AUSTRALIAN COMPETITION & CONSUMER COMMISSION

# Dairy Inquiry

## Guide to the ACCC's mandatory code recommendation

August 2018

The Australian Competition and Consumer Commission (ACCC) published its Dairy Inquiry final report on 30 April 2018, following an 18-month public inquiry.

The ACCC made a number of recommendations, including:

*Recommendation 8: A mandatory code of conduct within the act should be established for the dairy industry.*

In response to a number of enquiries about the proposed mandatory code, the ACCC has published this guide to provide industry with further information.

At the time of releasing this guide, the ACCC's Dairy Inquiry was being considered by the Government (who will make the decision about whether to introduce a mandatory code).

More information can be found in Chapter 9 of the report: *Proposed mandatory code of conduct*.

### What is an industry code?

Industry codes set out minimum obligations and standards of commercial conduct for industry participants. Industry codes can address industry-specific market failures that have not otherwise been addressed.

There are three types of industry codes:

- **Voluntary:** agreed by industry as self-regulation. Not enforceable, and not compulsory for industry participants to sign up.
- **Prescribed voluntary:** prescribed under the *Competition and Consumer Act 2010* (Cth) (CCA) and given the force of law. Enforceable by the ACCC for those parties that agree to become and remain signatories to the code, but not compulsory for industry participants to sign up.
- **Mandatory:** prescribed under the CCA and given the force of law. All industry participants must comply with the code and it is enforceable by the ACCC.

### The need for a mandatory code

The ACCC considers a mandatory code is the best way to improve the position of farmers in the dairy supply chain. Imbalances in bargaining power have resulted in contracts that favour processors, and in farmers having limited access to price and market information compared to processors.

A mandatory code can assist farmers by promoting:

- fairer allocation of risk
- strengthened competition between processors
- easier and more efficient investment decision-making for farmers.

The industry has recognised the issues facing it, and took the initiative to self-regulate by implementing the voluntary code on 30 June 2017. The ACCC appreciates the positive contribution the voluntary code has made to date, and has recommended a mandatory code that will build on this.

The ACCC sees the need for a mandatory code, as opposed to a voluntary code, for the following reasons:

- It is difficult to monitor compliance with a voluntary code.
- There are no consequences for breaching a voluntary code.
- Not all processors in the industry are signatories to the voluntary code.
- Strengthening the voluntary code may result in non-signatories being less likely to sign up.

## Prescribed voluntary code

The key difference between a prescribed voluntary code and a mandatory code is that a prescribed voluntary code is only binding on industry participants that agree to opt-in to the code. Signatories can withdraw from the code and cease to be bound by it at any stage.

As with the existing industry voluntary code, the ACCC does not support a prescribed voluntary code as processors are not obligated to become signatories.

## Scope of the proposed mandatory code

The ACCC recommended that a mandatory code address specific issues in the industry. Some of these issues are also covered by the voluntary code.

The ACCC has not recommended that a mandatory code regulate the relationship between processors and retailers. This is presently covered by the Food and Grocery Code.

Under the ACCC's proposal, a mandatory code would not regulate farmgate milk prices or restrict the types of contracting options that a processor can offer.

The ACCC's recommended dispute resolution body (Recommendation 5) is not contingent on legislating a mandatory code. However, the ACCC considers a mandatory code should require that contracts contain terms that provide for an effective independent dispute resolution process.

### Potential matters to be included in the recommended mandatory code

| Identified industry problem | Potential solution |
|---|---|
| There is a lack of timely and transparent information about the terms on which processors propose to acquire milk from farmers. | **Notice:** prohibition on farmers having to notify their intent to exit a contract before any clear market information is available.<br><br>**Price guidance and commitments:** for non-fixed price contracts, obligation to provide forecasted guidance and commitments about the basis for price changes during a season.<br><br>**Written acknowledgement of contract terms:** requirement that farmers acknowledge contract terms in writing. |
| Farmers are unreasonably restricted from switching. | **Loyalty bonuses:** prohibition on loyalty bonuses that require supply in future dairy season(s).<br><br>**Two-tier pricing:** restrictions on the use of exclusive supply clauses in conjunction with two-tier pricing. The ACCC did not recommend banning exclusive supply clauses generally. |
| Processors have an unfair ability to change key trading terms including price. | **Retrospective step-downs:** prohibition on retrospective step-downs.<br><br>**Other step-downs:** setting out circumstances when step-downs are appropriate or inappropriate. Farmers should be provided with adequate notice of a step-down followed by the opportunity to terminate the agreement without penalty.<br><br>**Unilateral variation:** prohibition or limitation on the ability of processers to unilaterally vary terms.<br><br>**Multi-year contracts:** requirement that processors provide farmers with a specified price for the duration of a multi-year agreement. If the price for a particular season falls below this price, farmers would be able to exit the contract without penalty. |
| Farmers lack the resources to effectively resolve disputes with processors. | **Dispute resolution process:** requirement that contracts contain an effective independent and cost-effective dispute resolution process for disputes arising between processors and farmers. |
| There is potential for conduct to be conducted in poor faith. | **Good faith:** requirement that processors and farmers act in good faith during negotiations, performance of the contracts, dispute resolution and the ending of an agreement. |

