



**Australian
Competition &
Consumer
Commission**

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6 September 2004

Mr Peter Margin
Managing Director
National Foods Ltd
PO Box 6089
MELBOURNE VIC 3004

Dear Mr Margin

Interested party consultation on arrangements for the distribution of dairy products in South Australia

1. Introduction

The Australian Competition and Consumer Commission (the ACCC) is currently conducting an interested party consultation process in relation to arrangements for the distribution of dairy products in South Australia.

The consultation process is in response to an application for authorisation lodged by the Milk Vendors Association (SA) Inc (the Association) for proposed collective bargaining arrangements in relation to the terms and conditions of distribution contracts between members and non-members of the Association and National Foods Milk Limited and Dairy Vale Foods Limited. For an explanation of the authorisation process and the conduct the subject of the application see sections 2 and 3 of this letter. A copy of the application for authorisation (without attachments) is also enclosed for your information and/or comment.

Consultation is also being conducted in relation to notifications for exclusive dealing agreements lodged by Dairy Vale Cooperative Ltd in November 1992 and February 1993 and by National Dairies SA Ltd in April 1993 and March 1994. For an explanation of the notification process and the conduct the subject of the notifications see sections 2 and 4 of this letter. For your information, copies of the notified agreements and the 1993 decisions of the Trade Practices Commission (now the ACCC) have been attached.

2. Background

The ACCC is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive arrangements or



conduct, thereby encouraging competition and efficiency in business resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way businesses may obtain immunity is to apply for what is known as an 'authorisation' from the ACCC. Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

In assessing the public benefits and detriments of an authorisation application, the ACCC undertakes a public consultation process seeking comments on the application from interested parties.

Notification is another way businesses may obtain immunity from the Act. Notification is currently only available in respect of exclusive dealing conduct. Generally speaking, exclusive dealing involves a business imposing restrictions on another's freedom to choose with whom, or in what, it deals. Businesses wishing to engage in exclusive dealing conduct can 'notify' the ACCC of the conduct. Immunity is obtained automatically and will continue until the ACCC issues a notice revoking the immunity.

The ACCC may issue a notice revoking the notification immunity if it is satisfied that the conduct substantially lessens competition and does not result in any public benefit which outweighs the resulting public detriment.

3. Application for authorisation by the Milk Vendors' Association (SA) Inc (the Association)

On 3 September 2004 the ACCC received an application for authorisation lodged by the Association for the Association to collectively bargain on behalf of its present and future members with National Foods Milk Limited and Dairy Vale Foods Limited in relation to the terms and conditions of vendor distribution contracts. Authorisation has also been sought in relation to a dispute resolution process provided by the Association.

The Association has also sought interim authorisation in respect of these proposed arrangements. If granted, interim authorisation will enable the parties to engage in the proposed arrangements while the ACCC considers the merits of the substantive application for authorisation. By its nature, the ACCC is required to consider a request for interim authorisation very quickly and so only a short consultation period is available. The ACCC is not required to make a decision on the merits of the application for authorisation in reaching its decision on a request for interim authorisation, but would look at factors such as the urgent need for exemption of the arrangement and harm likely to result to the applicant and interested parties should interim authorisation be granted/denied.

The Association has sought interim authorisation on the grounds that draft distributor contracts have recently been issued by both processors and are due to be finalised before the anticipated completion of the authorisation process.

The Association submits that the proposed collective bargaining arrangements would result in a benefit to the public of South Australia which would outweigh any detriment constituted by any lessening of competition that would be likely to result. For details on the public benefits and detriments that the Association claims are likely to result

from the proposed collective bargaining arrangements please see the enclosed submission.

4. Exclusive dealing notifications

On 24 November 1992 and 9 February 1993, Dairy Vale Cooperative Ltd (Dairy Vale) lodged notifications in relation to an exclusive dealing agreement between Dairy Vale and selected milk vendors in South Australia. The agreement gave vendors the exclusive right to distribute all Dairy Vale products in particular areas and specified the territory in which the vendor would operate. Dairy Vale retained the right to sell products direct to the retailer. The agreement also provided for vendors to carry competing products provided Dairy Vale agreed in writing.

On 13 April 1993 National Dairies SA Ltd (National Dairies) lodged a notification of exclusive dealing in relation to an agreement with milk vendors in some country areas of South Australia. The agreement gave vendors the exclusive right to distribute National Dairies' white milk, modified milk and flavoured milk. Vendors were given non-exclusive rights to distribute other National Dairies products, and they could distribute non-National Dairies products provided National Dairies granted an exemption. Distributors were not zoned and they could compete with National Dairies for the business of new customers.

