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## Dairy Industry Services Reform Bill 2003

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Dairy Industry Services Reform Bill 2003

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# Dairy Industry Services Reform Bill 2003

**Date Introduced:** 12 February 2003

**House:** House of Representatives

**Portfolio:** Agriculture, Fisheries and Forestry

**Commencement:** The main provisions commence on Royal Assent. Transitional provisions and amendments to related legislation commence on Proclamation.

## Purpose

The Dairy Industry Services Reform Bill 2003 ('the Bill') will merge the Australian Dairy Corporation ('ADC') and the Dairy Research and Development Corporation ('DRDC') into a single, privatised company by:

- Converting the ADC from a statutory authority to a Corporations Act company limited by guarantee and controlled by dairy farmers as its members, to be known as Dairy Australia Limited ('**Dairy Australia**');
- Transferring the assets and liabilities of the DRDC to Dairy Australia; and
- Providing for the transfer of DRDC staff to Dairy Australia, with protection for their rights and entitlements.

## Background

### Privatisation

In the late 1990s corporatisation and privatisation received renewed attention under the National Competition Policy and the Competition Principles Agreement among the Commonwealth and State and Territory Governments.<sup>1</sup> There has been a particular focus on review of legislative arrangements and privatisation of agricultural marketing and research and development bodies.

The current Bill follows a series of Acts passed in recent years that deal with privatisation or corporatisation in the Agriculture, Fisheries and Forestry Portfolio. These are:

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- the *Wool Industry Privatisation Act 2000*
- the *Horticulture Marketing and Research and Development Services Act 2000* and *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000*
- the *Pig Industry Act 2001*, and
- the *Egg Industry Service Provision Act 2002*.

All of these Acts seek to transfer control over marketing and research and development activities from government to industry participants. They provide for private control in relation to the use of participant levies whilst retaining an element of public control in relation to the use of government subsidies. More detail appears in [Bills Digest No. 52 1999-2000](#), [No. 58 1999-2000](#), [No. 93 2000-2001](#) and [No. 40 2002-03](#).

Background on restructuring of the dairy industry is provided in [Bills Digest No. 35 2002-03](#),<sup>2</sup> and on the related issue of deregulation of the milk products market in [Bills Digest No 167 2000-01](#)<sup>3</sup> and [Bills Digest No. 127 1999-2000](#).<sup>4</sup>

## The ADC and DRDC

The ADC is one of six national bodies representing the various production, manufacturing and marketing sectors of the Australian dairy industry. Each body has different but complementary functions. The Australian Dairy Industry Council (ADIC) is the industry's peak body and represents all sectors of the industry to the Australian and international governments. It also co-ordinates industry policy for its three constituent organisations: the Australian Dairy Farmers' Federation (ADFF), the Australian Dairy Products Federation (ADPF) and the Market Milk Federation of Australia (MMFA). These three organisations look after the national policy interests of the three key industry sectors – dairy farmers, dairy product manufacturers and liquid milk processors.

The ADC is a statutory authority operating under the *Dairy Produce Act 1986*. Its role focuses on industry marketing services and the regulation of financial support to the dairy industry. It is complemented by the Dairy Research and Development Corporation (DRDC). The DRDC is also a statutory authority. It is established under the Dairy Research and Development Corporation Regulations pursuant to the *Primary Industries and Energy Research and Development Act 1989*. The DRDC is the research management arm of the industry. It invests around \$30 million a year in research and development. These funds are drawn from levies paid by farmers and matching government funds.

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## Origins of Dairy Australia

The proposal in the current Bill dates back to meetings of a large number of dairy industry leaders, including dairy company CEOs, held in 2000 to discuss possible future industry services, structures and funding mechanisms.

As a result of these meetings a draft structure was outlined at the December 2000 AGM of the Australian Dairy Industry Council. The matter was further developed during 2001 and broad agreement on a proposed set of arrangements to put to Government was reached in December 2001.<sup>5</sup>

In August 2002, the Government amended the *Dairy Produce Act 1986* so the ADC could fund the involvement of the Commonwealth, the DRDC and the dairy industry in a consultative process, along with the provision of advisers to assist in the investigation of the best options for reform. The Minister for Agriculture, Fisheries and Forestry, The Hon Warren Truss, said that the dairy industry had approached the Government with a proposal that would see the two statutory authorities, ADC and DRDC, become one Corporations Law company, directly accountable to their levy paying members.<sup>6</sup>

Following the completion of the consultation process, the Government announced in December 2002 its approval for the conversion of the ADC and DRDC into the new company, Dairy Australia. According to the Minister:

Dairy Australia's membership will include dairy farmers and peak farmer and processor groups, and it will manage around \$35 million in levy funds and \$15 million in matching Commonwealth R&D contributions every year....This streamlined new structure will help the dairy industry to capitalise on the significant changes that have taken place in the industry in recent years, and ensure Australia maintains its position as one of the world's leading suppliers of dairy products. It will also mean dairy farmers have a far greater say in how their levies are invested.<sup>7</sup>

## Reactions to Dairy Australia

There has been little adverse comment on the creation of Dairy Australia. In reporting on Government approval for the new body, *The Land* newspaper referred to the view of 'industry officials' that this would mark 'a new era of direct industry self-management'.<sup>8</sup> The influential United Dairyfarmers of Victoria strongly approved of the establishment of Dairy Australia, noting that Dairyfarmers would have a bigger say in the future of their industry. President of United Dairyfarmers, Peter Owen, said that the creation of an industry-owned service company 'allows us to get on with the job of delivering even better value on dairyfarmers' levies'.<sup>9</sup>

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## Dairy Australia functions and membership

A telephone helpline<sup>10</sup> has been set up for dairy farmers with questions about Dairy Australia, together with a [website](#)<sup>11</sup> providing information about the structure, membership and costs of joining the new body.

Once established, Dairy Australia would take over the main functions of the ADC and DRDC, namely research and development, information, marketing and trade development. According to the Dairy Australia [website](#), this would include:

- investing in over 300 research and development projects for the farm and manufacturing sectors
- trade policy analysis
- promotion of the health and nutritional benefits of dairy products
- provision of industry statistics, and
- management of issues such as criticism of dairy products, environmental concerns etc.<sup>12</sup>

Dairy Australia will also be responsible for expenditure of levy payments collected from dairy farmers, and for administration of some dairy assistance programs (see further below under the heading Dairy Structural Adjustment Fund).

Dairy Australia will comprise voting members drawn from dairy levy payers (Group A members) and non-voting members made up of the peak dairy farmer and processor bodies (Group B members). As the Minister explained in the Second Reading Speech, details relating to membership will be contained in the constitution of Dairy Australia and are not dealt with in the current Bill.<sup>13</sup> However, information on the Dairy Australia [website](#) includes the following points:

- all levy paying dairy farmers will have the right to be Group A members, but membership will not be compulsory;
- the number of votes at company meetings assigned to each dairy business will be directly linked to the amount of levy the business has paid in the previous financial year. The rate will be one vote for every dollar of levy paid; and
- the new entity will be a company limited by guarantee, with the amount of the guarantee set at \$2 per member.<sup>14</sup>

The Government has established an interim advisory board to complete a business plan, constitution and management structure for Dairy Australia before the intended start up date of 1 July 2003.<sup>15</sup> Before Dairy Australia is registered with the Australian Securities

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and Investment Commission, the Minister must approve the constitution and the inaugural directors of the company.<sup>16</sup>

## The Dairy Service Levy

The Department of Agriculture, Fisheries and Forestry (AFFA) collects levies from dairy businesses under the auspices of the *Primary Industries Levies and Charges Collection Act 1991*. The levies are paid to AFFA by milk processors who subtract an equivalent amount from the price paid to dairy farmers for milk.<sup>17</sup>

There are three existing levies payable by dairy businesses:

- the Corporation levy;
- the research levy; and
- the promotion levy.

At present, AFFA passes the Corporation levy and promotion levy to ADC and the research levy to DRDC.

The cognate Bill – the Primary Industries (Excise) Levies Amendment (Dairy) Bill 2003 – will combine these 3 levies into a single 'dairy service levy'. This will be payable in the same fashion and will initially be set at the current total rate for the existing levies – approximately \$0.32 per litre.<sup>18</sup> A funding agreement will be established which will oblige the Commonwealth to pass on the amount collected from the dairy service levy to Dairy Australia, less certain Commonwealth costs.<sup>19</sup>

The Minister has said that the Government will provide Dairy Australia members with the right to vote on the rate of the dairy service levy that funds the company:

I believe it is important that all levy payers have a say in how much they will pay...As well as being fair and equitable, this will help ensure greater accountability by Dairy Australia to its members, and guarantee a company that is in tune with their needs and aspirations.<sup>20</sup>

The Dairy Australia [website](#)<sup>21</sup> explains that all levy payers will be able to vote on the levy rate, not only those who choose to become members of the company. It is expected that levy payers will be able to vote at least every three years on the size of the levy required to fund Dairy Australia's operations. The voting entitlement for each dairy business will be the same as for members voting at general meetings of the company, ie one vote for every levy dollar paid in the previous financial year. Following the vote by levy payers, the Commonwealth Government will set the rate for the 'dairy service levy' after receiving a recommendation from the Dairy Australia Board.

