



Dairy Code compliance

Observations from 2021–22 season opening

November 2021



acc.gov.au

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601
© Commonwealth of Australia 2021

This work is copyright. In addition to any use permitted under the *Copyright Act 1968*, all material contained within this work is provided under a Creative Commons Attribution 3.0 Australia licence, with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logos
- any illustration, diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website, as is the full legal code for the CC BY 3.0 AU licence.

Requests and inquiries concerning reproduction and rights should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

Parties who wish to re-publish or otherwise use the information in this publication must check this information for currency and accuracy prior to publication. This should be done prior to each publication edition, as ACCC guidance and relevant transitional legislation frequently change. Any queries parties have should be addressed to the Director, Content and Digital Services, ACCC, GPO Box 3131, Canberra ACT 2601.

ACCC 11/21_21-99

www.accc.gov.au

Contents

1.	Overview	1
2.	Key issues in Code compliance	2
2.1	Publication of milk supply agreements	2
2.2	Contents of milk supply agreements	4
2.3	Records and reporting	5
3.	ACCC compliance and enforcement	6
3.1	2020–21 season	6
3.2	2021–22 season	6
4.	Next steps	7

1. Overview

This report outlines the ACCC's observations on processors' compliance with the Dairy Code¹ for the 2021–22 season so far. The ACCC has published this report to highlight the areas that some processors need to improve to ensure that they comply with the Code.

There has been a substantial improvement in compliance with the Dairy Code since the Code commenced on 1 January 2020. This is particularly so regarding the requirement to publish standard form milk supply agreements (MSAs) by 1 June each year, which is an important aspect of the Dairy Code's role in enhancing transparency and improving competition at the opening of each dairy season.

However, the ACCC considers that non-compliance with some other aspects of the Dairy Code remains widespread. While only a court can ultimately determine whether a contravention of the Dairy Code has occurred, this report reflects the ACCC's views on levels of compliance.

Individual instances of non-compliance may only give rise to a low level of identifiable harm, which is why the ACCC has so far often taken an approach focused more on education and engagement with processors.

Widespread non-compliance, however, undermines the ability of the Dairy Code to improve transparency across the industry and to address the bargaining power imbalances that can harm dairy farmers.

Processors have now had sufficient time to familiarise themselves with their obligations under the Dairy Code. While the Code was new, the ACCC often alerted processors to potential non-compliance. However, responsibility for ensuring compliance with the Dairy Code rests with the processors and future non-compliance faces a greater risk of enforcement action.

¹ *Competition and Consumer (Industry Codes – Dairy) Regulations 2019.*

2. Key issues in Code compliance

This section outlines the key issues with processors' compliance with the Dairy Code that the ACCC has identified during the 2021–22 season so far. To assist industry participants, this section discusses these issues in the order in which the requirements appear in the Code.²

2.1 Publication of milk supply agreements³

The Dairy Code's publishing requirements are an important obligation for processors, as they increase transparency for farmers during the supply negotiations that mostly occur around June each year.

Requirement to publish MSAs by the publication deadline⁴

The Code requires all processors that intend to purchase milk from farmers during the next financial year to publish standard form MSAs by the publication deadline, which is 2:00pm (Australian Capital Territory time) on 1 June each year.

The vast majority of processors reviewed by the ACCC published their 2021–22 standard form MSAs on time.

Requirement to publish a statement of circumstances⁵

Each standard form MSA published by a processor must be accompanied by a statement of the circumstances in which the processor would enter into an MSA in that form (statement of circumstances).

These circumstances may include:

- the region where milk is to be supplied
- the quantity of milk to be supplied (including any minimum volume requirements)
- the length of the supply period
- whether the processor has already entered into a sufficient number of MSAs to meet its demand for milk, or
- any other matters the processor considers relevant.

The ACCC noted some minor non-compliance with this requirement, with some processors failing to publish a statement of circumstances for each standard form MSA.

Requirement to offer a non-exclusive supply option⁶

For every set of circumstances in which a processor elects to offer an exclusive supply agreement (that is, an MSA that prohibits a farmer from supplying milk to another processor), the processor must also offer a non-exclusive supply agreement covering the same circumstances.

The ACCC again noted some minor non-compliance with this requirement, despite having issued an infringement notice to Union Dairy Company for alleged non-compliance with this requirement (amongst other issues) last season, and despite having raised concerns about this issue in our *Initial observations on compliance* report in December 2020.

2 Not all Code requirements raised compliance concerns for the ACCC in the 2021–22 season so far, so this report does not discuss all Code requirements.

