



Dairy Industry Code

ACCC submission in response to the *Discussion paper on the operation of the Dairy Industry Code*

March 2024

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

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1. Executive summary

- 1.1. The ACCC welcomes the opportunity to make a submission in response to the Department of Agriculture, Fisheries and Forestry's (the Department's) discussion paper on the operation of the dairy code.
- 1.2. The ACCC is an independent Commonwealth statutory authority. Its roles include:
 - administering and enforcing the *Competition and Consumer Act 2010* (Cth) (CCA) and Australian Consumer Law
 - promote competition, fair trading and consumer protection
 - regulate national infrastructure.
- 1.3. The *Competition and Consumer (Industry Codes – Dairy) Regulations 2019* (the dairy code) came into effect on 1 January 2020. The code was introduced in response to the findings contained in the ACCC's Dairy inquiry final report (2018) (ACCC inquiry).¹ The ACCC inquiry identified substantial and systemic bargaining power imbalances between dairy farmers and dairy processors, which had led to significant information asymmetries and contracting practices that were heavily weighted in favour of processors. In addition, contracts historically contained several mechanisms that impeded farmers from switching between processors, reducing competition. These issues led to two major dairy processors announcing retrospective price step downs in April 2016, which caused a significant number of farmers to exit the industry.
- 1.4. This submission sets out the ACCC's observations and recommendations in response to the issues identified in the Department's discussion paper.
- 1.5. The ACCC considers that the dairy code has effectively addressed many of the market failures identified in the ACCC's inquiry and continues to function as an important protection for dairy farmers in their dealings with processors. In particular, the enhanced clarity and transparency around contracting arrangements has provided benefits to the industry. Further, the development of a publication deadline for milk supply agreements has increased price transparency and driven competition for raw milk. However, some minor amendments may be warranted to improve the operation of the dairy code and address issues highlighted in the discussion paper.
- 1.6. The ACCC recommends the following amendments should be considered as part of the second review of the dairy code:
 - requiring farmers to provide at least 60 days, but no more than 90 days, notice of their intention to extend milk supply agreements that are longer than three years, and
 - relaxing the publication requirements to allow processors to remove standard form milk supply agreements and statements of circumstances relating to the prior season from their websites from 1 June each year, to coincide with the release of the upcoming season's standard form milk supply agreements at the publication deadline.

¹ ACCC, [Dairy inquiry final report](#), 30 April 2018.

- 1.7. The ACCC considers that industry feedback on the other issues identified in the discussion paper will assist the Department in considering whether those requirements are operating as intended. However, the ACCC stresses the need for caution when considering more substantial amendments to the dairy code, particularly where there is a lack of evidence of harmful or inefficient practices.

2. ACCC's role and activities under the dairy code

- 2.1. The ACCC is responsible for monitoring and enforcing compliance with the dairy code as a mandatory industry code under Part IVB of the CCA. The ACCC has dedicated significant resources to educate stakeholders about their rights and obligations under the dairy code and has undertaken a significant body of compliance and enforcement work.

Education

- 2.2. The ACCC initially published guidance on parties' rights and obligations under the dairy code on its website following the commencement of the code in 2020. The ACCC regularly reviews and updates its guidance as required, including following the conclusion of the 2021 review of the dairy code and the *Lactalis* proceedings. The ACCC last updated its dairy code guidance on 27 April 2023 and intends to review these materials again ahead of the 2024-2025 dairy season.

