after the date on which the officer ceases to be an officer of the Co-operative.
- (9) An officer must give the Co-operative any information that it reasonably requires in order to arrange and maintain the insurance.
- (10) The Co-operative must give an officer within 14 days after receiving a written request from that officer:
  - (a) a copy of any relevant insurance policy; and
  - (b) the most recent certificate of currency or other document evidencing the Co-operative's renewal of the policy.
- (11) An officer must claim under the insurance for any liability that the officer has incurred that may be covered by the insurance, before seeking indemnity from the Co-operative under any other provision of these rules.
- (12) An officer must give the Co-operative notice as soon as the officer becomes aware of any of the following:
  - (a) a claim or proceeding, or circumstance, which may give rise to a claim under the insurance, whether the claim is likely to be more than the excess of the insurance or not; or
  - (b) a circumstance that may prejudice the insurance.

## **Part 6 Accounts and Audit**

### **Division 1 Accounts**

#### **91. \*Financial Year**

The \*financial year of the Co-operative ends on 30 June each year or such other date as is agreed by the Board.

#### **92. Accounts**

- (1) The Board shall cause to be opened or maintained a banking account or accounts of the Co-operative into which all monies received shall be paid as soon as possible after receipt.
- (2) All cheques drawn on such accounts and all drafts, bills of exchange, promissory notes and other negotiable instruments for and on behalf of the Co-operative shall be signed by such persons as are authorised by the Board.
- (3) The Board must cause to be prepared the accounts, statements and reports in accordance with the \*Corporations Act and any regulation thereunder, as adopted by the \*regulation.
- (4) The Board must submit an annual report, together with an auditors' report, to the annual general meeting of the Co-operative, in accordance with the \*Corporations Act and any regulation thereunder, as adopted by the \*regulation.
- (5) The Board must also have a copy of the annual report and the auditors' report displayed at the registered office of the Co-operative for at least 14 days before the annual general meeting of the Co-operative.
- (6) The Board must send a copy of the annual report and the auditors' report to each member with the notice of the annual general meeting of the Co-operative.

## **Part 6**

### **Division 2 Auditors**

#### **93. Appointment, Duties and Responsibilities of Auditors**

##### **Appointment**

- (1) The Co-operative must have an auditor.
- (2) The Co-operative shall at each annual general meeting, if there is a vacancy in the office of auditor, appoint an auditor to fill the vacancy. The board shall fill any vacancy in the office of auditor, other than a vacancy caused by the removal of an auditor from office, within one \*month of such vacancy occurring, unless the co-operative at a general meeting has already appointed an auditor to fill the vacancy.
- (3) The auditor holds office subject to the \*Corporations Act as adopted by the \*regulation.
- (4) So long as there is a vacancy in the office of auditor the surviving or continuing auditor may act.

##### **Office of Auditor**

- (5) Before the Board appoints an auditor the auditor must consent in \*writing to act as auditor.
- (6) An auditor holds office until the auditor:
  - (a) dies;

- (b) is removed from office in accordance with rule 95;
- (c) resigns in accordance with rule 96; or
- (d) is incapable of acting in accordance with the \*Corporations Act adopted by the \*regulation.

**Qualifications of Auditor**

- (7) A person is not qualified to be appointed auditor of the Co-operative if:
  - (a) the person is not a registered company auditor;
  - (b) the person or a corporation in which the person is a substantial shareholder, is indebted to the Co-operative (or to a subsidiary corporation of the Co-operative) for an amount exceeding \$ 5,000; or
  - (c) the person is:
    - (i) an officer of the Co-operative;
    - (ii) is a partner, employer or employee of an officer of the Co-operative;
    - (iii) is a partner of an employee of an officer of the Co-operative; or
    - (iv) is an employee of an employee of an officer of the Co-operative.
- (8) A firm is not qualified to be appointed auditor of the Co-operative unless:
  - (a) at least 1 member of the firm is a registered company auditor who is ordinarily resident in New South Wales;
  - (b) no member of the firm or corporation in which the firm is a substantial shareholder, is indebted to the Co-operative (a subsidiary of the Co-operative) for an amount exceeding \$5,000; or
  - (c) no member of the firm is:
    - (i) an officer of the Co-operative;
    - (ii) a partner employer or employee of an officer of the Co-operative;
    - (iii) a partner of an employee of an officer of the Co-operative; or
    - (iv) an employee of an employee of an officer of the Co-operative;
  - (d) no officer of the Co-operative receives any remuneration from the firm for acting as a consultant to it on accounting or auditing matters.

**94. Performance of Duties by Auditor**

- (1) All reasonable fees and expenses of the auditor are payable by the Co-operative.
- (2) The Board must give the auditor access to all books, accounts, vouchers, securities and documents of the Co-operative.
- (3) The Board members must give, and must cause the Co-operative's officers to give, such information and explanations to the auditor which are necessary for the performance of the auditor's duties.
- (4) The auditor is entitled to attend any general meeting of the Co-operative and to receive all notices of and other communications relating to any general meeting which any member of the Co-operative is entitled to receive. The auditor is also entitled to be heard, at any general meeting which the auditor attends, on any part of the business of the meeting which concerns the auditor.

**95. Removal of Auditors**

- (1) The auditor may be removed from office by special resolution at a general meeting.
- (2) Notice of intention to move the resolution must be given to the Co-operative at least 2 \*months before the meeting at which the resolution is moved but if a meeting is then convened for a date 2 \*months or less after notice has been given, notice shall be deemed to have been properly given.
- (3) Where special notice of a resolution to remove an auditor is received by the Co-operative the Co-operative must send a copy of the notice to the auditor and lodge a copy of the notice with the \*Registrar as soon as practicable.
- (4) The Co-operative must give notice of a resolution to remove the auditor to persons entitled to be given notice of a meeting of the Co-operative at the same time and in the same manner as it gives notice of the meeting.
- (5) After the auditor receives the notice the auditor has 7 days to make representations of a reasonable length in \*writing to the Co-operative. The auditor may request the Co-operative to send a copy of the representations to each person who received a copy of the notice of meeting.
- (6) Unless the \*Registrar on the application of the Co-operative otherwise orders, the Co-operative must send a copy of the representations in accordance with the auditor's request. The auditor may require that the representations be read out at the meeting and may also speak at the meeting.