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The Minister explained in the Second Reading Speech that Dairy Australia will only receive funds from the dairy service levy and matching contributions from the Commonwealth so long as it remains accountable for such funds to both levy payers and the Parliament. The Commonwealth will ensure through the funding agreement with Dairy Australia that planning and reporting requirements beyond the obligations in the Corporations Act are adhered to by Dairy Australia.<sup>22</sup>

### The Dairy Structural Adjustment Fund

As the Explanatory Memorandum notes, following deregulation of State regulated farm-gate milk prices on 1 July 2000, the Commonwealth made available to dairy producers a package of financial assistance, comprising:

- the Dairy Structural Adjustment Program
- the Dairy Exit Program, and
- the Dairy Regional Assistance Program.

Various forms of financial assistance are provided under these programs to help dairy producers and the regions in which they are located adjust to the impact of deregulation.

Dairy Australia will take over ADC's role in administering the Dairy Structural Assistance Fund (DSAF) from which payments for the above programs are made. The DSAF is funded by a levy of 11c per litre on retail sales of milk. Dairy Australia will act as 'trustee' of the DSAF and will hold the assets of the DSAF on trust for the purpose of assistance payments. Dairy Australia must report annually to the Minister on the administration of the DSAF, and these reports must be tabled in Parliament.<sup>23</sup>

In relation to the levy on retail milk sales, it was initially expected that the levy would be in place 'over a target period of up to eight years'.<sup>24</sup> That is the levy would cease by the end of 2007-08. When the Supplementary Dairy Assistance Scheme was introduced the Government advised this measure would be funded by extending the existing levy on sales of drinking milk products into the year 2008-09. The Minister said in his Second Reading Speech that 'it is estimated that the levy would be in place for an additional period of at least seven months and perhaps 10 months'.<sup>25</sup>

However, in November 2002 the [Review of the Dairy Adjustment Levy](#) by the Dairy Adjustment Authority has recommended, based on currently available data, that the levy continue until the first quarter of calendar year 2010 with a further review in 2006-07.<sup>26</sup>

Current administration of the Dairy Regional Assistance Program has been criticised by the ALP. The Shadow Minister for Primary Industries and Resources, Senator Kerry O'Brien, said in January 2003 that 'the distribution of DRAP funding is heavily skewed in favour of a small number of Coalition MPs at the expense of many other regions affected

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by dairy deregulation'.<sup>27</sup> The office of the Minister was reported as stating in response that the program was 'completely transparent' and delivered new jobs to areas hard hit by dairy deregulation.<sup>28</sup>

## Main Provisions

**Parts 2–4** deal with the provision of levy information to the ADC, the 'privatisation' of the ADC and DRDC and other related matters. Essentially, the intention is that the ADC will apply to be registered as Dairy Australia whereas the DRDC will transfer all assets and liabilities and employees, etc to the new company.

**Schedule 1** makes consequential amendments to other related legislation.

### Part 2 - Provision of levy information to Australian Dairy Corporation

**Part 2** deals with the provision of levy information to the ADC

**Clause 7** authorises the ADC to obtain names, addresses, contact details and ABNs of dairy farmers from any purchaser of the farmer's dairy products. This is 'to ensure that as many dairy farmers as possible are given appropriate information about the restructuring effected by the Bill and to encourage dairy farmers to become members of Dairy Australia'.<sup>29</sup>

**Schedule 1, items 121-124** amend the *Primary Industries Levies and Charges Collection Act 1991* to authorise AFFA to pass information to Dairy Australia on levies paid by dairy farmers. This will allow Dairy Australia to verify which dairy farmers are entitled to membership and the level of voting rights they should receive.<sup>30</sup>

### Part 3 – Privatisation of dairy corporations

**Part 3** deals with the creation of Dairy Australia, transitional arrangements, etc.

#### Division 2 – Registration of Dairy Australia

**Division 2** provides for the registration of ADC as a company limited by guarantee under the Corporations Act 2001, with the new name 'Dairy Australia Limited'. The application for registration must be accompanied by the new company's constitution, which must first be approved in writing by the Minister.

**Clause 14** provides that Dairy Australia is not to be regarded as a Commonwealth entity 'for the purposes of a law'. Such provisions are usually included to ensure that the Commonwealth is not legally responsible for the actions of a privatised body. However, in the current Bill 'a law' is defined to mean legislation, regulations or other instruments

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made by the Commonwealth, or a State or Territory. This does not exclude common law litigation against the Commonwealth in relation to actions by Dairy Australia.

