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28 September 2004

By facsimile: (02) 6243 1211

Australian Competition and Consumer Commission
470 Northbourne Avenue
Dickson
ACT 2602

Attention: Mr Tim Grimwade
General Manager, Adjudication Branch

Your Ref: C2004/1241
Our Ref: 2545843

Dear Mr Grimwade

**Milk Vendors Association (SA), Inc (MVA)
Application for authorization A90972 (Application)**

1. We act for National Foods Milk Limited (**NFML**), and refer to your letter to our client's parent company, National Foods Limited, dated 6 September 2004.
2. This letter contains our client's submissions on MVA's application for an interim authorization only. Our client's submissions on the substantive matters raised by the Application and the exclusive dealing notifications referred to in your letter will be provided at a later date.

INTRODUCTION

Background

3. In this letter, we refer to the conduct described in:
 - (1) paragraphs (a) and (b) of page 1 to the attachment to the Application (**Attachment**) as the "**single bargaining agent conduct**"; and

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- (2) paragraph (c) of page 1 of the Attachment as the “**exclusive dispute resolution services**” conduct.
4. We note that the MVA appears to have withdrawn its application for an interim authorization of the exclusive dispute resolution services conduct (minutes of the Commission’s meeting with the MVA on 21 September 2004, referred to in this letter as **21 September 2004 Minutes**). Accordingly, this letter deals only with the interim authorization of the single bargaining agent conduct.

Test for granting interim authorisation

5. Section 91(2) of the Trade Practices Act provides that the Commission may grant an interim authorization if it is appropriate to do so “for the purpose enabling due consideration to be given to ... an application for an authorization”.
6. The Commission’s guidelines on notifications and authorizations relevantly provide that:
 - (1) interim authorizations may be expected only in exceptional circumstances, where supported by persuasive submissions; and
 - (2) it is unlikely an interim authorization will be granted where the effect of allowing the proposed conduct to occur would prevent the market being able to return substantially to its pre-interim authorization state if the Commission later denied authorization.

Summary of submissions

7. NFML submits that the Commission should refuse to grant an interim authorization to the single bargaining agent conduct because:
 - (1) the Applicant’s submission that the new distributor contracts are “due to be finalised” before the Commission’s final decision is incorrect, and accordingly there is no urgency requiring an interim authorization of potentially serious anti-competitive conduct;
 - (2) the Applicant has not submitted that there are other exceptional circumstances which would support the grant of an interim authorization, and, in NFML’s opinion, no such exceptional circumstances exist;
 - (3) NFML would be reluctant to engage in negotiations with the MVA, as opposed to individual distributors, prior to the Commission’s final decision, so an interim authorization would not advance negotiations on NFML’s new distributor arrangements and could impede voluntary discussions with individual distributors;
 - (4) it is possible that conduct permitted by an interim authorization would make it more difficult or impossible for the market to be returned to its pre-interim-authorization state if the Commission were ultimately to refuse to grant a final authorization;

- (5) the conduct which is sought to be authorized is unclear, and an interim authorization should not be granted unless the parties have certainty about what conduct is and is not permitted; and
- (6) the interim authorization is not necessary for, and there is nothing to suggest it would assist in, the Commission giving due consideration to the Application.

8. Each of these factors is addressed below.

DETAILED SUBMISSIONS

"Exceptional circumstances"

9. There are no exceptional circumstances which would justify the grant of an interim authorization of the single bargaining agent conduct.

No urgency

10. There is no urgent need for an interim authorization. The assertion in the attachment to the Application that "draft distributor contracts have recently been issued by both South Australian processors and are due to be finalised before the anticipated completion of the Authorization proper" is incorrect insofar as it refers to conduct of NFML. The assertions stated in the 4th and 5th bullet points of the 21 September 2004 Minutes under the heading "National Foods contracting process" are also incorrect. Our client's conduct in relation to proposed arrangements with its South Australian distributors is described below.
11. Each of our client's current South Australian distributors is party to a licensed distributor agreement (**Current Agreement**). The earliest expiry date of any Current Agreement is 12 May 2005. The Current Agreement provides that the parties may (but are not obliged to) negotiate the terms and conditions of a new agreement in the year prior to the stated expiry date of the Current Agreement. If the parties are in such negotiations but have not reached agreement by the stated expiry date, the Current Agreement continues for a further 6 months **after** its stated expiry date. . NFML will continue to be bound by the terms of the Current Agreements until they expire or are terminated.
12. Accordingly, it seems likely that the Commission's final decision on the Application would be known in sufficient time for negotiations on the New Agreement to be conducted in light of it. It is in the interests of all of the parties to have the benefit of the Commission's decision and findings including any conditions or restrictions to be placed on any authorized conduct.
13. NFML provided a draft of a proposed new distributor agreement (**New Agreement**) to Mr Roger Prime, the manager and secretary of the MVA on 11 March 2004 with a request that the MVA provide comments on issues which were likely to be of concern to its members. An updated draft of the New Agreement was provided to Mr Prime on 22 July 2004. NFML

has not received any comments from the MVA on the New Agreement to date.