**96. Resignation of Auditor**

- (1) The auditor may, by notice in \*writing given to the Co-operative, resign as auditor of the Co-operative if:
  - (a) the auditor has, by notice in \*writing given to the \*Registrar, applied for consent to resign and stated the reasons and, at or about the same time, notified the Co-operative in \*writing of the application; and
  - (b) the auditor has received the consent of the \*Registrar.
- (2) The resignation of the auditor takes effect:
  - (a) on the date (if any) specified for the purpose in the notice of resignation;
  - (b) on the date on which the \*Registrar consents to the resignation; or
  - (c) on the date (if any) fixed by the \*Registrar for the purpose,whichever occurs last.

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**Part 7 \*Surpluses and Losses**

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**Division 1 Distributions to Members**

**97. Distribution of \*Surplus**

- (1) The Board may resolve to retain all or part of the \*surplus arising in a year from the business of the Co-operative to be applied for the benefit of the Co-operative.
- (2) The Board may apply any part of the \*surplus arising in a year from the business of the Co-operative or any part of the reserves to:
  - (a) be paid to a member by way of bonus or rebate based on the business done by the member with the Co-operative;
  - (b) in payment for the issue of bonus shares to the members on the basis of the members' dealing with the Co-operative or on the basis of shares held by the members; or
  - (c) be paid to a member by way of a \*limited dividend on the \*shares held;
- (3) The amount of a rebate or dividend payable to a member may, with the consent of the member, be applied:
  - (a) in payment for the issue to the member of bonus \*shares; or
  - (b) as a loan to the Co-operative.

**98. Declaration of Dividend, Bonus or Rebate**

- (1) The Board may declare an interim dividend, bonus or rebate of any part of the \*surplus arising in any year from the business of the Co-operative.
- (2) Except for an interim dividend, bonus or rebate, every dividend bonus or rebate must be declared at a general meeting of the Co-operative but may not exceed the amount recommended by the Board, nor exceed the percentage permitted by the Act or \*regulation.

**99. Payment of Dividend or Bonus or Rebate**

- (1) Any part of the \*surplus arising in any year from the business of the Co-operative may be credited to any person who is not a member, but is qualified to be a member, by way of bonus or rebate in proportion to the business done by him or her with the Co-operative, if:
  - (a) the person was a member at the time the business was done and the membership has lapsed; or
  - (b) the person has applied for membership after the business was done.
- (2) Nothing in this rule precludes the payment of a bonus to an employee under the terms of the employee's employment.
- (3) Any dividend, bonus or rebate which accrues to the holder of \*shares on which all calls due have been paid shall be paid to that holder. However, any dividend, bonus or rebate which accrues to the holder of partially paid up \*shares must be applied to paying off any subscriptions or calls on \*shares which may (at the time the dividend or bonus becomes payable) be due and unpaid by that holder.
- (4) If several persons are registered as joint holders of any \*share any one of them may give a valid receipt for any dividend or other money payable on or in respect of the \*share.
- (5) No dividend, bonus or rebate bears interest against the Co-operative.

**100. Determination of Dividend**

The Board may recommend:

- (a) a higher rate of dividend in respect of \*shares held by a member in excess of the minimum number of \*shares specified in rule 23; or
  - (b) different rates of dividend on \*shares based on the business done by shareholders with the Co-operative,
- to be declared at a general meeting in accordance with rule 98 and if declared, the Board shall be authorised to pay the dividend to members, subject to the provisions of rule 99(3).

### Part 7

#### Division 2 Provision for Loss

##### 101. Provision For Loss

The Board must make such provisions for loss which may result from the transactions of the Co-operative in accordance with current accounting standards as adopted by the \*regulation.

### Part 8 Miscellaneous

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#### Division 1 \*Disputes

##### 102. Definitions

In this Division:

(1) “**party**” includes:

- (a) members of the Co-operative;
- (b) any aggrieved person who has ceased to be a member in the last three \*months;
- (c) any person claiming through or under any aggrieved person referred to in Rule 102(1)(b);
- (d) the Co-operative, including the Board and any other officer of the Co-operative.

(2) “**dispute**” only refers to a matter affecting a \*party in the capacity of such a person as a member or ex-member of the Co-operative, or as a person claiming through or under a member of the Co-operative in that person’s capacity as a member.

##### 103. The \*Dispute Process

- (1) If a \*dispute arises a \*party may not commence any court or arbitration proceedings relating to the \*dispute unless the \*party has complied with the following paragraphs of the rule except where the person seeks urgent interlocutory relief.
- (2) A \*party claiming that a \*dispute has arisen must give \*written notice to the other \*party or \*parties specifying the nature of the \*dispute.
- (3) On receipt of that notice by that other \*party or \*parties, the \*parties must endeavour to resolve the \*dispute expeditiously, using the mediation rules of the NSW Law Society.
- (4) If the \*parties do not agree within seven days of receipt of the notice (or such further period as agreed in \*writing between them) as to:
  - (a) the timetable for all steps in the procedures; and
  - (b) the selection and compensation of the independent person required for mediation;then the \*dispute shall be settled by arbitration in accordance with the Commercial Arbitration Act 1984.
- (5) Nothing in this rule extends to any \*dispute as to the construction or effect of any mortgage or contract contained in any document other than these rules.