3 Part 2, Division 2, Subdivision B of the Dairy Code.

4 Section 12 of the Dairy Code.

5 Section 12 of the Dairy Code.

6 Section 12 of the Dairy Code.

This requirement is designed to promote competition by allowing farmers the option of supplying milk to more than one processor and to better manage risk. This requirement may also allow smaller processors or new entrants to procure milk from farmers who would otherwise have been locked into exclusive MSAs.

A potential source of this non-compliance may be processor confusion about the exact extent of the requirement. The ACCC considers that the statement of circumstances for the relevant exclusive and non-exclusive MSAs must be identical, however the MSAs themselves may be offered on different terms. For example, the non-exclusive MSA may provide different prices for milk compared to the exclusive MSA for the same set of circumstances.

The ACCC also considers that the requirement is compatible with processors pursuing a wide range of commercial priorities. However, the ACCC does not consider that a preference for, or history of, exclusive supply arrangements constitutes a justification for failing to comply with this Code requirement.

Removing or varying of MSAs and statements of circumstances⁷

Processors must not vary or remove the standard form MSAs or statements of circumstances published on their website, after the publication deadline of 1 June and before the end of the financial year to which they apply.

For example, standard form MSAs published on 1 June 2021 in relation to the 2021–22 dairy season must not be removed from the processor's website until 30 June 2022. After the commencement of the new dairy season on 1 July 2022, processors may remove these documents relating to the previous season from their websites.

In practice, this means that processors will have two sets of MSAs and statements of circumstances on their websites from 1 June to 30 June each year: those that relate to the season just ending, and those that relate to the upcoming season. The ACCC suggests that processors clearly label the season to which each document relates.

Around half of the processors reviewed by the ACCC in June this year had contravened this requirement, by removing their 2020–21 documents when they published their 2021–22 documents on 1 June 2021.

The ACCC's original web guidance incorrectly stated in one place that processors were permitted to remove their published documents 12 months after publication on 1 June. We have now corrected this part of our guidance.

Requirement to incorporate a statement of justification for minimum prices⁸

All standard form MSAs must include a statement of the processor's justification for each minimum price specified in the agreement (statement of justification).

This justification may include the factors that lead to the consideration of the prices offered, but does not need to include commercial-in-confidence material such as algorithms of the specific level of weighting factors or a currency's hedged value that may contribute to generate the offered price.

The ACCC noted some minor non-compliance with this requirement, with some processors failing to include any statement of justification.

As a guide, the ACCC considers that the Dairy Code requires this statement of justification to be included in the standard form MSA itself, rather than be located somewhere on the processor's website.

Further, the ACCC considers that some processors may have accidentally conflated this requirement and the requirement to publish a statement of circumstances for each published standard form MSA

7 Section 12 of the Dairy Code.

8 Section 14 of the Dairy Code.

(discussed above). The ACCC considers that processors have now had sufficient time to understand the differences between these two requirements.

2.2 Contents of milk supply agreements⁹

All MSAs, both at the time of publication and when they are entered into, must comply with the Code.¹⁰ There are two specific areas where processors' compliance could be improved.

Supply periods

Each executed MSA between a processor and a farmer must specify the first and last days of the supply period, and the last day must be identified as a particular calendar date (for example, 30 June 2023).¹¹

These requirements are intended to enhance contractual certainty, and to reduce barriers to farmers switching between processors, such as through the use of rolling agreements.

Where the supply period is longer than three years, the executed MSA must provide the farmer with the option to extend the supply period by an additional 12 months through written notice to the processor.¹²

The ACCC has encountered some continued processor confusion around these requirements. Processors should ensure that any of their contractual requirements around renewal or termination of their agreements do not have the effect of creating a rolling agreement.

Termination of MSAs¹³

An MSA must not permit a processor to unilaterally terminate an MSA, except where the farmer has committed a 'material breach' of the agreement.

This requirement is intended to ensure that processors cannot arbitrarily terminate their MSAs with farmers, and also to ensure that farmers are aware of the obligations they must meet in order to continue supplying milk to their processor.

The Dairy Code does not define what constitutes a 'material breach', which means the common law framework is likely to apply. This requires an assessment of whether the breach in question is important or significant when assessed against the overall contractual bargain and benefit of the MSA to the parties.

The ACCC has observed a number of MSAs that do not adopt the language around 'material breach' set out in the Code. The ACCC will continue to closely monitor the industry for any potential contraventions of the unilateral termination requirements.

9 Part 2, Division 2, Subdivision D of the Dairy Code.

10 Sections 13 and 17 of the Dairy Code.

11 Section 24 of the Dairy Code. There are slightly different requirements if the processor is a cooperative and the farmer is a member of that cooperative.

