

MILK VENDORS ASSOCIATION (SA) INC.

APPLICATION FOR AUTHORISATION A90972

RESPONSE TO SUBMISSIONS OF NATIONAL FOODS MILK LIMITED (NFML).

The Association responds to the Submissions of NFML as set out in a letter from its solicitors dated 28 September 2004 as follows:

- 2 The Association will make separate submission in relation to the review of the Notification.
 - 4 The Association confirms that it has withdrawn its Application for Interim Authorisation in relation to the provision of exclusive dispute resolution services.
 - 5 The Association accepts that section 91(2) of the TPA contains the provision alleged by NFML. However, section 91(2) provides also that the Commission may grant Interim Authorisation "for any other reason": see subsections 91(2)(c) and 91(2)(e).
 - 6 The Association submits that the circumstances as set out in its Application are sufficiently exceptional; its submissions in support of that Application are sufficiently persuasive; and that there is no basis for any assertion that the market will be unable to return to the *status quo ante* in the event that authorisation proper is denied.
- 7(1) The Association has today made enquiries of vendors who have confirmed that, at a meeting of vendors on 1 September 2004, NFML

announced a timetable whereby vendors would be expected to sign new contracts by November 2004.

7(2) The exceptional circumstances on which the Association has made submissions and on which it relies are:

- The existence in South Australia of the processor duopoly; and
- The substantial disparity in bargaining power between those processors, on the one hand, and individual vendors; and
- The history of unilateral imposition of contract terms by the South Australian processors; and
- The continuing existence, in spite of deregulation, of the Notifications; and
- The pressure exerted on vendors to sign new contracts.

7(3) NFML threatens to boycott negotiations with the Association following the grant of Interim Authorisation, and says that this is a basis for the refusal of such grant. No reasons are given as to why NFML would adopt such a stance. This is tantamount to blackmail.

7(4) No basis is given for the possibility asserted in this paragraph. It is submitted that there is no credible reason why the market could not return to the *status quo ante* were final authorisation to be refused.

7(5) NFML alleges a lack of clarity as to the conduct which is sought to be authorised. It does not, however, develop that allegation by the provision of any reference to the Association's Application. The Association submits that there is no lack of clarity in its Application.

7(6) Subparagraph 7(6) of NFML's Submissions is ambiguous and unclear.

Presumably, it refers to some putative submission for consideration pursuant to section 91(2)(a)(i) of the *TPA*. If so, it is misleading and irrelevant as the Association has not sought interim authorisation on the ground that such authorisation is necessary for the purpose of assisting the Commission in giving due consideration to its Application proper.

9 The exceptional circumstances to which the Association has made reference in its Application include the following:

- NFML is seeking to finalise new contracts with the Vendors within the next five weeks.
- The Notifications granted in 1993 allow NFML and Dairy Farmers to impose anti competitive terms on Vendors.
- NFML and Dairy Farmers constitute a duopoly in the milk/dairy product processing market in South Australia.
- There is enormous disparity in bargaining power between NFML/ Dairy Farmers on the one hand, and individual vendors on the other.

(see also 7(2) above)

10 The issues of urgency and exceptional circumstances have been addressed both in the Application and in paragraphs 7(2) and 9 above. The timetable for the finalisation of new NFML contracts has been addressed in paragraph 7(1) above.

- 11 The Association accepts that the current NFML vendor agreement provides for negotiation and extension as asserted. The Association submits, however, that the existing NFML contracts do not confer any right on NFML to compel vendors to commit to new contracts some six months prior to the expiry of their existing contracts: see paragraph 7(1) above.
- 12 NFML asserts that it would be in the best interests of all parties to await the Commission's final decision before commencing negotiations in relation to the new contracts. This is inconsistent with the submission in paragraph 14 to the effect that NFML convened a meeting of its vendors on 1 September 2004 at which the proposed new contracts were discussed. It is clear from the submission at paragraph 14 that NFML envisages that new contracts will be in place by November 2004: that is, some months before the final decision is made by the Commission.
- 13 NFML's proposed new agreement is a national agreement. Mr Prime, on behalf of the Association, attended a meeting of the Dairy Distributors Council in May 2004, which was also attended by representatives of vendor's associations from Western Australia, New South Wales and Tasmania. Representatives of NFML attended that meeting for the purpose of discussing the proposed new contract with the vendor attendees. At the conclusion of that meeting, NFML's representatives stated that they would amend their draft agreement in light of the

discussion. Mr Prime received an amended draft contract on 17 September 2004 by email.