### Part 8

#### Division 2 Notices

##### 104 Notices

###### Notices by the Co-operative to members

- (1) (a) Subject to paragraph (b) of this sub-rule (1), a notice may be given by the Co-operative to a member:
  - (i) by serving it personally at, or by sending it by post in a prepaid envelope to, the member’s address as shown in the register of members or any other address notified in \*writing by the member, or by transmitting it by fax to such fax

number, or by email to such email address in either case that the member has notified to the Co-operative for the giving of notices; or

- (ii) in the absence of a registered address or other notified postal, fax or email address, to an address ascertained by the \*secretary following enquiries by the \*secretary to be the last known address of the member, or by publishing the notice in a newspaper circulating generally in New South Wales.
- (b) Two or more members may by a memorandum in \*writing signed by all such members, notify the Co-operative that all news sheets and other documents (not being documents required by the Act to be served individually) to be given by the Co-operative to those members or any one or more of them will be properly given to each of them if a single copy of that document is sent to the address specified in the memorandum.
- (c) In the event that the Co-operative requires to give a notice to shareholders, a notice may be given by the Co-operative to the joint holders of a \*share by giving the notice in the manner authorised by paragraph (a) to the joint holder first named in the register of members in respect of the \*share.
- (d) A notice may be given by the Co-operative to a person entitled to a \*share as a result of a Transmission Event by serving it or sending it in the manner authorised by paragraph (a) hereof addressed to the name or title of the person, at or to any address or fax number or email address notified to the Co-operative in \*writing by that person for the giving of notices to that person, or if no address or fax number or email address has been notified, at or to the address or fax number or email address to which the notice might have been sent if the relevant Transmission Event had not occurred.
- (e) The fact that a person has supplied a fax number or an email address for the giving of notices does not require the Co-operative to give any notice to that person by fax or email.
- (f) A notice given to a member in accordance with paragraphs (a) or (b) or (c) or (d) of this sub-rule 104(1) is, despite the occurrence of a Transmission Event and whether or not the Co-operative has notice of that occurrence:
  - (i) duly given in respect of any \*shares registered in that person's name, whether solely or jointly with another person; and
  - (ii) sufficient service on any person entitled to the \*shares as a result of the Transmission Event.
- (g) A notice given to a person who is entitled to a \*share as a result of a Transmission Event is sufficient service on the member in whose name the \*share is registered.
- (h) Any person who, because of a transfer of \*shares, becomes entitled to \*shares registered in the name of a member is bound by every notice which, before that person's name and address is entered in the register of members in respect of those \*shares, is given to the member in accordance with this sub-rule 79(1).
- (i) Any failure of a member or shareholder to actually receive the notice shall not invalidate the event or transaction in respect of which the notice is required and a certificate signed by a director or \*secretary of the Co-operative to the effect that a notice has been given in accordance with these rules is conclusive evidence of that fact.

#### **Notices by the Co-operative to directors**

- (2) Subject to these rules, a notice may be given by the Co-operative to any director either by serving it personally at, or by sending it by post in a prepaid envelope to, the director's usual residential or business address, or such other address, or by fax or email to such fax number or email address, as the director has supplied to the Co-operative for the giving of notices. Every director shall supply the Co-operative with a fax number and/or an email address.

#### **Notices by members or directors to the Co-operative**

- (3) Subject to these rules, a notice may be given by a member or director to the Co-operative by serving it on the Co-operative at, or by sending it by post in a prepaid envelope to, the registered office of the Co-operative.

#### **Notices to members outside Australia**

- (4) Every member, and every person who is entitled to a \*share by reason of a Transmission Event, must provide the Co-operative in \*writing with an address within Australia for the service of notices.

#### **Time of service**

- (5) (a) Where a notice is sent by post, service of the notice is to be taken to be effected if a prepaid envelope containing the notice is properly addressed and placed in the post and to have been effected:
  - (i) in the case of a notice of a general meeting, on the expiration of 24 hours after the day of its posting; or
  - (ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post.
- (b) Where a notice is sent by fax or by email, the notice is to be taken to be given on the Business Day after it is sent.
- (c) Notice given by publication shall be deemed to be duly given to the member on the date the notice was published.

#### **Other communications and documents**

- (6) Sub-rules 104(1) to 104(5) (inclusive) apply, so far as they can and with necessary changes, to the service of any communication or document.

#### **Interpretation**

(7) In this rule, Transmission Event means:

- (a) in respect of a member who is an individual:
  - (i) the death of the member;
  - (ii) the bankruptcy of the member; or
  - (iii) the member becoming of unsound mind or a person who is, or whose estate is, liable to be dealt with in any way under the law relating to mental health; and
- (b) in respect of a member which is a body corporate, the dissolution of the member or the succession by another body corporate to the assets and liabilities of the member.

**105 Notices in \*writing**

A reference in these rules to a notice in \*writing includes a notice given by fax or a notice given by email if and only if the notice is given as permitted by rule 104.

**Part 8**

**Division 3 Winding Up**

**106. Winding Up**

- (1) The winding up of the Co-operative shall be in accordance with Part 12 of the Act.
- (2) If on the winding up of the Co-operative there remains after the satisfaction of all its debts and liabilities (including the refund of the amounts paid up on the \*shares) any property, this shall be paid to or distributed among the members of, and holders of CCUs in, the Co-operative according to their rights and interest in the Co-operative..
- (3) If on the winding up of the Co-operative there is a deficiency such deficiency must be dealt with according to the Part 12 of the Act.

**Part 8**

**Division 4 Fines**

**107. Fines Payable By Members**

- (1) The Board may impose on a member maximum fine of \$1,000.00 for any infringement of the rules.
- (2) A fine exceeding \$20 shall not be imposed on a member unless:
  - (a) \*written notice of intention to impose the fine and the reason for it has been given to the member; and
  - (b) the member has been given a reasonable opportunity to appear before the Board in person (with or without witnesses), or to send to the Board a \*written statement, for the purpose of showing cause why the fine should not be imposed.