Monitoring, compliance and enforcement

- 2.3. Ensuring compliance with the dairy code was one of the ACCC's compliance and enforcement priorities from 2020. Each year since the dairy code was introduced, the ACCC has conducted compliance checks on and around 1 June to ensure processors are complying with the dairy code's publication requirements.
- 2.4. The ACCC also conducts regular audits of dairy processors using its powers under s 51ADD of the CCA. Since 2020-21, the ACCC has conducted 3 rounds of audits reviewing a total of 12 processors' compliance with the dairy code's record keeping obligations.
- 2.5. The ACCC takes compliance and enforcement action as appropriate. This may involve engaging directly with processors to remedy issues with compliance, issuing infringement notices or ultimately instituting court proceedings.
- 2.6. Since 2020, the ACCC has issued 4 infringement notices to 3 dairy processors for alleged breaches of the dairy code as follows:
 - Union Dairy Company paid a penalty of \$10,500 in October 2020 for allegedly failing to comply with the dairy code's 2pm 1 June publication deadline.
 - Brownes Dairy paid two infringement notices totalling \$22,200 in July 2021 for publishing two milk supply agreements that allegedly did not comply with the dairy code.

- The Dairy Farmers Milk Cooperative paid a penalty of \$11,100 in September 2021 for allegedly not publishing its standard form milk supply agreements by the 2pm 1 June publication deadline.
- 2.7. In July 2021, the ACCC commenced proceedings against Lactalis Australia Pty Ltd (Lactalis) for allegedly breaching four requirements under the dairy code. In July 2023, the Federal Court of Australia ordered Lactalis to pay a penalty of \$950,000 for:²
- failing to publish its milk supply agreements on its website by 2pm on 1 June 2020, and
 - subsequently publishing and entering into milk supply agreements that allowed Lactalis to unilaterally terminate the agreement in circumstances not involving a material breach of the agreement.
- 2.8. However, the Court dismissed the ACCC's allegations that Lactalis had failed to comply with the single document and non-exclusivity requirements under the dairy code.
- 2.9. The ACCC has observed increased levels of compliance with the dairy code's requirements each year that it has been in effect. Monitoring during the 2023-24 season has not identified major or systemic compliance issues.

3. Issues identified in the discussion paper for potential improvements to the dairy code

Extensions of 3-year milk supply agreements

- 3.1. Section 36 of the dairy code provides that if the term of a milk supply agreement is longer than 3 years, the agreement must grant the farmer an option to extend the agreement by 12 months by giving written notice to the processor. Farmers must provide between 7 and 30 days' notice of their intention to extend the agreement prior to the end of the agreement.
- 3.2. The extension rules are intended to provide farmers operating in regions with longer term supply arrangements and less competition, such as Western Australia or Far North Queensland, sufficient time to find a new processor or manage the transition of their business.³
- 3.3. The discussion paper observes that the extension requirements may be creating additional risks and uncertainty for processors, which may in turn be discouraging the uptake of longer-term agreements. For example, a processor may receive notice

² *Australian Competition and Consumer Commission v Lactalis Australia Pty Ltd* [2022] FCA 1087.

³ Explanatory Statement to the *Competition and Consumer (Industry Codes – Dairy) Regulations 2019*, pp 15-16.

of an extension after they have contracted for additional milk for the upcoming season, potentially leading to an oversupply.

- 3.4. The ACCC notes that the extension requirements only apply to milk supply agreements that are *longer than 3 years*. Processors can offer agreements of up to 3 years without needing to provide a right of extension. While some processors do offer longer-term agreements, since the dairy code came into effect many standard form agreements are offered on a 12-month basis.
- 3.5. In order to partly address the risks and uncertainty to processors, the ACCC recommends the second review of the dairy code should consider amending the notice requirements in section 36(3) of the dairy code to provide that notice must be given:
 - no earlier than 90 days before the end of the supply period; and
 - no later than 60 days before the end of the supply period.
- 3.6. Given that most milk supply agreements end on 30 June each year, this would ensure that processors have notice of and can account for a farmer's intention to extend an agreement before publishing new milk supply agreements on 1 June.

