



# Dairy Code of Conduct

ACCC submission in response to the  
2021 review of the Code

August 2021

# 1. Introduction

The Australian Competition and Consumer Commission (**ACCC**) welcomes the opportunity to make a submission to the 2021 review of the Dairy Code.

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading, and product safety for the benefit of consumers, businesses, and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading, and product safety provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**), regulate national infrastructure, and undertake market studies.

The final report of the ACCC's inquiry into the Australian dairy industry (**Dairy Inquiry**), released in 2018, highlighted the real and sustained imbalance of bargaining power that exists between dairy processors and their dairy farmer suppliers.<sup>1</sup> The consequences of this dynamic played out in events surrounding the Dairy Inquiry, but were most starkly illustrated by the prospective and retrospective price reductions which Australia's largest dairy processors imposed on farmers in 2016. These had a devastating effect on the industry. Therefore, the key recommendation of the Dairy Inquiry was that the Australian Government should introduce a mandatory code of conduct to address market failures arising from this imbalance in bargaining power.

Accordingly, the ACCC welcomed the Government's introduction of the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019* (**Code**), and supports the Code's underlying framework and principles.

This submission sets out the ACCC's observations about how the Code is working in practice, discusses our enforcement and compliance activities, and makes recommendations to improve the certainty and enforceability of the Code.

## 1.1. Executive Summary

The Code came into effect on 1 January 2020, and as such has only been in operation for a short period (in effect, one full season), making it difficult to draw definitive conclusions about its impact.

However, on the information available, the ACCC considers that the Code is having a very positive effect on the industry by providing a useful framework for farmers to compare processor offers, while also addressing some of the unfair contracting practices stemming from the imbalance of bargaining power. The Code significantly improves price transparency and certainty when compared to prior market practices. At the time of the opening of both dairy seasons during the Code's operation, the ACCC observed strong price competition in most dairy regions.

At this stage, the ACCC considers the Code is meeting most of its preliminary objectives and having a positive impact on the industry.

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<sup>1</sup> On 27 October 2016, the Treasurer, the Hon Scott Morrison MP issued a notice requiring the ACCC to hold an inquiry into the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry. This followed late season 'step-downs' which caused severe and unforeseen reductions in the incomes of more than 2000 dairy farmers and significantly impacted the productiveness of the industry. Farmers exited the industry and the volume of milk produced fell substantially in the following season.

While the Code would benefit from minor amendments to enhance its certainty and enforceability, at this early stage the ACCC has not seen evidence that would justify making fundamental changes.

The ACCC recommends the Government implement the following minor amendments to improve the operation of the Code in the short term:

- **Recommendation 1: The Code should be amended to require internal dispute resolution processes to adopt the same 3 week timeframe provided under the Horticulture Code and Franchising Code. This timeframe should commence from the point at which the complaint is received by the respondent.**
- **Recommendation 3: The 14-day cooling-off period under section 23 of the Code should not be reduced.**
- **Recommendation 4: The Code should be amended so that processors purchasing milk from 5 or fewer farmers should be exempt from section 12 (and related sections) of the Code.**
- **Recommendation 5: The Code should be amended to clarify that the definition of 'minimum price' under the Code does not include any deductions related to milk quality.**

Given that the Code will be reviewed again in 2023, our submission also recommends a number of issues for further consideration. While these issues are starting to emerge now, the ACCC submits that the scope of required changes is not yet clear. Furthermore, these are substantial issues which may require more consultation and a longer period to assess than this first review permits. The ACCC considers that the 2023 review would provide a more appropriate forum to address these issues.

Accordingly, the ACCC recommends the Government should start gathering information and developing proposals in relation to the following issues now, with a view to considering more substantial changes to the Code as part of the 2023 review:

- **Recommendation 2: The Government should start to consider whether the dispute resolution procedures under the Code ought to be strengthened.**
- **Recommendation 6: The Government should start to consider whether the minimum price protections under the Code are fit for purpose.**
- **Recommendation 7: The Government should start to consider how the Code could better facilitate price comparisons between processors.**
- **Recommendation 8: The Government should start to consider whether the provisions around non-exclusive MSAs are meeting industry needs.**

However, this should not be taken to preclude more immediate reform if stakeholders or the Government consider it necessary.