**Part 8**

**Division 5 Other**

**108. Disclosure**

- (1) The Co-operative must disclose information in accordance with the Act and these rules if so required by the Act including any of the following sections of the Act:

Section	Section Title
146A	Disclosure to intending members
155	Members may be required to take up additional *shares
194	Special postal ballot
246	Disclosure by Directors
266	Application of Corporations Act to issues of debentures
266A	Disclosure statement – issues of debentures to members
268	Compulsory loan by member to Co-operative
285	Acquisition and disposal of assets
306	Additional disclosure requirements for offers involving conversion to a company
311A	Disclosure statement required – merger or transfer of engagements
369R	Disclosure statement required – merger or transfer of engagements (foreign co-operatives)



- (2) Nothing in this rule prevents the Co-operative from applying for, obtaining or relying on any exemptions from the disclosure requirements which may be available under the Act.

## Part 9 Dictionary

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*Note:*

*Each term defined in rules 109 and 110 is marked in the text of the rule with “\*” before it. There are exceptions to this procedure: the terms “the Act”, “the Board”, “the Co-operative”, “CCU”, “may”, “member”, “person” and “rules” are not marked with “\*” because they appear so often throughout these rules.*

### 109 Dictionary

In these rules, unless the context otherwise requires:

“**an Act**” means the legislation of any Australian parliament.

“**the Act**” means the Co-operatives Act 1992 (NSW) as amended.

“**active member**” means a member who is in active membership within the provisions of rule 13.

“**alter**” or similar word or expression used in relation to a rule amendment includes add to, substitute, and rescind.

“**ACF**” means Australian Co-operative Foods Limited (ARBN 010 308 068) and, if ACF is converted into a company, includes that company.

“**business day**” means a day that is not a Saturday or Sunday or a public holiday or bank holiday in New South Wales and “business days” should be construed accordingly “**the Co-operative**” means Dairy Farmers Milk Co-operative Limited.

“**CCU**” means a co-operative capital unit in the Co-operative.

“**Corporations Act**” means the Corporations Act 2001 (Cth).

“**dispute**” has the meaning given by rule 102.

“**EBL Accreditation Scheme**” means a scheme of the kind which the Board of the Co-operative is empowered to implement pursuant to the powers given to it by rule 66.

“**EBL levy**” has the meaning given by rule 66.

“**financial year**” means the financial year of the Co-operative as specified in rule 91.

“**Implementation Date**” means the date on which an office copy of an order of the Supreme Court of New South Wales approving the \*Scheme is lodged with the \*Registrar, or such other date as the Court specifies in such order to be the date on which the order takes effect.

“**limited dividend**” means a dividend that does not exceed the amount \*prescribed or such other amount or rate as the \*Registrar may approve in any particular case.

“**member**” means a member of the Co-operative.

“**merger date**” means the date on which a member, or applicant for membership, ceased to be a member of a \*merging co-operative.

“**merging co-operative**” means a co-operative or other entity other than \*ACF any of whose members become or apply to become members of the Co-operative.

“**milk**” means the lacteal secretions of a cow.

“**milk processor**” means a person who carries on a business of treating, and packaging \*milk and products and by-products of \*milk for sale for human consumption.

“**milk produce**” means \*milk, cream or any by-product of \*milk, and where a by-product is not measured by litres, the by-product shall be measured according to the number of litres of \*milk used to manufacture the by-product.

“**milk receival depot**” means any premises where \*milk is received directly from a dairy farm.

“**party**” and “**parties**”, in relation to a \*dispute, has the meaning given by rule 102.

“**person**” includes body, body corporate, company, Co-operative and corporation.

“**prescribed**” means prescribed by the Act or under the Act by the \*regulation.

“**Processor Shares**” means the shares in the capital of \*ACF held by the Co-operative following the \*Implementation Date and includes any other shares in the capital of \*ACF which may be issued to or acquired by the Co-operative, and includes such of those shares as become shares in the capital of any company into which \*ACF may convert.

“**provision**” in relation to the Act, means words or other matter that form or forms part of the Act, and includes:

- a chapter, part, division, subdivision, section, subsection, paragraph, subparagraph, sub-subparagraph or schedule of or to the Act;
- a section, clause, sub-clause, item, column, table or form of or in a schedule to the Act; and
- the long title and any preamble to the Act.

**“regional Director”** means a Director other than an independent Director.

**“registered dairyperson”** includes a person who is licensed to produce \*milk on a dairy farm.

**“Registrar”** means the Registrar of Co-operatives or any person delegated the Registrar’s functions.

**“regulation”** means a regulation made under the Act, and any regulation that applies to a Co-operative by way of a transitional regulation made under the Act.

**“relevant interest”** in relation to an entity:

- (i) if that entity is a co-operative, has the same meaning as in the Act as at 1 January 2004;
- (ii) if that entity is a company, has the same meaning as in the Corporations Act as at 1 January 2004.

**“required period”** means

- (i) in the case of a member who ceases to be an \*active member by virtue of rule 13.2.1(f) and does not otherwise qualify as an \*active member, a period of one (1) year less the period during which the member was continuously an inactive member of \*ACF calculated from the date activity last ceased whilst the member was a member of \*ACF up until the \*Implementation Date; and
- (ii) in all other cases means a period of one (1) year.

**“Scheme”** or **“Scheme of Arrangement”** means a scheme of arrangement between \*ACF and its members in or to the effect of the terms set out in Section 12 of the draft Scheme Booklet filed in Supreme Court proceedings commenced in 2004 by ACF subject to any alterations or conditions made or required by the Court including without limitation pursuant to section 344(3) of the Act .