12 Section 36 of the Dairy Code.

13 Section 34 of the Dairy Code.

2.3 Records and reporting¹⁴

Obligation to publish a disputes report¹⁵

All processors, except those that meet the definition of a 'small business entity', must publish a report on disputes that:

- arose under, or in connection with, one of their MSAs
- was subject to a mediation or arbitration that commenced or ended between 1 May and 30 April in the preceding year.

This report must be published by 2:00pm (Australian Capital Territory time) on 1 June after the end of the relevant reporting period. For example, a dispute report including all relevant disputes between 1 May 2020 and 30 April 2021 would be required to be published by 2:00pm on 1 June 2021.

Around half of the processors reviewed by the ACCC this season failed to publish their report on disputes by the deadline, although upon examination by the ACCC none of these processors had any relevant disputes to report.

The ACCC considers that a processor must publish a report on disputes each year, even if they had no disputes to report in the relevant reporting period. The fact that a processor has had no relevant disputes in the reporting period is an important aspect of the enhanced transparency that the Dairy Code aims to achieve, and the Code does not contain an exemption for processors who have had nil disputes.

Removal or variation of disputes reports¹⁶

A processor must not vary or remove a disputes report published on their website, before the end of the financial year in which it was published. For example, if a disputes report was published on 1 June 2021, the processor must not vary or remove it until 30 June 2022.

The ACCC noted some minor non-compliance with this requirement, with a number of processors removing their disputes reports on 1 June 2021.

¹⁴ Part 2, Division 2, Subdivision G of the Dairy Code.

¹⁵ Section 56 of the Dairy Code.

¹⁶ Section 56 of the Dairy Code.

3. ACCC compliance and enforcement

Ensuring compliance with mandatory industry codes of conduct in the agriculture sector, including the Dairy Code, has been one of the ACCC's compliance and enforcement priorities in both 2020 and 2021.

The ACCC has undertaken a number of compliance and enforcement actions since the commencement of the Dairy Code on 1 January 2020.

3.1 2020-21 season

As noted in the ACCC's *Initial observations on compliance* report in December 2020, in October 2020 Riddoch Trading Pty Ltd (trading as Union Dairy Company) paid an infringement notice issued by the ACCC for alleged breaches of the publishing requirements, by requiring farmers to fill in an online form before they could access the MSA during the 2020-21 season.

Since that previous ACCC report, in July 2021 Brownes Foods Operations Pty Ltd paid two infringement notices issued by the ACCC for allegedly publishing MSAs in the 2020-21 season that did not comply with the Dairy Code.

In July 2021, the ACCC also commenced proceedings against Lactalis Australia Pty Ltd in relation to a number of alleged breaches of the Code relating to MSAs published during the 2020-21 season, including:

- failing to publish standard form MSAs on its website by the publication deadline
- failing to publish non-exclusive MSAs by requiring farmers to supply 90% of their monthly milk production to Lactalis, and
- publishing and entering into MSAs that did not comply with the Code.

Finally, the ACCC also conducted an audit of Dairy Code compliance in the 2020-21 season. Under the *Competition and Consumer Act 2010* (Cth), we are empowered to conduct such audits on persons or businesses who are subject to the Code.

In particular, these audits focused on comparing the minimum prices specified in milk supply agreement with the prices actually paid to farmers. For the processors audited, the ACCC identified strong overall compliance, including with the minimum price requirements, with prices paid being at or above the relevant published minimum prices.

3.2 2021-22 season

In June 2021, the ACCC once again conducted compliance checks of processors' websites immediately following the publication deadline of 2:00pm on 1 June 2021. As noted above, compliance with the publishing requirements was substantially improved from the 2020-21 season.

One exception was the Dairy Farmers Milk Co-operative which, in September 2021, paid an infringement notice issued by the ACCC for allegedly failing to publish its MSAs on its website by the 2:00pm deadline on 1 June 2021.

The ACCC also wrote to a number of processors seeking further information with regard to potential contraventions of the Dairy Code in their standard form MSAs, statements of circumstances, or disputes reports. Each of these processors took action to address the ACCC's concerns.

4. Next steps

The ACCC will continue to monitor compliance with the Dairy Code. Processors have now had sufficient time to familiarise themselves with their obligations under the Dairy Code, and the ACCC expects that compliance will continue to improve significantly in future seasons.

The ACCC will also review its web guidance in light of the key compliance issues that arise, and the main areas of confusion we encounter. We intend to provide updated guidance in the first half of next year, a sufficient time ahead of the 2022–23 season opening to assist processors to continue to improve their compliance.

The ACCC will take into account the Department of Agriculture, Water, and the Environment's current review of the Dairy Code in determining the exact timing of this updated guidance and any additional ACCC engagement with the dairy industry.



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