Small business definition and exemptions

- 3.7. Section 8 of the dairy code provides that a processor that is a small business entity is exempt from:
 - the requirements to publish standard form milk supply agreements, and
 - the requirement to have milk supply agreements that comply with the dairy code.
- 3.8. However, all processors (including small business entities) are subject to the good faith requirements.⁴
- 3.9. The dairy code uses the definition of 'small business entity' as set out in the *Income Tax Assessment Act 1997* (Cth). This generally means processors with an aggregated annual turnover of less than \$10 million will be exempt from most of the dairy code's requirements.
- 3.10. The ACCC's submission to the 2021 review of the dairy code recommended amending the code so that processors purchasing milk from 5 or fewer farmers should be exempt from the publishing requirements (and related provisions). This was intended to reduce the administrative burden on smaller processors acquiring milk from a limited number of farms. Such processors are unlikely to be significant drivers of competition in the market.
- 3.11. However, it is important that any processor caught by the expanded small business definition remain bound to comply with the requirement to enter into written milk supply agreements that comply with the dairy code. This ensures farmers dealing with such processors still have adequate protection, given that farmers may still be subject to significant power imbalances even in dealings with processors who acquire milk from a more limited number of suppliers.
- 3.12. The ACCC observes that smaller processors have been complying with the publication requirements under the dairy code for over 4 years and the ACCC has not identified any serious compliance issues among smaller processors. Given the

⁴ Dairy code, s 11

ACCC's view that smaller processors should continue to be bound by the requirement to have milk supply agreements in place with farmers, it is unclear whether expanding the meaning of a 'small business entity' will provide significant cost savings.

- 3.13. Given the importance of ensuring transparency over pricing and contractual terms in the dairy industry, the ACCC recommends maintaining the current small business exemption under section 8 of the dairy code, subject to compelling evidence from smaller processors about the need for such an exemption.

Requirements for varying milk supply agreements

- 3.14. Section 12(2) of the dairy code requires processors to publish all of their standard form milk supply agreements on their website by 2pm (AEST) on 1 June each year.
- 3.15. Under section 12(6), once a processor has published a standard form agreement on its website, it cannot vary or remove that agreement from its website until the end of the following financial year. For example, agreements published on 1 June 2024 will need to remain on the processor's website until 11:59 pm on 30 June 2025.
- 3.16. While processors cannot vary or remove the published milk supply agreements, they are permitted to publish new milk supply agreements at any time and processors regularly publish new milk supply agreements after 1 June, generally to update milk prices in response to market conditions. Although new agreements can be published at any time, it should be noted that newly published agreements will not affect the terms of agreements that have already been entered into.
- 3.17. The ACCC considers the requirement for processors to publish and maintain standard form milk supply agreements (including updated agreements) on their website has greatly improved transparency in the dairy industry. The ACCC has concerns that the proposal to allow processors to publish a list of variations to agreements rather than publishing complete copies of those agreements may undermine the overall transparency of agreements and be a source of additional confusion.
- 3.18. As noted above, the ACCC regularly monitors compliance with the publishing requirements under the dairy code. The dairy code has now been in effect for over four years and the ACCC considers that the processors reviewed by the ACCC generally have effective systems in place for archiving old milk supply agreements on their website. Accordingly, allowing processors to publish a list of variations rather than complete milk supply agreements is likely to diminish transparency and create additional uncertainty for only a minor reduction in administrative burden.
- 3.19. However, the requirement that published milk supply agreements cannot be removed until the end of the following financial year means that for the month of June, a processor will have 2 years' worth of milk supply agreements on its website: milk supply agreements for the current financial year, and milk supply agreements it intends to enter into for the following financial year. While this allows for transparency as potential suppliers are able to review the previous years' terms and minimum price, it has the potential to create confusion about which milk supply agreements is available for the following financial year.
- 3.20. The ACCC submits the second review should consider whether it would be beneficial to allow processors to remove the current financial year agreements on the same date they are required to publish the new agreements. For example, this would allow processors to remove milk supply agreements published on their websites on and

from 1 June 2023 in conjunction with the publication of new milk supply agreements on 1 June 2024. This would reduce any potential confusion and lessen the administrative burden on processors to maintain 2 years' worth of standard form milk supply agreements their websites. The ACCC considers this is unlikely to have any significant impacts on transparency in the industry. However, this should be tested with dairy farmers.