**“secretary”** means any person appointed by the Board as secretary of the Co-operative pursuant to rule 89.

**“share”** means share in the capital of the Co-operative.

**“sharefarmer”** means a natural person who

- does not receive wages for his or her services;
- operates a dairy farm as a licensee or tenant under a \*written agreement; and
- receives a portion of the proceeds from \*milk produced on that dairy farm under a \*written agreement with a \* (s) on that farm.

**“special resolution”** means a resolution which is passed in accordance with rule 63.

**“State”** means the State of New South Wales.

**“surplus”** means the excess of income over expenditure after making appropriate allowance for taxation expense, depreciation in value of the property of the Co-operative and for future contingencies.

**“test day”** has the meaning given by rules 13(2) and 13(3).

**“writing”** includes printing, typing, lithography and other modes of representing or reproducing words in a visible form and **“written”** has a corresponding meaning.

## **110. Interpretation**

In the rules the following words shall be interpreted in the following ways:

**“may”** or a similar word or expression used in relation to a power of the Board indicates that the power may be exercised or not exercised at the Board’s discretion.

**“month”** means calendar month.

**“rules”** mean the registered rules of the Co-operative as \*altered from time to time and reference to particular rules has a corresponding meaning.

## **111. Interpretation of \*Provisions in the Act**

(1) A reference in these rules to **“the Act”** includes a reference to:

- (a) the Act as originally enacted, and as amended from time to time since its original enactment;
- (b) if the Act has been repealed since the inclusion of the reference in these rules - the legislation enacted in substitution of the Act (whether legislation of a state or territory or the federal Parliament) and as amended from time to time since its enactment; and

- (c) a \*regulation.
- (2) A reference in these rules to a provision in an Act includes a reference to:
  - (a) the provision as originally enacted, and as amended from time to time since the original enactment;
  - (b) if the provision has been omitted and re-enacted (with or without modification) since the enactment of the reference - the provision as re-enacted and as amended from time to time since its re-enactment; and
  - (c) if the provision has been omitted and replaced with a new provision dealing with the same area of law or procedure - the new provision as enacted and as amended from time to time since its enactment.
- (3) In the interpretation of a rule, or paragraph of a rule, the interpretation that will best achieve the purpose of the rule is to be preferred to any other interpretation.
- (4) This provision applies whether or not the purpose is expressly stated in the rule or paragraph of the rule.
- (5) In these rules, unless the context indicates a contrary intention, headings are for convenience and do not affect interpretation.
- (6) In these rules, unless the context otherwise requires:
  - (a) expressions used have the same meanings as those given to them by the Act;
  - (b) words denoting the singular include the plural and vice versa;
  - (c) words denoting any gender shall include all genders;
  - (d) words denoting natural persons shall include bodies corporate and, except in relation to members, unincorporate; and
  - (e) headings are for convenience only and shall not affect interpretation.

## **112 Invalidity**

If the whole or any part of a provision of these rules is invalid or unenforceable for a particular purpose it shall if possible be read down so as to be valid and enforceable for that purpose. If however, the whole or any part of a provision of these rules is not capable of being read down it is severed to the extent of the invalidity or unenforceability without affecting the remaining provisions of these rules or affecting the validity or enforceability of that provision for any other purpose.

## **Part 10 Pre \*Implementation Date**

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### **113 Pre \*Implementation Date**

Despite any other provision contained in these rules,

- (a) rule 71 shall not apply until after the \*Implementation Date. Prior to the \*Implementation Date Directors are to be elected by a simple majority at a general meeting of members.
- (b) a person is not eligible to be elected as a Director of the Co-operative unless:
  - (i) the person is an \*active member of the Co-operative; or
  - (ii) a representative of a body corporate which is an \*active member of the Co-operative; or
  - (iii) if the person is standing for election as an independent director, he or she is a person of professional business or general management or other experience or standing in the community and is nominated by the Board.
- (c) a member may hold or have a \*relevant interest in \*shares up to and including 20% of the nominal value of the issued share capital of the Co-operative.

**Form A**

**DAIRY FARMERS MILK CO-OPERATIVE LIMITED**

**SHARE TRANSFER FORM**

I, \_\_\_\_\_  
(Name of Transferor)

of \_\_\_\_\_  
(Address of Current Transferor)

in consideration of the sum of \$ \_\_\_\_\_ paid to me by

\_\_\_\_\_ ("the transferee")  
(Name of Transferee)

do transfer to the transferee \_\_\_\_\_ (number and class) share(s) numbered <sup>1</sup>  
in Dairy Farmers Milk Co-operative Limited to hold on behalf of the transferee, the transferee's heirs, executors,  
administrators and assigns, subject to the conditions on which I hold the same at the time of the execution of this  
transfer.

Date: \_\_\_\_\_

Signature of Transferor: \_\_\_\_\_

Signature of Witness: \_\_\_\_\_

I, the transferee, agree to take the share(s) subject to the conditions on which the transferor holds the share(s) and  
subject to the rules of Dairy Farmers Milk Co-operative Limited as amended from time to time.

Date: \_\_\_\_\_

Signature of Transferee: \_\_\_\_\_

Signature of Witness: \_\_\_\_\_

[1 If not enough room please attach a separate page]

**Form B**

**DAIRY FARMERS MILK CO-OPERATIVE LIMITED**

**PROXY FORM**

I, \_\_\_\_\_  
(Name of Member)

of \_\_\_\_\_  
(Address of Member)

appoint \_\_\_\_\_  
(Name of Proxy)

of \_\_\_\_\_  
(Address of Proxy)

or, in that person's absence, the deputy chairperson of the Co-operative, or a person nominated by the deputy chairperson, as my proxy to vote for me on my behalf at the [ Annual / Special ] General Meeting of the Co-operative to be held on \_\_\_\_\_  
(Date)

and at any adjournment of that meeting.