The ACCC is happy to provide additional information to the review to enhance the certainty and enforceability of the Code, and to ensure that the Code continues to deliver on its objectives.

## 2. ACCC's role and activities under the Code

The ACCC has dedicated significant resources to educating stakeholders on the implementation of the Code, as well as monitoring and enforcing compliance.

### 2.1. Education and engagement

Before the first round of MSAs under the Code were published on 1 June 2020, the ACCC published extensive guidance to assist processors and farmers to understand their rights and obligations. The ACCC maintains a webpage devoted to the Code where we continue to produce information and resources to assist stakeholders.

We have engaged extensively with the industry through a range of channels to raise awareness of the Code. Between December 2019 and November 2020, the ACCC's Dairy Consultative Committee provided an opportunity for the ACCC to liaise directly with key industry representatives on the implementation of, and distribution of information relating to, the Code. While face-to-face meetings were curtailed by COVID-19 restrictions, we have been actively engaging with stakeholders through virtual forums and meetings.

### 2.2. Compliance and enforcement

#### **ACCC role**

The ACCC is responsible for the enforcement of the Code. The ACCC prioritises matters in accordance with our [Compliance and Enforcement Policy](#).

The ACCC's 2021 enforcement and compliance priorities include ensuring compliance with mandatory industry codes of conduct in the agriculture sector, including the Code, and ensuring that small businesses receive the protections of the fair trading laws.

#### **Complaints and enquiries**

The ACCC receives the majority of our reports relating to the Code through our [Infocentre](#). Around the time of the Code's drafting and implementation, the ACCC received some general enquiries seeking further information on the nature and scope of the Code.

Since the Code came into effect, the ACCC has received only a small number of complaints from stakeholders in the dairy industry which raise potential compliance issues under the Code. Some of these complaints have involved individual contract interpretation or dispute resolution issues, which are outside the scope of the ACCC's compliance and enforcement mandate under the Code. As set out in section 3.1 below, the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) may be able to assist parties to resolve individual disputes under an MSA.

The ACCC also initiates our own compliance checks to ensure that processors are complying with the Code, which are discussed below.

#### **Compliance and enforcement monitoring**

The ACCC has a range of tools available to monitor compliance with, and investigate alleged breaches of, industry codes.

Under the CCA, the ACCC is empowered to conduct compliance checks or audits of persons or businesses that are subject to the Code. The ACCC has conducted, and will continue to conduct, both risk-based and random audits of processors.

The Code requires processors to publish standard form MSAs on their websites by 2:00pm (Canberra time) on 1 June every year. The ACCC assessed MSAs published in June 2020 and 2021 and found several examples of non-compliance. The following matters have been publicly resolved and as such can be included in this submission:

- Saputo Dairy Australia (**Saputo**) allegedly published its MSAs at around 3pm on 1 June 2020. The ACCC obtained evidence that the delay was caused by a technical failure meaning the files were only publicly available via a direct link. Saputo took immediate steps to correct this. The ACCC issued a public statement about the matter and Saputo undertook to examine its internal processes to ensure future compliance.
- The ACCC issued Riddoch Trading Pty Ltd, trading as Union Dairy Company (**UDC**), with an infringement notice for allegedly failing to publish its standard form MSAs on its website. Instead of making its MSAs publicly available, UDC required suppliers to provide their email address to UDC who would then send a copy of the agreement to them.
- The ACCC issued Brownes Foods Operations Pty Ltd with two infringement notices for allegedly publishing MSAs that did not comply with the Code.

In addition, the ACCC has recently filed proceedings against Lactalis Australia Pty Ltd (**Lactalis**) alleging that Lactalis breached a number of the Code's requirements in 2020-21 by, in summary: failing to publish standard form MSAs and statements of circumstances on its website at or before the 1 June 2020 publication deadline; failing to publish a standard form non-exclusive agreement at any time; publishing and entering into MSAs that allowed Lactalis to terminate the MSA for non-material breaches; and entering into MSAs that did not consist of a single document.

In December 2020, the ACCC also published a document outlining our [Initial observations on compliance with the Dairy Code](#). This provided information about several areas where we thought compliance could be improved, and encouraged processors to consider whether their agreements were compliant with the Code.