Non-exclusive milk supply agreements

3.21. The dairy code defines exclusive and non-exclusive supply agreements as follows:⁵

- **exclusive supply agreement** means a milk supply agreement between a farmer and a processor that prohibits the farmer supplying milk to another processor
- **non-exclusive supply agreement** means a milk supply agreement that is not an exclusive supply agreement.

3.22. Pursuant to section 12 of the dairy code, processors must ensure they publish non-exclusive supply agreements. If a processor publishes an exclusive milk supply agreement, they must also publish a non-exclusive version of that agreement.⁶ However, while processors must ensure all farmers have a choice between exclusive and non-exclusive supply, there is no requirement that exclusive and non-exclusive agreements are offered on the same terms. While there is no universal or consistent approach towards non-exclusive supply agreements in the dairy industry, the ACCC has observed that:

- non-exclusive supply agreements often include a lower price in comparison to exclusive supply agreements
- non-exclusive suppliers are often ineligible for incentive or bonus payments available to exclusive suppliers
- additional requirements may be imposed on non-exclusive suppliers.

3.23. As noted above, the ACCC commenced proceedings against Lactalis for including a term in its 2020-21 milk supply agreements that required non-exclusive suppliers to provide at least 90% of their monthly milk production to Lactalis. The ACCC alleged that this term would have the practical effect of preventing most farmers from being able to supply milk to a second processor.

3.24. Ultimately, the ACCC was unsuccessful as the Court held that the issue of whether a milk supply agreement is exclusive or non-exclusive for the purposes of the dairy code is determined by the "legal effect" of the terms of the agreement, irrespective of the "practical effect" on most farmers. An agreement is only exclusive for the purposes of the dairy code if it expressly prohibits the farmer from supplying milk to another processor. Because Lactalis' milk supply agreements did not expressly prohibit supply to a second processor, its agreements were non-exclusive. The Court observed that focusing on the 'practical effect' of an agreement would create significant uncertainty as to whether a contravention had occurred.⁷

3.25. In light of the *Lactalis* decision, the ACCC considers it would be possible for processors to insert terms into milk supply agreements specifically for the purpose

⁵ Dairy code, s 5 (definitions).

⁶ Dairy code, s 12(5).

⁷ *Australian Competition and Consumer Commission v Lactalis Australia Pty Ltd* [2022] FCA 1087, paras [67] to [69].

of discouraging or preventing farmers from entering into non-exclusive supply agreements, without breaching the requirement to publish a non-exclusive supply agreement. However, there is no evidence that processors are currently including terms in milk supply agreements with the intention of suppressing non-exclusive supply arrangements.

- 3.26. The ACCC considers that the requirements to publish non-exclusive supply agreements could have a positive effect on competition by enabling smaller or boutique processors to purchase some of a farmer's milk. Smaller processors may offer a price premium for milk supply but may not require 100% of a farmer's milk production. Without access to non-exclusive supply options, farmers may need to choose between scaling back production in order to access price premiums (which significantly undermines the benefit of such an arrangement) or forego any price premiums on offer. This also makes it difficult for smaller processors to compete for milk supply.
- 3.27. However, uptake of non-exclusive arrangements has not been widespread in the dairy industry. The ACCC acknowledges there are administrative difficulties and additional costs for farmers associated with supplying more than one dairy processor concurrently. In addition, non-exclusive suppliers generally receive a lower price for their milk in comparison to exclusive suppliers, and may receive fewer bonus payments, which is likely to render the arrangement commercially unviable in a range of circumstances.
- 3.28. The ACCC recommends the Department undertake consultation with smaller dairy processors and farmers interested in exploring non-exclusive supply options to identify barriers to non-exclusive supply with a view to considering potential amendments to the dairy code as part of the second review. This would build a stronger evidence base around whether the current provisions are unduly restricting access to non-exclusive agreements.