Dated: \_\_\_\_\_

Signature: \_\_\_\_\_

[Note: Corporate members should execute by attorney or by the prescribed officebearers, or, if required by the company's constitution, under the company's common seal.]

**Form C**

DAIRY FARMERS MILK CO-OPERATIVE LIMITED

**COMPANY REPRESENTATIVE FORM**

\_\_\_\_\_  
(Name of Corporate Member)

of \_\_\_\_\_  
(Address of Corporate Member)

appoint \_\_\_\_\_  
(Name of Representative)

of \_\_\_\_\_  
(Address of Representative)

as its representative for the purposes of section 68 of the Co-operatives Act 1992.

Signed for and on behalf of the abovenamed corporate member of the Co-operative by:

Secretary: \_\_\_\_\_ Director: \_\_\_\_\_

Dated: \_\_\_\_\_

[Affix common seal, if required by the company's constitution]

**Note**

- (i) A body corporate must not appoint a person to represent the body corporate as a member of the Co-operative if such person is a member of the Co-operative or is the representative of another body corporate member.
- (ii) A person is not qualified to be appointed as the representative of a company that is not a listed corporation (within the meaning of the Corporations Act) unless the person is an officer, member or employee of the company.

## Compliance Schedule

Rule No.	Heading	Co-operatives Act 1992 Co-operatives Regulation 1997
1	Rules	Section 106 Section 108 Section 251(1) Schedule 1
2	Rule Alterations	Sections 110 - 113
3	Name	Sections 255-259, Schedule 1
4	Trading Co-operative	Sections 14, 33
5	Change of Registered Office	Section 261, Schedule 1
6	Notification of Office Address at which Registers are Kept	Sections 249, 250
7	Powers	Sections 29 - 33
8	Loans by Members to the Co-operative	Section 268
9	Dealings of members with Co-operative	Sections 78, 80
10	Seal	Sections 48A, 49, 258
11	Co-operative may authorize Agent or Attorney to Execute Deeds	Section 48
12.1	Records and Registers – Custody and Inspection	Section 249, Reg 16 Section 278 , Sched 3 cl 41 Section 251, Reg 17
12.2	Records and Registers – Access by Officers	Schedule 1
13	Primary Activity Rule and Active Membership Provisions	Part 6 - Sections 115ff
14	Forfeitures and Cancellations Relating to Inactive Members	Sections 127 - 137
15	Qualifications for membership	Sections 64, 74, 148
16	Shares not to be Quoted	Section 117 of Income Tax Assessment Act 1936 (Cth)
17	Application for Membership and Shares	Sections 62 - 65, 74, 76A, 146A-D, 147 - 152
18	Members of the Co-operative	Sections 63, 70, 71, 74
19	Liability of Members to the Co-operative	Sections 76, 80
20	Ceasing Membership	Sections 70, 71
21	Expulsion of members	Sections 70, 81
22	Capital and Shares	Sections 147, 156, 268, 289, 290, Schedule 1
23	Minimum Shareholding	Section 74(1)(b)

Rule No.	Heading	Co-operatives Act 1992 Co-operatives Regulation 1997
24	Notice to be Given of Substantial Share Interest and Substantial Change in Share Interest	Sections 287, 288
25	Bonus Shares	Section 156 [and see Sections 151(4)(a), 276(3), 282(1)(b) and 282(2)] Schedule 1
26	Compulsory Share Acquisition	Section 155
27	Purchase of Members' Shares	Section 172, 174
28	Repayment of Former Member's Share Capital	Sections 134, 135, 136
29	Confirmation of Shares held by Members	Schedule 1
30	Calls on shares	Section 149
31	Default in payment of calls	Section 149, Schedule 1
32	Non Payment of Subscription Deemed to be a Call	Schedule 1
33	Forfeited Shares on Default in Payment of Calls	Schedule 1
34	Sale of Shares by Board	Section 80
35	Transfer of Shares	Sections 157-163, 170, Schedule 1
36	Death of Member	Sections 83, 164
37	Registration of Official Trustee in Bankruptcy	Section 166
38	Registration as Administrator of Estate on Incapacity of Member	Section 165
39	Entitlements and Liabilities of Person Registered as Trustee, Administrator etc	Sections 165, 167
40	Co-operative Capital Units	Part 10, Division 2: Sections 269ff
41	Rights Attaching to CCUs	Part 10, Division 2: Sections 269ff
42	Terms of Issue of Debentures	Sections 266, 266A, 266B, 267, 270(2)
43.1	Annual general meetings – Time and location	Sections 198, 408
43.2	Annual general meetings – Requisition by Members of Resolution to be considered by AGM	Section 197
44	Special General Meetings	Sections 198(2), 202
45	Convening General Meetings	Section 199A
46	Requisition of General Meetings	Section 202
47	Notice of General Meetings	Sections 199A, 189(3)
48	Conduct of General Meeting in Multiple Locations	Sections 198, 199