The ACCC will continue to monitor compliance with the Code and take enforcement and compliance action as appropriate.

### **Milk supply agreements entered into before 1 January 2020**

When the Code came into effect on 1 January 2020, MSAs that pre-dated the Code were not required to comply with the Code. Initially, only MSAs created, varied, or renewed after 1 January 2020 were subject to the Code.

However, all MSAs were required to be compliant with the Code from 1 January 2021, no matter when they were entered into. This means that from 1 January 2021, processors will have breached the Code if any of their MSAs (regardless of when they were entered into) do not comply with the Code.

The ACCC received a small number of complaints relating to MSAs entered into before the commencement of the Code. These were considered in accordance with our [Compliance and Enforcement Policy](#) and the ACCC did not identify any breaches of the Code or the CCA arising from these complaints. This transitional period is now finished, and the ACCC is not aware of any ongoing transitional issues that raise concerns under the laws administered by the ACCC.

## Remedies for breach of the Code

A breach of a civil penalty provision of the Code is a breach of the CCA<sup>2</sup>, and, if it is sufficiently serious, can result in the ACCC taking legal action. Currently, contraventions of these provisions may attract financial penalties of:

- up to \$22,200 (100 penalty units) per breach for farmers, and
- up to \$66,600 (300 penalty units) per breach for processors.

The ACCC can also issue infringement notices for breaches of civil penalty provisions of the Code. The penalty which may be imposed in relation to an infringement notice is fixed at \$11,100 (50 penalty units) for body corporates and \$2,200 (10 penalty units) for individuals and other entities.

The ACCC can also issue public warning notices related to contraventions of the Code<sup>3</sup> and can seek the following remedies through the courts or as negotiated with the parties: injunctions,<sup>4</sup> non-party redress,<sup>5</sup> section 87B undertakings, and administrative resolutions.

Private parties can also recover damages under the CCA for a contravention of the Code.<sup>6</sup>

## 3. Recommendations

As set out above, the ACCC considers that the Code would benefit from a number of minor amendments to improve its operation in the short term. This section sets out the ACCC's recommended minor amendments, as well as our recommendations in relation to several longer-term issues that the ACCC considers would be best addressed through gathering further information, developing proposals for potential reform, and consulting with stakeholders as part of the 2023 review of the Code.

### 3.1. Dispute resolution provisions under the Code should be strengthened

#### *Dispute resolution under the Code*

The ACCC considers that access to effective dispute resolution procedures is an essential element of the Code.

Under the Code, an MSA must provide for both an internal complaints handling procedure and a mediation process. A milk supply agreement may also provide for an arbitration process, including by adopting the arbitration process set out in the Code.

Before resorting to mediation or arbitration, parties must first try to resolve the dispute via the processor's internal complaints handling process.

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<sup>2</sup> CCA s 51ACB.

<sup>3</sup> CCA s 51ADA.

<sup>4</sup> CCA s 80(1)(a)(ii).

<sup>5</sup> CCA s 51ADB.

<sup>6</sup> CCA s 82.

By 1 June each year, all processors who are subject to the Code must publish a report on disputes for the 12 months beginning on 1 May in the previous year, setting out:

- the number of disputes arising under or in connection with their MSAs that were the subject of mediation or arbitration that started or ended in the reporting period
- information about the nature of these disputes
- the number of mediations or arbitrations conducted
- the average time taken to resolve these disputes
- the outcomes of these disputes.

It is important for processors to publish reports on disputes on time so that potential suppliers can know whether the processor has been involved in a relevant recent dispute and consider this as part of their decision making on who to supply their milk to.

As part of our compliance and enforcement monitoring, the ACCC reviewed the dispute reports published by processors on 1 June each year.

### ***Internal dispute resolution processes should be faster***

**Recommendation 1: The Code should be amended to require internal dispute resolution processes to adopt the same 3 week timeframe provided under the Horticulture Code and Franchising Code. This timeframe should commence from the point at which the complaint is received by the respondent.**

At present, before resorting to mediation or arbitration, parties must first try to resolve the dispute via the processor's internal complaints handling process, which is allowed to take up to 60 days from when the respondent acknowledged the complaint.