Minimum price requirements in multi-year milk supply agreements

- 3.29. Under section 26 of the dairy code, all milk supply agreements must include a minimum price (or prices) payable for milk supplied. Once an agreement has been entered into, a processor must not unilaterally reduce the minimum prices contained in the agreement, except in limited exceptional circumstances.⁸
- 3.30. Processors are free to set minimum prices as they see fit, having regard to their individual business requirements and domestic or international market conditions. The dairy code allows processors to specify minimum prices in several different ways, including as a single price for the entire agreement or as a schedule of yearly or monthly prices, which provides flexibility to account for different milking systems such as seasonal or flat supply.⁹ Where processors do offer multi-year agreements, it is common to see lower minimum prices offered in the out-years to account for future uncertainty around dairy prices.
- 3.31. The ACCC strongly supports maintaining the existing minimum price requirements for all milk supply agreements under the dairy code. The ACCC has not seen any

⁸ Dairy code, ss 27 and 28 and 33.

⁹ Dairy code, s 26.

evidence that the minimum price requirements under the code are distorting price signals in the dairy industry.

- 3.32. The minimum price protections provide an important degree of price certainty to farmers, enabling them to make informed and efficient production decisions for the duration of their milk supply agreement. It is important to observe that the minimum price specified in the agreement does not necessarily represent the price a farmer will ultimately receive for their milk. Processors regularly ‘step up’ milk prices during the season depending on market conditions and farmers may be paid less than the minimum price in certain scenarios – for example, where they fail to meet quality requirements for milk.¹⁰
- 3.33. Conversely, allowing processors to enter into longer term milk supply agreements with farmers in order to secure supply while also retaining the ability to shift pricing risks onto their suppliers is likely to significantly dampen competition in the dairy industry and unfairly burden dairy farmers. Generally speaking, the ACCC considers that dairy processors are much better placed to manage pricing risks in comparison to individual farmers and the ACCC strongly supports maintaining the existing minimum price requirements for all milk supply agreements under the dairy code.
- 3.34. As noted in the discussion paper, global prices for milk are subject to substantial volatility. Australian dairy processors are exposed to global prices as exporters of milk and they must also compete with dairy products imported into the Australian market. The ACCC’s inquiry observed that processors hold better market information than farmers, given processors have more visibility over farmgate, wholesale, retail and export pricing in comparison to farmers.¹¹ Furthermore, processors have some options to manage pricing risks, including:¹²
- entering into forward contracts for export products before announcing farmgate prices, and
 - diversifying their production and sales channels.
- 3.35. Following the publication of milk supply agreements on 1 June 2023, global prices for milk fell after processors had locked in minimum prices for the 2023-24 dairy season. Processors have voiced concerns that the minimum price requirements under the dairy code are unfairly constraining their ability to compete. However, it must also be observed that the shrinking milk pool in Australia has required processors to compete more fiercely on prices to meet their milk requirements. The ACCC considers it would be fundamentally unfair and inefficient to allow processors to be permitted to entice farmers into agreements by publishing attractive milk prices, while also allowing processors to shift pricing risks onto farmers via step downs. Reducing the level of price transparency and certainty for dairy farmers is unlikely to incentivise farmers to increase production, which may lead to a further declining milk pool.
- 3.36. Ensuring the ongoing viability of the Australian dairy industry is an issue that is of critical importance to both farmers and processors, and the ACCC acknowledges the importance of ensuring the dairy code’s minimum price requirements do not inappropriately affect the operation of the market.

¹⁰ Dairy code, s 5 (definition of ‘minimum price’).

¹¹ ACCC, [Dairy inquiry final report](#), p 40.

¹² ACCC, [Dairy inquiry final report](#), pp 35, 51-52.