**Schedule 1, item 51** amends the *Dairy Produce Act 1986* to stipulate that a 'funding contract' between Dairy Australia and the Commonwealth must be concluded before the Minister can declare Dairy Australia to be an 'eligible body' able to receive funds from the dairy service levy and matching Commonwealth amounts (**new section 7**). The funding contract must ensure that dairy service payments are spent on 'marketing, promotion, strategic policy development, research and development activities or other activities, for the benefit of the Australian dairy industry' (**new section 5**).

### Division 3 – transfer of DRDC assets and liabilities

**Division 3** transfers all the assets and liabilities of DRDC to Dairy Australia. This includes the substitution of Dairy Australia for DRDC in any legal proceedings. The Explanatory Memorandum notes that there is no similar provision transferring ADC's assets and liabilities because the legal entity known as the ADC will continue to exist, as a registered company under the Dairy Australia name.<sup>31</sup>

All contracts and agreements entered into by DRDC will be transferred to Dairy Australia (**clause 18**).

### Division 4 – transferring employees of dairy corporations

**Division 4 of Part 3** deems all employees of DRDC to be employees of Dairy Australia. There is no similar provision for ADC employees since they will continue to be employed by the same legal entity, renamed as Dairy Australia.

**Division 4** provides that:

- DRDC employees will be transferred to Dairy Australia on the same terms and conditions
- accrued entitlements of DRDC employees are unaffected by their transfer to Dairy Australia
- accrued rights of DRDC and ADC employees to compensation under the *Safety, Rehabilitation and Compensation Act 1988* are expressly continued
- accrued rights to maternity leave are not affected by the transfer to Dairy Australia, and
- DRDC and ADC employees retain accrued long service leave rights on transfer to Dairy Australia.

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The Explanatory Memorandum notes that since Dairy Australia will be a private company, former ADC and DRDC employees will no longer be entitled to contribute to Commonwealth superannuation schemes.<sup>32</sup>

## Concluding Comments

A key issue in the privatisation of government owned entities is the shift from the 'public' accountability requirements under legislation such as the *Commonwealth Authorities and Companies Act 1997* ('CAC Act') to the 'private' reporting regime under the *Corporations Act*. Instead of CAC Act requirements such as the tabling of annual reports in Parliament and an obligation to keep the responsible Minister informed of significant developments, a privatised entity is 'accountable' through annual financial and directors reports that are sent to members, tabled at company meetings and lodged with the Australian Securities and Investment Commission (ASIC). While reports lodged with ASIC are obtainable by members of the public, the privatisation process removes the element of enforced parliamentary scrutiny. In addition, a privatised entity is not subject to administrative law scrutiny through freedom of information and judicial review processes.<sup>33</sup>

As noted above, while the provisions of Dairy Australia's constitution are not included with the current Bill, it is envisaged that voting power in the new company will be based on the amount of levy paid by individual members. It follows that wealthier dairy farmers will have a greater say in the direction of Dairy Australia, including on key issues such as election of directors.

Public scrutiny of Dairy Australia's operations will be important. Dairy Australia will use public funds: the dairy service levy collected by AFFA and matching Commonwealth payments for its normal operations, and the DSAF funded by a surcharge on retail sales of milk for its financial assistance programs. The concept of a privately controlled body such as Dairy Australia administering a publicly funded assistance program such as the DSAF might be questioned, especially given the absence of any administrative review processes. In relation to the DSAF, however, the current Bill does require additional accountability to Parliament.

As noted, the Minister has also foreshadowed additional accountability obligations in relation to the use of the dairy service levy and Commonwealth payments for Dairy Australia's normal activities, to be included in the Statutory Funding Agreement. Neither the second reading speech nor the Explanatory Memorandum indicate what additional obligations are to be included in the Agreement. An earlier example of additional reporting obligations can be found in the [statutory funding agreement](#)<sup>34</sup> between the Commonwealth and Australian Wool Services Limited (the privatised Wool Research and Promotion Organisation).