The ACCC supports strengthening the Code by amending it to provide faster access to mediation.

### ***Additional issues for consideration***

**Recommendation 2: The Government should start to consider whether the dispute resolution procedures under the Code ought to be strengthened.**

The ACCC supports the development of accessible and effective dispute resolution procedures.

We note that to date, only a small number of disputes have been publicly reported under the Code. Nonetheless, the ACCC recommends the Government should consider in the lead-up to the 2023 review of the Code whether the dispute resolution framework provided under the Code can be improved by:

- Clarifying that the Code does not limit a party's right to bring legal proceedings.
- Requiring all mediation and arbitration under a milk supply agreement to be conducted in accordance with the procedures set out in the Code. The availability of multiple dispute resolution procedures under an MSA may confuse parties and undermine the benefits of having the ASBFEO process.
- Clarifying the obligations and procedures to be followed during mediation and arbitration under the Code. At present, the procedures under the Code allow the mediator or arbitrator considerable freedom in determining how to conduct the process. By contrast, similar industry codes, such as the Food and Grocery Code,



provide that 'mediation or arbitration for the purposes of this code must be conducted in accordance with the rules of the Institute of Arbitrators and Mediators Australia'.

- Considering the circumstances under which an arbitration may be terminated unilaterally, this has the potential to undermine an arbitration scheme, as a complainant who believes that an arbitrator will not rule in their favour may request termination of the process prior to any final findings.

### 3.2. Cooling-off periods should remain at 14-days

#### **Recommendation 3: The 14-day cooling-off period under section 23 of the Code should not be reduced.**

Under section 23 of the Code, MSAs must provide a 14-day cooling-off period, during which the farmer may terminate a milk supply agreement with immediate effect without incurring any liability.

The cooling-off period starts when the parties enter into the agreement, and expires:

- if it is a written agreement, 14 days after the parties enter into the agreement;
- if it is an unwritten agreement, 14 days after the processor gives the farmer a written record of the agreement.

If the agreement is terminated during the cooling-off period, the agreement continues to apply to all milk supplied under the agreement up until the date on which the termination takes effect.

Given the imbalance in bargaining power between farmers and processors, the ACCC considers that it is particularly important that farmers have this meaningful opportunity to review a MSA to ensure that it is financially and legally appropriate to their circumstances.

The ACCC considers that any period less than 14 days would provide insufficient time to allow farmers to seek legal and business advice. The ACCC strongly recommends retention of a 14 day cooling-off period in the Code.

### 3.3. Processors with 5 or fewer farmer suppliers should be exempt from the publication requirements

#### **Recommendation 4: The Code should be amended so that processors purchasing milk from 5 or fewer farmers should be exempt from section 12 (and related sections) of the Code.**

Issue: A number of processors that do not qualify for the small business exemption deal with as few as one farmer, yet are required to publish their standard form MSAs.
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Under the Code, milk processors that are small business entities (meaning a business with an annual turnover of less than \$10 million) are exempt from most of the Code's requirements, with the exception of the requirement to deal with farmers in good faith.<sup>7</sup>

During compliance and enforcement activities, the ACCC has identified a number of processors that exceed the \$10 million turnover threshold, yet only contract with a very small number of farmers (in some cases, as few as one farmer), for a relatively small volume of milk. Generally, these processors are not seeking to take on new suppliers.

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<sup>7</sup> Dairy Code, section 8.



The ACCC considers that publication of these agreements does not add considerably to market transparency, as the vast majority of milk supply is captured through the larger processors, and the Code's requirements may pose an unnecessary administrative burden on these smaller processors.

The ACCC supports an additional exemption from the publication requirements under the Code for processors that purchased milk from 5 or fewer farmers (as defined by the Code)<sup>8</sup> in the dairy season preceding each 1 June. The ACCC considers that such processors should be exempt from section 12 of the Code (and associated sections such as 13, 14, and 15). These processors should continue to be subject to the other provisions of the Code.

### 3.4. Minimum price and the manner in which the industry values milk and communicates this

#### *Background – milk pricing in the dairy industry*

The ACCC supports the broad framework provided by the minimum price protections under the Code, which are a fundamental part of providing price transparency and certainty to farmers.