- 14 Mr Prime attended the meeting convened by NFML on 1 September 2004. At that meeting, a representative of NFML stated that the New South Wales vendors' association was happy with the amended draft contract, and that it was now being sent out to individual vendors. This was refuted by Mr Prime, who was aware that the New South Wales vendors' association was not happy with the amended draft. The Association agrees that NFML outlined the proposed timetable for the completion of new contracts by November 2004. The Association agrees also that this timetable was put forward by NFML of its own volition and without prompting from anybody present at the meeting. The suggestion that this timetable was put forward "in response to a prior question from a distributor" is novel. Taken at face value, this can only mean that "one-on one" negotiations had taken place before 1 September.
- 15 The Association accepts that NFML has not yet provided draft agreements to South Australian distributors. To the best of the Association's knowledge, NFML has postponed meetings with individual distributors, presumably in response to the Association's application for interim authorisation. The Association maintains, as set out in paragraphs 7(1) and 14 above, that NFML has set a strict timetable for the signing of new agreements.

- 16 The Association maintains that NFML is seeking to finalise new contracts by November 2004: see paragraphs 7(1) and 14 above. The alleged prejudice which will be suffered by vendors in the hypothetical scenario advanced by NFML is nugatory: the six month extension (referred to in 11 above) will apply regardless of whether a particular vendor as negotiated in person or via the Association.
- 17 The relevant exceptional circumstances have been set out in the Application and in paragraphs 7(2) and 9 above.
- 18 The refusal of interim authorisation would cause detriment to those members and non members of the Association who wish to have the Association negotiate on their behalf. Those vendors would incur the transaction costs referred to in the Association's Application. Those costs would represent a dead weight loss to vendors. The NFML Submission itself recognises that the participation of the Association in the absence of interim authorisation would be severely limited by section 45 of the *TPA*.
- 19 The option of awaiting the Commission's final determination before engaging in negotiations with NFML is not a realistic option. Vendors reasonably fear that if they do not enter negotiations and comply with the timetable laid down by NFML, they will not be offered new contracts. Given the history of the industry, the disparity in relative bargaining positions and the continuing effects of deregulation, as set out in the Application, the vendors' fears are legitimate and well grounded.

- 20 Once again, NFML threatens to boycott negotiations with the Association in the event that Interim Authorisation is granted. NFML's reference at sub paragraph 20(1) to the "possibility ... of a uniform agreement" is ironic, given that the current processor – imposed contracts are uniform.
- 21 The present bargaining positions are extremely disadvantageous to vendors and are unacceptable to them, as set out in the Application. The Association reiterates, however, that participation in the proposed arrangement will be entirely voluntary and that such vendors as may wish to deal individually with NFML (or with Dairy Farmers) will be at liberty to do so. NFML refers to potential "highly anti competitive effects" in relation to the proposed arrangements; it does not, however, elaborate. The Association submits that there will be no significant anti competitive effects flowing from the proposed arrangements. None are asserted by NFML. How such non existent effects could become "entrenched", as asserted by NFML, remains a mystery.
- 23 NFML asserts, at 23(1) that should, for example, Dairy Farmers negotiate new vendor agreements with the Association during a period of interim authorisation, this may in some unspecified way "unduly affect NFML's practical ability to negotiate new contracts". Once again, this assertion is totally unsupported, and, on the face of it, quite implausible. The Association reiterates that uniform contracts are the norm in the industry and that the terms of those contracts have been dictated by the processors.

23(2) The reference to pricing information at subparagraph 23(2) is misleading. There is no suggestion that such information would be, or ever has been, disclosed during the negotiation process. The existing contracts refer to the sale of products by NFML to distributors at "current licensed distributor prices". Those prices are given to vendors by NFML from time to time. The Association understands that, to date, those prices have been uniform to all vendors.

- 24 The Association submits that the proposed arrangement has been specified with sufficient clarity. For the avoidance of doubt, the Association confirms that the geographic scope of the proposed arrangement would be confined to the State of South Australia.
- 25 The submission at paragraph 25 is erroneous and misleading: see paragraphs 5 and 7(6) above. NFML reiterates its threat to boycott negotiations with the Association and says that such refusal to deal itself provides grounds for a refusal to grant interim authorisation. The submission that any agreements entered into during the period of interim authorisation are likely to "pre-empt or at least complicate the Commission's findings..." is vague and could apply equally to any application for interim authorisation. If accepted, it would necessitate the refusal of all applications for interim authorisation.

