AUSTRALIAN COMPETITION & CONSUMER COMMISSION

What the dairy code means for farmers

April 2020

Dairy farmers are given specific protections by the Dairy Industry Code of Conduct (code). Farmers must also comply with several obligations in the code.

The code came into effect on 1 January 2020. **All contracts (or other agreements to supply milk) created, varied or renewed after this date are subject to the code**. The good faith obligation applies to all agreements to supply milk, even if they were entered into before the code came into effect.

The code applies to dealings between a dairy farmer and any corporation that purchases milk directly from them. The code refers to these parties as 'processors', and they may include supermarkets, milk brokers, cooperatives or corporations created for the purposes of collective bargaining.

Contracts between a farmer and processor for the supply of milk are referred to as milk supply agreements. Milk supply agreements between a farmer and a processor must comply with the code.

The code is legally binding on both processors and farmers, and provides legally enforceable rights. Breaches of the code may result in enforcement action by the ACCC.

This fact sheet is intended to help farmers understand their rights and obligations under the code. This guidance is general in nature and does not take into account your specific circumstances. If you are not sure how the code applies to your specific circumstances, you should seek legal advice. The ACCC cannot provide legal advice to farmers or processors about how the code applies to their circumstances.

What about contracts from before 1 January 2020?

If your contract was entered into before 1 January 2020, then most of the code will not apply unless it was varied or renewed in 2020. The main exception is the good faith obligation, which applies regardless to *all* dealings between processors and farmers in relation to the supply of milk.

From 1 January 2021, a processor will breach the code if any of their milk supply agreements (regardless of when they were entered into) do not comply with the code. Before 1 January 2021, farmers and processors should work together to vary existing agreements to be code compliant or agree to terminate any noncompliant agreement. The code will apply to this process to the extent that both the farmer and the processor must act in good faith in relation to the supply of milk.

Who is exempt from the code?

If a farmer is selling milk to a processor that qualifies as a 'small business entity' (generally a processor that has an annual aggregated turnover of under $10 million), most of the code will not apply to either party. However, both the farmer and the processor must still act in good faith.

What does the good faith obligation mean for me?

All dealings between farmers and processors must be in good faith.

The code outlines certain matters that a court may consider when determining whether a party has acted in good faith. In general, good faith requires parties to exercise their rights honestly, reasonably and not arbitrarily or for some irrelevant purpose.

What must a milk supply agreement include?

Milk supply agreements must be in plain English or include a plain English overview. The ACCC considers plain English documents should avoid technical or legal jargon that a layperson would not understand. However, a milk supply agreement may use dairy industry terms that a dairy farmer would readily understand but that an ordinary layperson may not.

Milk supply agreements must include (among other things):

- a specified first and last day of the milk supply period (unless the processor is a cooperative and the farmer is a member of that cooperative)
- a cooling-off period of at least 14 days
- the processor's quality requirements, and details of the sampling procedure they may use
- the processor's quantity requirements, and volume accuracy assurances they may use
- the actions a processor may take if milk does not meet the specified quality and quantity requirements (including the circumstances in which the processor may reject the milk)
- a minimum price (see below)
- a procedure for handling complaints.

A milk supply agreement must *not* allow a processor to unilaterally vary the contract, except to the extent necessary to comply with a change in the law.

What about handbooks?

The code does not prohibit processors from using handbooks.

However, milk supply agreements must be contained in a single document. Accordingly, if a processor wants the 'handbook' to form part of an agreement, the ACCC considers:

- the agreement must clearly state that the handbook is a part of the milk supply agreement
- the handbook should be provided together with all other documents forming part of the agreement (for example, it is attached to the agreement)
- the terms of the agreement (including the handbook) must comply with the code.

If the handbook forms part of the agreement, the handbook may only be varied in very limited circumstances, in accordance with the code and the terms of the agreement. This means processors may not unilaterally vary the handbook unless it is necessary to comply with a change in the law.

What dates do I need to be aware of?

By 1 June each year processors need to publish on their websites all standard form milk supply agreements for the coming financial year. This allows farmers time to compare the milk supply agreements being offered by each processor.

Farmers may wish to consider negotiating their milk supply agreements to begin at the start of the financial year (1 July). This will provide at least an entire month for you to compare offers, consider which agreement is most appropriate for your circumstances, and seek professional advice to confirm this.

What is a minimum price and why is it important?

One of the most important requirements of the code is that every milk supply agreement must include a minimum price. This is the lowest price payable for the milk supplied to the processor, excluding any temporary step-downs (see below), loyalty payments or fees. The minimum price can be either a single price that will apply for the entire agreement, or a schedule setting out prices on either a monthly or yearly basis.