However, the manner in which the industry typically communicates milk prices is complex, and raises issues that warrant consideration during the current and upcoming reviews. These issues arise because the overall price a farmer receives for milk is typically dependant on a number of quality parameters, with the overall price subject to a number of additional premiums and deductions. Milk quality, and other production characteristics which may be rewarded or penalised, vary from farm to farm, and within and between seasons.

Milk is valued according to its milkfat and protein content. Typically, a processor sets a base price for each month of the agreement, expressed in dollars per kilogram for milkfat and protein.

Historically, there has been significant variability in the price of milk under a supply agreement. The use of variable pricing has in part evolved from co-operative models that previously characterised the dairy industry. Traditionally, a co-operative processor set a conservatively low milk price at the commencement of each season and increased this throughout the season (via 'step-ups') as the profits that could be distributed became more certain.

Variable price arrangements have remained common in the industry, despite most processors now being corporations which acquire milk from unrelated dairy farmers. While the ability to vary prices has generally been used to vary the price upwards, there have been instances of the use of 'step downs', for example, Murray Goulburn and Fonterra's conduct in April and May 2016.

Traditionally, processors have also provided an indicative combined price expressed in dollars per kilogram of milk solids (\$ kg/MS), which is the weighted average price of the fat and protein components (determined by milk composition) plus any bonuses, less any charges and deductions (including quality penalties). In Queensland, parts of NSW, and WA, the price is often expressed in cents per litre (c/L), however, the basic principles are roughly the same.

The overall milk price received by supplying farmers is often subject to a number of additional payments and deductions, including:

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<sup>8</sup> The Code (section 5) defines a farmer as 'a person that produces, or that may produce, milk'.

- *Milk quality incentives and penalties*: processors usually prescribe certain incentives and penalties related to the quality of milk supplied. The incentive or penalty will normally be calculated on a sliding scale based on test results, such as the Bulk Milk Cell Count and the Thermoduric Plate Count. However, as the standards are determined by the processor, milk quality testing regimes are seldom consistent across processors.
- *A production payment*: an additional payment provided as an incentive to increase production. This payment is often calculated on a sliding scale based on the total amount of milk solids supplied during the season.
- *A volume charge*: a flat rate charge for every litre of milk supplied.
- *A stop charge*: a collection fee that is typically only charged if a second milk collection is required.

The number of components forming the overall milk price creates complexity for farmers, impeding their ability to accurately compare the offers of competing processors. Many processors provide an indicative overall milk price that combines variable seasonal rates, incentive payments, penalties and service charges. These offers are rarely consistent across processors.

The ACCC's Dairy Inquiry found that pricing offers from processors were complicated and often difficult to interpret. For example, the publicised 'farm gate price' may not accurately represent the price payable to any particular farm, or the bonuses and deductions that the farm will receive. This uncertainty arises even in the absence of mid-season price adjustments.

### ***Minimum price framework under the Code***

A number of the Code's protections apply by reference to the 'minimum price', which must be clearly specified in the MSA. In summary:

- The MSA must clearly specify the minimum price or prices under the agreement, by specifying either a single minimum price or a schedule of yearly or monthly minimum prices.<sup>9</sup>
- The 'minimum price' is the lowest price payable under the agreement for milk supplied during the period, disregarding: (a) loyalty payments; (b) any potential prospective step downs; and (c) any fees payable by the farmer under the agreement.<sup>10</sup>
- The minimum price requirements do not oblige a processor to pay any particular price for milk (i.e., they do not set a 'floor price' for milk), and the minimum price need not be the same as the final price paid.
- The Code limits the extent to which processors can step-down the minimum price. Retrospective step-downs are prohibited in all circumstances;<sup>11</sup> prospective step-downs are limited to defined 'exceptional circumstances'.<sup>12</sup>

The minimum price protections in the Code are drafted broadly and provide processors with a significant degree of discretion in terms of how a minimum price can be disclosed to farmers. The Code does not require the minimum price to be specified in any particular way,

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<sup>9</sup> *Dairy Code*, section 26.

<sup>10</sup> *Dairy Code*, section 5 (definitions).