Rule No.	Heading	Co-operatives Act 1992 Co-operatives Regulation 1997
49	Business of Annual and Special General Meetings	Schedule 1
50	Quorum at General Meetings	Section 199, Schedule 1
51	Chairperson at General Meetings	Schedule 1
52	Adjournment and Recommencement of General Meetings	Schedule 1
53	Standing Orders at General Meetings	Schedule 1
54	One Member One Vote Attendance and Voting at General Meetings	Sections 181, 190B, 192A, 201, Schedule 1
55	Effect of Relevant Interest and Transfer of Beneficial Interest on Voting Rights	Sections 178, 182
56	Notice to be Given of Voting Interest	Section 286
57	Proxy Voters and Corporate Representative Votes	Sections 179, 68, 184
58	Lodgment of Proxy Form and Corporate Representative Form	Sections 179, 68, Schedule 1
59	Revocation of Proxy	Section 179, Schedule 1
60	Restriction on Voting Entitlement Under Power of Attorney	Section 183
61	Postal Ballot	Sections 193, 194A, 195
62	Notice of Special Resolutions	Section 193
63	Passing Resolutions	Schedule 1
64	Board of Directors	Sections 205, 206, 216, Schedule 1
65	Powers and Duties of the Board Requirements for Disposal of Processor Shares at the Initiative of the Board Dealings with Processor Shares on the Happening of a Processor Share Event Scheme Proposals	Section 204
66	EBL Accreditation Scheme	Section 204
67	Classification of Members and Regional Directors	Sections 205, 206, Schedule 1
68	Appointment, Retirement and Rotation of Regional Directors	Sections 205, 206, Schedule 1
69	Conduct of Elections for Regional Directors	Sections 206, 218, Schedule 1
70	Conduct of Elections for Independent Directors	Sections 205, 206, 216, Schedule 1
71	Conduct of Elections Generally	Sections 205, 206, Schedule 1
72	Qualifications of Directors	Sections 68, 206, Schedule 1
73	Directors' Duties	Sections 221, 222, 223, 229, 234

Rule No.	Heading	Co-operatives Act 1992 Co-operatives Regulation 1997
74	Directors' Remuneration	Section 230, Schedule 1
75	Requisition and Notice of Board Meeting	Section 209
76	Proceedings of the Board	Sections 209, 210, Schedule 1
77	Transaction of Business Outside Board Meetings	Section 210
78	Quorum for Board Meetings	Section 209, Schedule 1
79	Appointment of Directors to Constitute Quorum	Sections 209, 212
80	Chairperson and Deputy Chairperson of Board	Section 209, Schedule 1
81	Minutes of Board Meetings	Sections 219, 424
82	Delegation and Board Committees	Sections 213, 214
83	Exercise of Delegated Power by Directors	Sections 213, 214
84	Other Committees	Sections 213, 214
85	Removal of Director from Office	Section 218
86	Vacation of Office of Director	Sections 208, 218, Schedule 1
87	Filling of Casual vacancies	Section 212
88	Officers	Section 220, Schedule 1
89	Secretary and Principal Executive Officer	Section 219, Schedule 1
90.1	Indemnity and Indemnity Insurance – Officers' Indemnities	Section 228
90.2	Indemnity and Indemnity Insurance - Insurance	Section 228
91	Financial Year	Section 248
92	Accounts	Section 243
93	Appointment Duties and Responsibilities of Auditors	Section 243
94	Performance of Duties by Auditor	Section 247, Schedule 1
95	Removal of Auditors	Section 190B
96	Resignation of Auditor	Schedule 1
97	Distribution of Surplus	Part 10
98	Declaration of Dividend, Bonus or Rebate	Sections 280 – 283, 156
99	Payment of Dividend or Bonus or Dividend	Sections 280 – 283, 156
100	Determination of Dividend	Sections 280 – 283, 156
101	Provision for loss	Schedule 1
102	Disputes - Definitions	Section 89
103	The Dispute Process	Section 89
104	Notices	Sections 440, 440A
105	Notices in Writing	Schedule 1














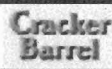
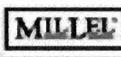
<b>Rule No.</b>	<b>Heading</b>	<b>Co-operatives Act 1992 Co-operatives Regulation 1997</b>
106	Winding Up	Part 12
107	Fines Payable by Members	Section 79
108	Disclosure	Sections 146A, 155, 194, 246, 266, 266A, 286, 306, 311A, 369R
109	Dictionary	Section 5
110	Interpretation	Section 5
111	Interpretation of provisions in the Act	Section 5
112	Invalidity	Sections 106 & 107
113	Implementation Date	Section 113

## Confidential Appendix B: List of DFMC members and locations

**Restriction of publication of part claimed**

## Appendix C: Dairy Farmers key brands

### Overview of Dairy Farmers' Key Brands by Category

Product Categories	Segment (if applicable)	Key Brands
Fresh White Milk		 
Flavoured Milk		  
Dairy Foods	Everyday Yogurt	  
	Kids	
	Dairy Snacks	 
	Culinary	
Dairy Cheese		  

Source: Dairy Farmers, Aztec Retail Scan Data (MAT 16-Dec-2007)

## Confidential Appendix D: Milk Supply Agreement and Supplement between DFMC and ACF

**Restriction of publication of part claimed**

## Confidential Appendix E: Sample supply contracts between DFMC and farmer members

**Restriction of publication of part claimed**

## **Confidential Appendix F: Tables summarising existing supply contracts**

**Restriction of publication of part claimed**



## Appendix G: List of Dairy Industry Participants and locations

**Location of dairy processing facilities for Australia's major milk processors**

	Dairy Farmers	National Foods	Fonterra	Parmalat <sup>41</sup>	Murray Goulburn	Warrnambool	Norco
<b>Queensland</b>	<b>Malanda</b> (Fresh white and flavoured milk, fresh cream and cheese)  <b>Booval</b> (Fresh white and flavoured milk, fresh cream, powders)	<b>Crestmead</b> (Fresh milk)	-	<b>Brisbane</b>  <b>Nambour</b>  <b>Rockhampton</b>	-	-	<b>Gold Coast</b>
<b>New South Wales</b>	<b>Lidcombe</b> (Fresh white and flavoured milk and fresh cream)  <b>Wetherill Park</b> (Dairy foods, sour cream, bottle and carton UHT)  <b>Hexham</b> (Fresh white milk, condensed milk and desserts, cottage cheese)  <b>Baulkham Hills</b> (fresh white milk and fresh cream)	<b>Penrith</b> (fresh milk)	<b>Wagga</b> <b>Wagga</b> (packaged milk, cream, cheese, yoghurt, desserts)	-	-	-	<b>Raleigh</b>
<b>ACT</b>	<b>Canberra</b> (Fresh white and fresh cream)	-	-	-	-	-	
<b>Victoria</b>	<b>Simpson</b>	<b>Campbellfield</b>	<b>Longwarry</b>	<b>Bendigo</b>	<b>Leitchville</b>	<b>Allansford</b>	