14. On 1 September 2004, NFML conducted an information session attended by approximately 108 of its South Australian distributors, at which a number of issues including proposed arrangements for a New Agreement were discussed. At that information session, and in response to a prior question from a distributor, NFML outlined a proposed timetable which envisaged that it would be possible for distributors to replace their Current Agreements with New Agreements by November 2004. However, this would have to be by agreement with the relevant individual distributor. NFML has set no timetable for the introduction of New Agreements prior to the expiry of Current Agreements.
15. NFML has **not**:
 - (1) provided drafts of the New Agreement to any distributor;
 - (2) met individually with any distributor about the proposed New Agreement; nor
 - (3) made any representations that a distributor must sign a New Agreement within 4-8 weeks if it wishes to be offered a new contract when its Current Agreement expires.
16. It is accordingly incorrect (as the Applicant asserts) that the New Agreements are "due to be finalised" before the Commission's final decision or the issue of the Commission's draft determination. If agreement cannot be reached voluntarily with an individual distributor as to the terms and conditions of a New Agreement, the Current Agreement will continue in force and the distributor will not be prejudiced by having to resume negotiations on any New Agreement in light of the Commission's final decision on the Application.

No other exceptional circumstances

17. The Application does not make any submissions that there are other exceptional circumstances supporting the grant of an interim authorization. In NFML's opinion, there are no such exceptional circumstances.
18. It is not suggested that the MVA would be impeded in providing services to its members or suffer any detriment if an interim authorization were not granted, in particular to distributors who are willing to engage in voluntary negotiations about the Network Agreement prior to the Commission's final decision on the Application. For example, the MVA could continue to provide market information and analysis to its members and, to the extent not prohibited by section 45 of the Act, provide representations to processors on issues of concern to their members (as noted in the Commission's issues paper on collective bargaining).
19. As noted above, individual distributors are unlikely to suffer any detriment if an interim authorization is not granted, since Current Agreements can

only be replaced with New Agreements by consent. Individual distributors are free not to engage with NFML and to await the Commission's final determination if they desire.

No effect on negotiations

20. If the Commission grants the interim authorization, NFML would be most reluctant to proceed with negotiating the New Agreement with the MVA, as opposed to voluntarily with individual distributors, prior to the Commission's final decision on the Application. This is because NFML would wish any collective bargaining to be conducted in light of the Commission's findings on the substantive merits of the Application. In particular, NFML is conscious that:
- (1) the Commission has in the past declined to grant final authorizations to single bargaining agent conduct because of the significant anti-competitive effects of such conduct (including the possibility that such conduct increases the likelihood of a uniform agreement); and
 - (2) the Commission may impose protective conditions on authorized collective bargaining to reduce its anti-competitive effects, e.g. restrictions on the terms which may be collectively bargained (for example, price) and on dealings with confidential information.
21. In the absence of an interim authorization, negotiations on the New Agreement could continue to be conducted by distributors and NFML on a voluntary basis prior to the final decision of the Commission.

Preservation of market conditions

22. While NFML does not now wish to make any submissions on the substantive merits of the Application, it notes that conduct in the nature of the single bargaining agent conduct has the potential to be highly anti-competitive. In the absence of an interim authorization, none of the anti-competitive effects of the single bargaining agent conduct would eventuate prior to the Commission finding that there would be a net public benefit. However, an interim authorization has the potential to entrench anti-competitive behaviour even if the Commission declines to grant a final authorization.
23. For example:
- (1) to the extent that other processors enter into new agreements with distributors represented by the MVA that have been negotiated during an interim authorization, this may unduly affect NFML's practical ability to negotiate the New Agreements. The Commission's issues paper on collective bargaining specifically notes that the potential for uniform contracts to develop tends to increase if there is a single bargaining agent; and
 - (2) if the Commission declines to grant a final authorization, or decides to grant a final authorization subject to conditions on

information-sharing, it would be difficult to retrieve sensitive information (e.g. as to pricing) shared between distributors and the MVA during the period of an interim authorization, or to enforce those conditions retrospectively.

Lack of certainty about authorized conduct

24. It would be undesirable for an interim authorization to be granted unless the conduct to be permitted is more clearly defined. In particular, the geographic scope of the MVA's power to act as a single bargaining agent is unclear – it is not, on its terms, limited to persons in South Australia since “non-members” of the MVA may be represented (see paragraph (a) on page 1 of the attachment to the application).

Due consideration: test in section 91(2)

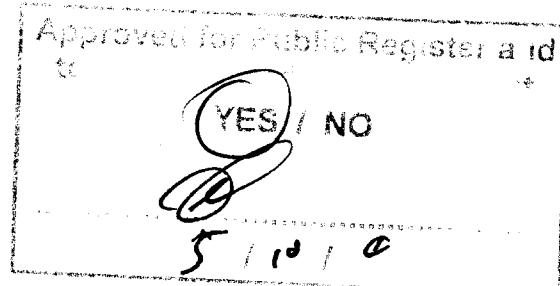
25. There is nothing in the Application which suggests that an interim authorization would assist the Commission in giving due consideration to the Application. To the extent that non-NFML distributor arrangements are finalised during the interim authorization period¹, this is likely to pre-empt or at least complicate the Commission's findings on the substantive merits of the Application.

We confirm our present intention to teleconference with you and our client on Tuesday 28 September 2004 at 4 p.m. If you have any queries in the meantime, please do not hesitate to contact Richard Lewis.

Yours faithfully



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¹ As noted above, NFML itself would be most reluctant to finalise distributor arrangements during an interim authorization