<sup>11</sup> *Dairy Code*, section 27.

<sup>12</sup> *Dairy Code*, section 28.

other than by reference to milk supplied during the period (e.g. it may be specified by reference to milk solids, or on a cents per litre basis).

This absence of standardisation creates a number of real or perceived risks for farmers that may tend to undermine price transparency and certainty, and therefore undermine some of the key benefits intended by the Code.

### ***Minimum prices should exclude quality deductions***

#### **Recommendation 5: The Code should be amended to clarify that the definition of 'minimum price' under the Code does not include any deductions related to milk quality.**

As described above, the overall milk price a farmer receives is typically reliant on the fat and protein content of the milk supplied, with the overall price subject to a number of additional premiums and deductions.

In the majority of MSAs reviewed by the ACCC, the lowest price payable under the MSA can only be calculated by applying potential quality deductions to the stated schedule of minimum prices. It is unclear whether this complies with the definition of 'minimum price' under the Code.

Applying deductions to the minimum price to account for quality variations is a practice which is widespread across the industry and follows the industry norm that existed before the Code (with the difference being that the 'base rate' prices were not a guaranteed minimum). When seeking to specify the minimum price payable for milk under an MSA, processors have generally specified the lowest price payable for standard quality milk, rather than the lowest price payable for the lowest quality milk.

While this approach arguably does not comply with the requirement to specify the lowest possible price payable for milk under an MSA, it provides a more meaningful indication of what farmers can expect to be paid for their milk because it reflects the minimum price payable if farmers meet their milk quality obligations. As such, there are significant challenges in terms of enforcing this provision in a manner that is consistent with the transparency objectives of the Code.

Furthermore, if the minimum price is required to account for lower quality milk, this may encourage processors to reduce their published minimum prices, which will provide less certainty to farmers and a greater capacity for processors to step-down prices without triggering the protections in the Code.

The Government could consider linking the minimum price to a particular set of industry standard quality parameters (for example a standard fat, protein and somatic cell count). This would provide certainty to farmers and also facilitate easier comparison of minimum prices.

### ***The drafting of the minimum price protections should be carefully considered***

#### **Recommendation 6: The Government should start to consider whether the minimum price protections under the Code are fit for purpose.**

Issue: The drafting of minimum price provisions raise the risk that farmers may not be protected in the manner originally envisaged when the Code was drafted.
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The ACCC considers there are a number of risks associated with the current drafting of the minimum price provisions that may prevent the Code from achieving the desired level of

transparency in the industry. However, any major changes would need to be considered carefully, given the potential costs and unintended consequences of amending the current framework. We encourage the Government to start gathering information and developing potential options for reform ahead of the 2023 review.

The Code's minimum price requirements do not oblige a processor to pay any particular price for milk, and the minimum price need not be the same as the final price paid. For example, a processor could legally pay suppliers the market rate for milk while setting a minimum price of 10 c/L. Such an arrangement may allow the processor to step-down the milk price without triggering the protections under the Code, and ultimately leave farmers with little to no price certainty under their MSA.

The ACCC also notes concerns raised publicly by stakeholders over the pricing schedules in longer term MSAs. It is the ACCC's preliminary view that an agreement that includes a schedule specifying one minimum price for the first year and a lower minimum price for the second or subsequent year(s) would meet the disclosure obligations under the Code.

While this practice may impact price certainty for farmers supplying under multi-year agreements, the ACCC considers that such conduct, if it does occur, is still preferable to the kinds of contracts that were permitted before the Code, as it still provides a guaranteed minimum price that farmers can rely on for the duration of the supply period. This allows processors to meaningfully compete to provide guaranteed income, while continuing to offer longer term MSAs which incorporate some pricing safeguards for their legitimate business interests, and retaining the ability to pay farmers more if circumstances allow.

During the development of the Code, stakeholders also expressed concern that the minimum price requirements would result in processors offering only short term contracts to farmers.