A processor is required to specify its requirements in relation to the quality of milk supplied and may offer a higher price for milk of certain quality. For example, a processor may specify a minimum price per litre of milk with a minimum percentage of milk solids, but offer a higher amount per litre of milk with a higher percentage. The minimum price is afforded additional protections under the code (for example, in relation to the prohibition against retrospective step-downs).

It is important to note that the code does not specify what a minimum farmgate price should be, or require processors to set their milk prices in a specified way (for example, by reference to particular quality). Similarly, the code does not require processors to offer any particular price for a farmer's milk (such as a price that exceeds cost of production).

What about a weighted average price?

The code does not prohibit processors from advertising a weighted average price or an indicative price in addition to the minimum price. However, the protections under the code do not apply to weighted average or indicative prices.

Are step-downs permitted?

Retrospective step-downs (where the processor reduces the minimum price with respect to milk already supplied) are prohibited in all circumstances.

Prospective step-downs (where the processor reduces the minimum price for milk yet to be supplied) are permitted only under a narrow range of exceptional and temporary circumstances.

In the event of a prospective step-down, you must also be allowed to terminate the agreement within 21 days of receiving notice.

Does the code permit open-ended supply agreements?

The code specifies that all milk supply agreements must have a definite end date (except agreements with some cooperatives). This prevents automatic roll-over clauses.

This does not prevent you from renewing your milk supply agreement with the processor should both parties agree to do so. You can agree to vary your supply period at any time, but you should be conscious of the 1 June publication date as it is an opportunity to see what prices other processors may be offering.

If you are a member of a cooperative, these restrictions on open-ended supply agreements may not apply; however, your milk supply agreement must still specify a minimum price.

What is the cooling-off period?

Milk supply agreements must give farmers a cooling-off period during which you may terminate your contract with a processor without penalty. The cooling-off period must start when you enter into the agreement and expire:

- if it is a written agreement, 14 days after you entered into it
- if it is an unwritten agreement, 14 days after the processor gives you a written record of the agreement.

You may wish to use this time to seek professional advice to confirm that the agreement is appropriate for your circumstances.

Are loyalty payments permitted under the code?

The code prevents processors from offering loyalty payments that are conditional upon farmers renewing their contract with the same processor or continuing to supply milk after the original agreement ends.

If a milk supply agreement is terminated (for example, because the processor has implemented a prospective step-down and the farmer chooses to terminate), the code requires that any loyalty payments that are detailed in the agreement be paid out to the farmer on a pro-rata basis. Note, however, that this will not apply if the contract is terminated because of a material breach on your part.

Does the code permit exclusive supply agreements?

Exclusive supply agreements are not prohibited by the code. However, processors are required to offer a standard form non-exclusive option when they publish their contracts on 1 June.

The code does prohibit any exclusive supply agreement that:

- places a maximum volume limit on milk which can be supplied (for example, which would prevent you from selling surplus milk to another processor)
- includes tier pricing (where a processor pays a lower price for milk above a certain volume).

If you sign a non-exclusive agreement with a maximum volume limit, it is important that you understand what your options are if you produce extra milk. If you ask the processor to collect this extra milk, they may pay a lower price for it. You will, however, have the option to sell the extra milk to another processor.

How does the code help me if I have a dispute with my processor?

Under the code, milk supply agreements must include a procedure for handling complaints and must provide for mediation as a means of resolving disputes. Milk supply agreements may also provide for arbitration.

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

What are my record-keeping obligations?

Both farmers and processors have record-keeping obligations under the code.

Farmers must keep records of the following:

- the milk supply agreement (or a record of the contents of the agreement if not in writing)
- any variation of the agreement (or a record of the contents of the variation if not in writing)
- any termination of the agreement (or a record of the contents of the termination if not in writing).

You **must** keep these records for six years from the date the record is made or given. Penalties can apply to both processors and farmers who do not meet record-keeping requirements.

If you enter into a milk supply agreement with a processor that is a 'small business entity', these record-keeping requirements will not apply. However, it is still advisable to maintain written records of agreements, variations and terminations.

What are the consequences if I don't comply with the code?

The code imposes several obligations on farmers. Financial penalties may apply if you:

- fail to act in good faith
- unilaterally vary the agreement in a manner that does not comply with the code
- unilaterally vary or terminate the agreement in a manner that is not permitted by the milk supply agreement
- fail to keep written records of agreements, variations and terminations.

How will the code be enforced?

In 2020 the Dairy Code of Conduct is a priority area for the ACCC. We have dedicated resources to engage in enforcement and compliance work in relation to the code. This includes industry education and checking for compliance with the code.

To report potential non-compliance with the code please contact the ACCC on:

ACCC small business helpline: 1300 302 021

Email: dairy@accc.gov.au

For further information go to: accc.gov.au/dairy

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