Reducing minimum prices in exceptional circumstances

- 3.37. Section 28 of the dairy code permits processors to unilaterally reduce the minimum prices payable for milk yet to be supplied under the agreement in 'exceptional circumstances'. 'Exceptional circumstances' are defined as temporary circumstances involving an extraordinary event that:¹³
- occurs outside of Australia
 - has a highly significant effect on supply, demand or costs in the dairy industry, and
 - is not caused by decisions made by processors.
- 3.38. Before a processor can determine that exceptional circumstances exist, it must ensure it takes all reasonable steps to prevent or limit the impact of the exceptional circumstances on the processor and determine that the step down is 'unavoidable'.¹⁴
- 3.39. Once a processor has determined that exceptional circumstances exist, it must provide notice of the step down to any affected farmers and the ACCC. The dairy code grants farmers a right to terminate their agreement with the processor within 21 days of receiving notice of the step down.¹⁵
- 3.40. To date, no processor has provided notice to the ACCC of a unilateral prospective step down under section 28 of the dairy code.
- 3.41. The ACCC considers that the unilateral prospective step down rules are intended to function as a measure of last resort to protect the ongoing viability of Australian dairy processors in extreme circumstances. However, the rules are necessarily subject to considerable uncertainty. For example, the exceptional circumstances test relies on several nebulous concepts including whether processors have contributed to the situation, whether the circumstances are 'unavoidable' and whether processors have taken sufficient steps to mitigate the impact of any extraneous events. Given the unforeseeable nature of 'exceptional circumstances' it is difficult or impossible to provide a meaningful indication of circumstances that are likely to meet the threshold set out in the dairy code.
- 3.42. Ultimately, the ACCC considers that responsibility for declaring whether 'exceptional circumstances' exist must rest with individual processors, to ensure they have the ability to respond to extraordinary events. The ACCC would welcome additional consultation with the industry on ways to clarify the operation of the unilateral prospective step down rules.

Cooling-off periods

- 3.43. Section 23 of the dairy code requires milk supply agreements to include a cooling-off period allowing a farmer to terminate a milk supply agreement with immediate effect up to 14 days after the agreement is entered into. The processor is not afforded the same right to terminate during the cooling off period.
- 3.44. The ACCC maintains that the cooling-off period should remain at 14 days. As set out in the ACCC's submission to the 2021 review, the 14-day cooling-off period provides an important and meaningful opportunity for farmers to review a milk supply

¹³ Dairy code, s 28(3).

¹⁴ Dairy code, s 28(4).

¹⁵ Dairy code, s 28(5).

agreement and ensure it is financially and legally appropriate to their circumstances. A period of less than 14 days would be insufficient time for a farmer to seek relevant advice.

- 3.45. The ACCC notes the concerns around the potential for farmers to abuse the cooling-off period by entering into agreements with multiple processors and then cancelling agreements with processors they do not want to deal with in the upcoming season. The ACCC has not been provided with any evidence that the cooling-off periods under the dairy code are being abused in this way, or that this has led to processors dealing with significant shortfalls of milk at the beginning of the dairy season. The ACCC considers clear evidence that cooling-off periods are being abused is needed before any changes to the dairy code should be made.

Unwritten and unsigned milk supply agreements

- 3.46. Section 16 of the dairy code provides that a processor can only purchase milk from a farmer under a milk supply agreement. Section 12 requires a processor to publish *all* of its standard form milk supply agreements on its website. As required by section 18, if a milk supply agreement is not in writing the processor must create a written record of the contents of the agreement and provide a copy to the farmer within 30 days of entering into the agreement. The processor must also take reasonable steps to secure a farmer's written acknowledgement that the record represents an accurate record of the parties' agreement.
- 3.47. Generally speaking, bespoke milk supply agreements between farmers and large dairy processors are rare. Many processors include disclaimers in their milk supply agreements or statements of circumstances that the terms of the agreement are not open to negotiation.
- 3.48. Furthermore, the dairy code imposes a range of record keeping obligations on both farmers and processors, to ensure the terms of any milk supply agreement are adequately captured in writing.¹⁶
- 3.49. Accordingly, the ACCC considers the current requirements under the dairy code are sufficient to address the potential risks associated with reliance on unwritten or unsigned milk supply agreements.

¹⁶ Dairy code, s 55.