To date, the potential conduct outlined above has not occurred in practice:

- While we have observed some processors calculating the 'base price' payable for milk separately from the 'minimum price' under the agreement, we have not identified any processors setting arbitrarily low minimum prices in order to circumvent the step-down provisions in the Code.
- For multi-year contracts, in many cases the minimum price remains the same for the entirety of the supply period. In cases where the minimum price was defined separately from the actual pricing mechanisms in the MSA, the minimum price for out years may be lower than the initial year, but still serves as a meaningful price floor.
- A significant number of processors continue to offer multi-year MSAs.

This may have been assisted by relatively strong demand for milk in the past two dairy seasons. At the beginning of the 2020-21 and 2021-22 dairy seasons we observed competition between processors with regard to minimum price for one-year MSAs. For example, the ACCC observed processors increasing price offers in response to prices set by other processors.

The ACCC will continue to monitor processor conduct in relation to this risk between now and the 2023 review.

## *The Code should facilitate the comparison of processor offers*

### **Recommendation 7: The Government should start to consider how the Code could better facilitate price comparisons between processors.**

Issue: While section 12(2) of the Code has improved transparency in the industry, it remains difficult for farmers to accurately or easily compare minimum price offers between processors. Recommendation 7 of the Dairy Inquiry remains unaddressed.

Because the overall price a farmer receives for milk is typically reliant on its fat and protein content, with the overall price subject to a number of additional premiums and deductions that vary between processors, it can often be difficult for farmers to accurately or easily compare minimum price offers between processors, particularly as it relates to their farm.

The ACCC supports careful consideration regarding whether the Code can provide farmers with a better means of comparing offers from different processors.

Following the Dairy Inquiry, the ACCC recommended that processors should publish information identifying how their pricing offers apply to individual farm production characteristics to enable better farm income forecasts.<sup>13</sup> Similarly, industry stakeholders have expressed a desire for something equivalent to a bank comparison rate, which reflects the interest rate of a loan plus specific fees and charges, intending to make accurate comparison of the total cost of products easier.

The ACCC considers this is a complex matter that requires careful consideration. The ACCC envisages that complexities such as variation in farm production profile across and between regions will need to be resolved.

In practice, the ACCC has observed that processors have generally continued the established industry practice of publishing a series of monthly prices per litre or kilo of milk solids (which now form the binding minimum price in the vast majority of cases), accompanied by a 'weighted average' price.

The ACCC has been clear in providing guidance that it considers that such a forecast or volume weighted average price will not constitute a minimum price for the purposes of the Code, unless that price is specified as the minimum the processor is obliged to pay under the agreement. We have also been clear that if a processor wishes to provide a weighted average price in addition to the minimum price, they should be conscious of their obligation to not mislead or deceive farmers.

The ACCC is concerned that the assumptions made to produce these headline prices are generally not transparent (for example, those the processor makes about the farm's production profile), and are also not standardised across the industry (i.e. they are not equivalent to a bank comparison rate).

Consequently, while the requirement to release minimum prices on a particular date has improved transparency in the industry, in some cases it remains difficult for farmers to accurately or easily compare minimum prices between processors.

Furthermore, although the Code requires processors to 'clearly specify' the minimum price in the MSA, processors have specified the minimum price with varying degrees of clarity. For example, some specify the minimum price up front in a 'key terms' section of the document, or an appendix to the document. Others specify the minimum price in the body of the MSA.

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<sup>13</sup> ACCC Dairy Inquiry recommendation 7: Processors should publish information identifying how their pricing offers apply to individual farm production characteristics to enable better farm income forecasts.

Accordingly, the ACCC recommends that the review should also consider whether greater standardisation is required around where and how processors specify the minimum price under their agreement.

### 3.5. The requirements around non-exclusive supply agreements should be reviewed to ensure they are meeting industry needs

#### **Recommendation 8: The Government should start to consider whether the provisions around non-exclusive MSAs are meeting industry needs.**

Issue: The Code was intended to provide farmers with access to non-exclusive supply arrangements. The ACCC has heard feedback that the current drafting enables processors to make it difficult to access viable non-exclusive supply arrangements. However, processors have a legitimate need for certainty of supply and to obtain commercially viable milk volumes.