## The role of Government and the ACCC in implementing a mandatory code

Should the Government choose to implement the mandatory code, drafting and putting the code into effect will involve several stages, which may take approximately 12 months if all stages are followed. Given the detailed information about the dairy industry arising from the ACCC's Dairy Inquiry, it is likely the code development process could be considerably shorter. The Government follows the same process to implement a prescribed voluntary code.

Following this procedure, there is typically a transition period to allow industry participants time to understand their obligations and adjust their business practices before the mandatory code comes into effect.

As shown in the 'Process for developing a mandatory code chart', the industry—including processors and farmer groups—are generally consulted at most stages of the code implementation process. Consultation will include meetings, round-tables and inviting written submissions.

The ACCC's role is to enforce any mandatory code. The ACCC can take enforcement action for non-compliance against parties that are subject to the mandatory code. Remedies include injunctions, damages, non-punitive orders and other compensatory orders.

Any person who suffers loss or damage due to a contravention of a mandatory code can also bring a court action for damages.

Mandatory codes are generally reviewed every two to five years; the timeframe will be specified when the code is introduced. The review will generally include public consultation, including with processors and farmer groups.

## Costs of the proposed mandatory code

Implementing a mandatory code in the dairy industry will come with some associated compliance costs, although the ACCC considers these would not be substantial.

Costs for farmers would be minimal, and likely non-existent. Farmers' regulatory responsibilities would only require them to retain signed or acknowledged copies of milk supply agreements and act in good faith in their dealings with processors.

The ACCC will likely be consulted on a mandatory code proposal and would not support significant regulatory obligations being placed on farmers. The ACCC would also not support a mandatory code that includes penalties against farmers.

For processors, the potential compliance costs could include:

- updating their contracts so they comply with the mandatory code
- keeping copies of contracts signed with farmers for a minimum time period, similar to requirements in other industry codes
- a requirement to participate in any compliance checks the ACCC undertakes
- informing themselves of the mandatory code's requirements and updating their practices to ensure they are compliant.

Records of transactions and contracts currently need to be retained for taxation purposes for seven years, so any record keeping requirements are unlikely to add additional costs.[1]

## More information

The Dairy Inquiry final report is available at www.accc.gov.au/dairyinquiry

1 The ACCC acknowledges that at times the Commonwealth Government recovers costs from the non-government sector for the costs of a specific government activity, including at times industry regulation.

No mandatory industry codes under the CCA are subject to Government cost recovery. The ACCC would oppose any suggestion that cost recovery be applied to a mandatory code in the dairy industry.

## Process for developing a mandatory code

| Step | Consultation |
| --- | --- |
| Government department develops interim / consultation Regulatory Impact Statement (RIS). | Informal consultation process. |
| Government department runs public consultation to understand industry issues. Much of this has been completed by the Dairy Inquiry. | Interested parties invited to make submissions. |
| If mandatory code supported, Government department drafts decision RIS identifying mandatory code preferred option. | |
| Government department runs public consultation on decision RIS and undertakes cost benefit analysis. | Interested parties invited to make submissions. |
| Government department and Office of Parliamentary Counsel draft mandatory code to Commonwealth Legislative Standards. | Informal consultation process. |
| Exposure draft released for public consultation. Changes may be incorporated. | Interested parties invited to make submissions. |
| Governor General will make regulation prescribing the mandatory code. | |
| Code registered and tabled in each House of Parliament. | |
| Once passed, ACCC monitors and enforces the mandatory code. | |
| Code reviewed as scheduled by provision of the code. | Interested parties invited to make submissions. |


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