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## Endnotes

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- 1 Productivity Commission, [Impact of Competition Policy Reforms on Rural and Regional Australia Inquiry Report](#), 14 October 1999. See: [Appendix C](#).
- 2 Rosemary Bell and Peter Hicks, Dairy Industry Legislation Amendment Bill 2002, *Bills Digest No 35 2002-03* at <http://www.aph.gov.au/library/pubs/bd/2002-03/03bd035.pdf>.
- 3 Rosemary Bell, Dairy Produce Legislation Amendment (Supplementary Assistance) Bill 2001, *Bills Digest No 167 2000-01* at <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD167.htm>.
- 4 Mary Anne Neilsen, Dairy Industry Adjustment Bill 2000, *Bills Digest No 127 1999-2000* at: <http://www.aph.gov.au/library/pubs/bd/1999-2000/2000bd127.htm>.
- 5 Australian Dairy Industry Council, 'Future Industry Structures', *Milk Matters*, June 2000 at: <http://www.dairy.com.au/adic/mmnews010601-02.html>; 'Industry Restructure', *Milk Matters*, September 2000 at <http://www.dairy.com.au/adic/mmnews210901.html>; 'Pat Rowley, *Milk Matters*, Chairman, Australian Dairy Industry Council, Address to the ADIC AGM 5/12/01', at: <http://www.dairy.com.au/adic/mmnews030202.html>.
- 6 The Hon Warren Truss, MP, 'Second Reading Speech', Dairy Industry Legislation Amendment Bill 2002, House of Representatives, *Debates*, 28 August 2002, p. 5607.
- 7 The Hon Warren Truss, MP, 'Dairy Australia gets the go-ahead', *Media Release*, 19 December 2002.
- 8 'DA ushers "new era"', *The Land*, 9 January 2003.
- 9 United Dairyfarmers of Victoria, 'National dairy body a win for farmers', *Media Release*, 17 December 2002.
- 10 1800 00 4377 see: Dairy Australia, [Media Statement](#), 6 February 2003.
- 11 <http://www.dairyaustralia.com.au/dairyAustralia/index.ph p3>.
- 12 <http://www.dairyaustralia.com.au/dairyAustralia/index.ph p3>.
- 13 The Hon Warren Truss, MP, 'Second Reading Speech', Dairy Industry Services Reform Bill 2003, House of Representatives, *Debates*, 12 February 2003, p. 656.
- 14 <http://www.dairyaustralia.com.au/dairyAustralia/index.ph p3>.
- 15 The members of the Interim Advisory Board are Pat Rowley (Chairman), Sandy Murdoch, John Massey, Sarah Croke and Reg Smith. *ibid*.
- 16 The Hon Warren Truss, MP, 'Second Reading Speech', Dairy Industry Services Reform Bill 2003, House of Representatives, *Debates*, 12 February 2003, p. 656.
- 17 Explanatory memorandum, p. 3.
- 18 <http://www.dairyaustralia.com.au/dairyAustralia/index.php3>.
- 19 Explanatory Memorandum, p. 10.
- 20 The Hon Warren Truss, MP, 'Dairy Australia gets the go-ahead', *Media Release*, 19 December 2002.

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- 21 <http://www.dairyaustralia.com.au/dairyAustralia/index.php3>.
- 22 The Hon Warren Truss, MP, 'Second Reading Speech', Dairy Industry Services Reform Bill 2003, House of Representatives, *Debates*, 12 February 2003 p. 656.
- 23 Explanatory Memorandum, p. 15.
- 24 Dairy Industry Adjustment Bill 2000, Explanatory Memorandum, p.5
- 25 The Hon Warren Truss, MP, 'Second Reading Speech', Dairy Produce Legislation Amendment (Supplementary Assistance) Bill 2001, House of Representatives, *Debates*, 24 May 2001, p. 26970.
- 26 Dairy Adjustment Authority, Review of the Dairy Adjustment Levy, November 2002
- 27 Senator Kerry O'Brien, 'National Party milks consumers to fund its survival', *Media Release*, 12 January 2003.
- 28 *The Land*, 16 January 2003.
- 29 Explanatory memorandum, p. 3.
- 30 *ibid.*, p. 4.
- 31 Explanatory memorandum, p. 5.
- 32 Explanatory memorandum p. 7.
- 33 See eg Nicholas Seddon, *Government Contracts – Federal, State and Local* 2<sup>nd</sup> edition, Federation Press, 1999. The author states that 'documents in the hands of private sector providers are beyond the reach' of freedom of information legislation' (p 322). As for availability of judicial review, eg under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), this depends on the contested decision being one of 'an administrative character...made under an enactment'. Seddon notes that 'traditionally the availability of judicial review has been about the control of the exercise of public power', although there is now some recognition, especially in the United Kingdom, that 'when private bodies are vested with powers that have a public effect', such bodies may also be subject to judicial review. The idea that decisions of privatised public bodies might be reviewable has, however, had little impact in Australia (pp 298–299).
- 34 Department of Agriculture, Fisheries and Forestry, [\*The Commonwealth of Australia: Wool Services Limited-Statutory Funding Agreement\*](#), March 2001.

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