The Code does not prohibit farmers and processors from entering into exclusive milk supply agreements. However, if a processor publishes an exclusive MSA it must also publish a non-exclusive supply agreement covering those same circumstances.<sup>14</sup>

The Code defines a “non-exclusive supply agreement” as a supply agreement that is not an exclusive supply agreement. An “exclusive supply agreement” is defined as an agreement that “prohibits” the farmer from supplying milk to another processor.<sup>15</sup>

The ACCC’s published guidance on the Code states that an MSA is unlikely to constitute an ‘exclusive agreement’ solely because it requires a farmer to supply a specified minimum volume of milk to the processor. However, the ACCC considers that a minimum volume obligation in a non-exclusive agreement may mean it is effectively an exclusive agreement if the consequence of the minimum volume obligation is that the farmer could not be expected to ever have the capacity to supply any other processor.

The ACCC has recently commenced proceedings against Lactalis Australia Pty Ltd (Lactalis) alleging that Lactalis failed to publish a non-exclusive agreement at or before the 1 June 2020 publication deadline. While Lactalis published certain standard form agreements on its website from around 17 June 2020, the ACCC alleges that the agreements were not non-exclusive agreements because they required farmers to supply the equivalent of at least 90% of their previous season’s monthly milk production to Lactalis.

#### ***Right to choose between exclusive and non-exclusive supply***

The Code was intended to provide farmers with access to non-exclusive supply arrangements. Non-exclusive MSAs may enable some farmers to engage in dual supply arrangements, potentially increasing profits through securing a second high value contract (for example, with a small cheese processor). Farmers have also previously raised concerns that exclusivity clauses are used to processors’ advantage.

Non-exclusive MSAs may also offer broader benefits to the industry, for example, if they enable small dairy processors to acquire milk, even though their size precludes them from accepting all the milk produced by a single farm each day.

The ACCC has observed that following the introduction of the Code some processors have published exclusive and non-exclusive agreements that purport to cover the same

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<sup>14</sup> Dairy Code, sub-ss 12(2) and (5).

<sup>15</sup> Dairy Code, s 5.

circumstances, but differ in terms of prices paid for milk, minimum volume commitments and other key terms. Such MSAs do not necessarily breach the Code, because the Code does not require exclusive and non-exclusive MSAs that cover the same circumstances to be offered on the same terms or have the same minimum price.

The ACCC's view is that the Code should not necessarily require exclusive and non-exclusive MSAs that cover the same circumstances to be offered on the same terms, including minimum price. Processors may have legitimate reasons to value exclusive and non-exclusive supply differently, and non-exclusive supply may require the processor to make adjustments to their pricing. For example, non-exclusive supply may create some inefficiencies in the milk collection process. In the absence of a minimum volume requirement on the farmer, they may also pose additional risks for processors in terms of the volume of milk to be supplied.

However, the ACCC acknowledges concerns raised by farmers that the use of different contractual offerings may have the effect of making non-exclusive supply arrangements unattractive or unviable. In some cases, this could render the farmer's right to choose between exclusive or non-exclusive agreements illusory in practice.

Example: Under the current drafting of the Code, a processor that publishes a standard form exclusive MSA requiring farmers to supply a minimum of 500 litres per milk collection (as is common), with no minimum monthly or annual volumes, may require a farmer taking up a standard form MSA for non-exclusive supply linked to the same circumstances to commit to an annual volume of 2 million litres per year.

The ACCC recommends that, in the lead-up to the 2023 review of the Code, the Government should consider whether the provisions relating to non-exclusive MSAs are meeting industry needs.

Should the Government wish to review the Code's drafting in regard to non-exclusive agreements, amending the requirements around the statement of circumstances may provide one avenue for change.

If a processor publishes an exclusive standard form MSA with an accompanying statement of circumstances, then the processor must also publish a non-exclusive standard form MSA covering the same circumstances. Accordingly, these 'paired' exclusive and non-exclusive MSAs are already linked by a shared, identical statement of circumstances. If certain key terms (such as minimum volume commitments) were required to be specified in the statement of circumstances, this would prevent processors from imposing onerous and unnecessary conditions in non-exclusive MSAs as a means to discourage non-exclusive supply.

Taking the above example, under this framework if a processor only required farmers that had signed exclusive MSAs to commit to 500 litres of milk per collection, it could not then impose additional monthly or annual volume requirements under a non-exclusive MSA.