

GUIDE TO MILK SUPPLY AGREEMENTS AND THE DAIRY INDUSTRY CODE OF CONDUCT

MILK SUPPLY AGREEMENT (MSA) CHECKLIST 1

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At the start of 2020, the Australian Government introduced the *Competition and Consumer (Industry Codes–Dairy) Regulations*. The Dairy Industry Code of Conduct, also known as the Dairy Code or the mandatory code, is an enforceable code which applies to milk supply agreements (MSAs).

What the Dairy Industry Code of Conduct is

The Dairy Code creates a minimum standard as to how farmers and processors (which can include supermarkets, milk brokers, cooperatives or collective bargaining corporations) should deal with each other when they are entering into milk supply agreements, which are contracts. It creates rules that must be followed by both, farmers and processors, about how they contract with each other, and some terms that must be in all milk supply agreements. All milk must be purchased under a milk supply agreement (MSA) and that all MSAs must comply with the Code.

What the Dairy Industry Code of Conduct is not

The Dairy Code is not a milk supply agreement, and farmers must enter into their own milk supply agreement with their processor. The Dairy Code does not fix a price for milk and it will not protect farmers from making bad deals. A farmer is still a businessperson who needs to make sure they look after their business by being careful and thoughtful about what they are signing up to.

The first two rules of signing a milk supply agreement

Rule 1: Read it. **Rule 2:** Understand it. If you're unsure of what you're signing up for, or even if an aspect of the milk supply agreement is uncertain to you, seek advice. Seeking advice is a sensible business expense. This fact sheet isn't legal advice, rather it aims to support better decisions by providing information that helps you to understand the Dairy Code and how it relates to milk supply agreements.

A milk supply agreement is a binding contract once signed.



Good faith and Plain English

All parties to any milk supply agreement, including farmers, must deal with each other in good faith. This essentially means that you must act honestly, reasonably and not arbitrarily with each other or for some irrelevant purpose, and that the parties must act co-operatively to achieve the purpose of the agreement. This does not mean you have to act in the interests of the processor, nor do they have to act in your interests. It does not mean that the parties cannot 'drive a hard bargain' and it will not save you from a poor commercial deal. What it does mean is that both parties must be honest and work to make sure the intent of the milk supply agreement is achieved. It is intended to ensure that the parties to the agreement are volunteers and not pushed or pressured into an agreement or one of its terms.

All contracts and any variations to contracts must be written in plain English or to have a plain English overview of what the document says. This applies to both parties in the contract.

Remember: you have the right to negotiate and you can always say 'no' and seek better terms than those that are published by the processor.

Rules under the Dairy Industry Code of Conduct

If you're dealing with a large processor (meaning a processor with a turnover of more than \$10 million per year), then there are terms that **must** be in your milk supply agreement.

Milk supply agreement checklist

- A minimum 14 day cooling off period (this is a period where you can change your mind).
- There always has to be a start date and an end date (unless you are selling to the cooperative of which you are a member).
- Quality, quantity and testing procedures have to be included in the agreement (this will often be dealt with by reference to a handbook).
- The agreement will state the minimum price that will be paid by the processor, this price may go up over time.
- The minimum price does not include prospective stepdowns, loyalty payments, incentives or fees for services. A minimum price can be a single price or a schedule setting out prices on a monthly or yearly basis.
- The agreement must not include any form of retrospective stepdown of the minimum price
- The agreement can include a prospective step down, but **only** in certain exceptional circumstances (even so, if this happens you may terminate the agreement within 21 days).
- The processor cannot vary the agreement without your consent unless it is required to comply with the law or for a prospective stepdown in exceptional circumstances.
- If an agreement includes a reference to a milk supply handbook or processor policy document, then the document that was current when you signed applies and should have been given to you prior to you signing. Any subsequent changes to those documents do not apply to you unless you consent. Those documents must be incorporated into a single milk supply agreement. This is normally done by adding the documents as schedules to the agreement.
- The agreement must specify when ownership of the milk passes from the farmer to the processor.
- The agreement must be clear on services that are to be performed by the processor, such as testing, transport or disposal of milk and the agreement must clearly state what any costs are.
- If the agreement offers a loyalty payment, then the payment will be paid proportionally even if the farmer elects to change processors at the end of the agreement or to stop supplying (unless the farmer materially breaches the agreement). It is also important to note that a processor cannot use a loyalty payment to impose a condition that the farmer provides milk after the agreement ends, to ask the farmer to postpone the end of the supply period or to enter into a new agreement.
- The agreement must contain a dispute resolution procedure – including internal complaint handling procedures and a mediation process. It can also allow for arbitration if the parties want to avoid court cases in the event of a serious dispute.
- The processor must guarantee their testing system and the way they check volumetric measuring.

Non-exclusive milk supply agreements: The default position under the Dairy Code is that a milk supply agreement is non-exclusive. If a processor wishes to offer an exclusive milk supply agreement, it must also offer a non-exclusive milk supply agreement for the same set of circumstances (terms and prices can be different). The Dairy Code expressly forbids a demand for exclusivity and capped volumes in the same milk supply agreement.

Remember: processors must publish their minimum price and standard form version of their milk supply agreement on their website by 1 June each year. This will give you a chance to look at their contract before you even talk to them. These contracts can be renegotiated or changed but you can insist on using the published contract if you want to.

Also, look to make sure they have included a **price justification** on the published supply agreement. This justification will indicate to you how they've arrived at the price they're offering.

Supplier/farmer responsibilities

The Dairy Code also gives the farmer some duties. You must keep a written copy of the milk supply agreement, including a written copy of any variations to the milk supply agreement, for 6 years. This is a normal requirement of running a business.

Like the processor, you cannot change the agreement without the permission of the other party and you cannot change it in such a way that it breaches the code even if you both agree. You also cannot terminate the agreement unless both parties to the contract agree or unless there is a breach of some other fundamental term of the agreement. The Code contains a number of fines for both farmers and processors who breach the variation and termination sections of the Code. If you're planning a change get advice. See penalties and provisions in the **ACCC** website for more detailed information.

Verbal agreements

Finally, the Dairy Code does allow for agreements to be entered into verbally. **This is not recommended.** However, if it does occur the Dairy Code will still apply, and it will be the job of the processor to send to the farmer a written version of the verbal agreement within 30 days and make all reasonable efforts to get the farmer to acknowledge that the written version reflects the verbal agreement.

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