<sup>41</sup> No further information regarding what is produced at each manufacturing facility is available on the Parmalat website: [www.pauls.com.au](http://www.pauls.com.au)

	Dairy Farmers	National Foods	Fonterra	Parmalat <sup>41</sup>	Murray Goulburn	Warrnambool	Norco
	(cheese)  <b>Allansford</b> (Cheese)  <b>Shepparton</b> (Fresh white and flavoured milk)	Id (cheese packaging)  <b>Chelsea Heights</b> (fresh milk and cream)  <b>Timboon</b> (specialty cheese)  <b>Morwell</b> (fresh dairy foods)  <b>Cobden</b> (UHT flavoured milk)	(grated parmesan cheese)  <b>Dennington</b>  (milk powders)  <b>Cobden</b>  (butter milk powders, frozen creams)  <b>Cororooke</b>  (cheese, milk powders)  <b>Stanhope</b>  (cheese, milk powders)  <b>Darnum Park</b>  (milk powders)	Rowville	(cheese)  <b>Rochester</b>  (cheese, powders and lactose)  <b>Cobran</b>  (cheese – bulk and retail, powders and lactose)  <b>Kiewa</b>  (cheese, retail milk/cream)  <b>Maffra</b>  (butter, speciality ingredients and powders)  <b>Leongatha</b>  (butter, retail butter/ spreads and creams, UHT products)  <b>Koroit</b>  (butter, powders, protein concentrate)	rd	
South Australia	<b>Clarence Gardens</b> (Fresh white and flavoured milk)  <b>Jervois</b> (Cheese and powders)	<b>Salisbury</b> (fresh milk)  <b>Murray Bridge</b> (dairy snacks, cream, cheese)	-				
Western Australia		<b>Bentley</b> (fresh milk and UHT milk)	<b>Balcatta</b> (milk, flavoured milk, ice cream)				

	Dairy Farmers	National Foods	Fonterra	Parmalat <sup>41</sup>	Murray Goulburn	Warrnambool	Norco
			Brunswick (Yoghurts, Desserts, cream, cheese)				
Tasmania	-	King Island (specialty cheese, cream)  Burnie and Heidi Farm (specialty cheese)  Lenah Valley (fresh milk)	Wynyard (cheese, protein concentrate)  Spreyton (Butter, milk powders, lactose)	-	"Classic Foods" (specialty UHT products)		
Northern Territory	-			Darwin			

**Sources:** The information in this table has been taken from publicly available information on the website of each processor, and from instructions from ACF.

- Dairy Farmers: ACF management
- National Foods: [www.natfoods.com.au](http://www.natfoods.com.au) (site locator)
- Fonterra: [www.fonterra.com.au](http://www.fonterra.com.au) (manufacturing)
- Parmalat: [www.pauls.com.au](http://www.pauls.com.au) (about us: site locations)
- Murray Goulburn: [www.mgc.com.au](http://www.mgc.com.au) (profile: MG map)
- Warrnambool: [www.wcbf.com.au](http://www.wcbf.com.au) (who we are)
- Norco: [www.norco.com.au](http://www.norco.com.au) (NORCO Foods)

## Appendix H: Historical Pricing

This appendix contains an explanation of the table setting out a historical comparison of typical factory paid prices and the prices paid by ACF, on behalf of DFMC, to farmer members.

Dairy Australia is the source of typical factory paid prices.<sup>42</sup> They are made available on a state by state basis for each financial year. It is not known how Dairy Australia calculates these prices.

ACF management is the source of ACF and DFMC's average prices. ACF and DFMC set prices on a region by region basis in each financial year. The five pricing regions are:

1. **Far Northern:** comprising the Atherton tableland
2. **Northern:** comprising Wide Bay, South Burnett, Darling Downs, West Moreton, and Northern NSW
3. **Central:** comprising the Mid North Coast, Tamworth, Hunter Valley, Sydney, South Coast, Central West
4. **Riverina / North Victoria:** comprising South Riverina and North Victoria
5. **West Victoria / South Australia:** comprising Colac, Camperdown, Warrnambool, Mt Gambier, SA Riverland and Central SA.

In order to make a comparison with the Dairy Australia data, the table below compares each region against the most relevant state. Specifically:

- The Far Northern region is not compared against any state, as a relevant comparison is unavailable. The price will typically fall between the SE Queensland and Victoria prices due to the product mix in the Far Northern region.
- The Northern region is compared against Queensland. It is believed that the Dairy Australia price for Queensland is heavily weighted by SE Qld processors, particularly Parmalat;
- The Central region is compared against New South Wales;
- The Riverina / North Victoria region is compared against Victoria; and
- The West Victoria / South Australia region is compared against South Australia.

The consequence of this is that the pricing data does not compare exactly. For example, a small amount of NSW Northern Rivers milk is compared against Queensland and a small amount of NSW Riverina milk is compared against Victoria.

The ACF/DFMC average prices have been calculated by summing the actual payments made to farmer members for all aspects of their raw milk (including the base rate, quality, composition, contract and volume payments, location bonuses and new milk incentives) in each region in each financial year, and dividing that total by the total litres supplied in each region.

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<sup>42</sup> Dairy Australia 'Australian Dairy Industry In Focus 2007' at 14

**Confidential Appendix I: Pricing negotiation estimates**

**Restriction of publication of part claimed**