On 29 March 1994 National Dairies lodged two further notifications of exclusive dealing in relation to agreements with milk vendors operating in Adelaide. The first gave wholesale vendors, who distributed products to retail outlets and other large buyers, the exclusive right to distribute National Dairies' white milk, modified milk and flavoured milk within a specified territory of metropolitan Adelaide. The second notification provided retail vendors with the exclusive right to distribute National Dairies' white milk, modified milk and flavoured milk to households and small retailers. Both agreements gave vendors non-exclusive rights to distribute other National Dairies products, and they could distribute non-National Dairies products provided National Dairies granted an exemption.

At the time of assessing the notifications in 1993 and 1994, the Trade Practices Commission (now the ACCC) considered that the exclusive dealing arrangements were likely to have little impact on competition in the short term although it noted that the impact after deregulation was unclear. The Trade Practices Commission also considered there was little public benefit in the agreements themselves.

Given that the ACCC has received the application for authorisation of collective bargaining arrangements by milk vendors, the deregulation of the dairy industry and the considerable time that has passed since the exclusive dealing arrangements were notified, the ACCC proposes to review the notifications at the same time as considering the application for authorisation. The review will assess the effect the notified conduct may have on competition and whether the public benefit continues to outweigh the public detriment and therefore whether or not the immunity provided by the notifications should continue.

5. Request for submissions

To assist the ACCC in its consideration of the collective bargaining authorisation application and the review of the exclusive dealing notifications it would be helpful to obtain your comments on the following issues, where relevant:

Authorisation

- the likely public benefits from the proposed collective bargaining arrangements by milk vendors in South Australia with processors for the distribution of dairy products;
- the likely effect on competition, and any other public detriments, from the proposed collective bargaining arrangements by milk vendors in South Australia with processors for the distribution of dairy products;
- the effect of the ACCC granting/denying interim authorisation in respect of the proposed collective bargaining arrangements;
- any other information that may be relevant to the ACCC's assessment of the public benefits and detriments of the proposed collective bargaining arrangements

Notifications

- details as to the way National Foods products are currently distributed in South Australia, including the types of products distributed by vendors and how National Foods products are distributed to small and large retailers and households;
- the extent to which the exclusive dealing agreements the subject of the notifications lodged by National Dairies for the distribution of dairy products in South Australia continue to be given effect to;
- the public benefits resulting from the notified exclusive dealing agreements for the distribution of dairy products in South Australia;
- the relevant market(s) affected by the notified exclusive dealing agreements and any changes since the notifications were lodged; the effect on competition from the notified exclusive dealing agreements for the distribution of dairy products in South Australia;
- details of any exemptions granted under the agreements to allow vendors to carry competing products and the basis on which exemptions were granted;
- the percentage of vendors contracted to National Foods who carry competing products (dual vendors) and the percentage of vendors who carry only National Foods products (sole/exclusive vendors);
- the retail market shares of National Foods products in South Australia; and
- any other information that may be relevant to the ACCC's assessment of the public benefits and detriments, including the effect on competition, of the exclusive dealing agreements.

The ACCC asks for submissions to be in writing so they can be made publicly available. They are placed on a public register for this purpose.

Persons lodging a submission with the ACCC may request that information included in the submission be treated as confidential and not placed on the public register. If confidentiality is granted in respect of information the ACCC may take it into account, even though it is not publicly available. Guidelines for seeking confidentiality are attached.

If you wish to lodge a submission, please address your submission to:

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Submissions can also be lodged by email to: adjudication@acc.gov.au

Initial submissions in relation to the request for interim authorisation by the Milk Vendors' Association (SA) Inc for the proposed collective bargaining arrangements in respect of current distribution contracts should reach the ACCC by **21 September 2004**. Submissions in relation to the substantive application for authorisation of proposed collective bargaining arrangements and the review of the exclusive dealing notifications should reach the ACCC by **5 October 2004**.

If you have any questions about the issues raised in this letter please contact Michael Green on 02 6243 1088.

A copy of this letter will be placed on the ACCC's public register.

Yours sincerely

Handwritten signature of Tim Grimwade, consisting of a stylized 'T' and 'G' followed by a cursive 'ce'.

Tim Grimwade
General Manager
Adjudication Branch

GUIDELINES FOR CONFIDENTIALITY CLAIMS

Authorisations/Notifications

The process whereby the Commission assesses applications for authorisation and notifications is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the Commission to maintain a public register in respect of authorisation applications and notifications.

Applicants and interested parties can request that a submission, or a part of a submission, be excluded from the public register.

The Commission is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or processes;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

The Commission also has the discretion, under s 89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the Commission:

- (a) where the request is that a whole document be excluded, the words “**Restriction of Publication Claimed**” should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words “**Restriction of Publication of Part Claimed**” should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

However, even if a document does not meet these technical requirements, the Commission may still grant confidentiality where, in the Commission's view, it is desirable to do so.

If the Commission denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the Commission will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the Commission will return the original material and destroy all associated copies. The Commission will not consider this material when reaching its decision.

If the Commission does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the Commission pursuant to its powers generally under the *Trade Practices Act*.