

5 October, 2004

NPU:vn

The General Manager
Adjudication Branch
Australian Competition and Consumer Branch
PO Box 1199
DICKSON ACT 2066

Dear Sir,

**RE: Interested party consultation on arrangements for the distribution of dairy products in South Australia
(Your Ref: c2004/1241)**

Thank you for the invitation to comment on the issues outlined in your letter of 6 September, 2004.

At the outset Parmalat Australia Ltd ("*Parmalat*") does not believe the Milk Vendors Association (SA) Inc ("*the Association*") proposal for collective bargaining arrangements for members and non-members of the Association meets the criteria established in section 90(6) of the Trade Practices Act (1974) ("*the Act*").

Specifically, many of the "*benefits*" claimed by the Association appear to be overstated or are of benefit only to the Association and its Members, rather than to the public as a whole.

1. Fairness in the Negotiating Process

The Association has not argued that either of the two South Australian processors have engaged in unconscionable conduct in breach of section 51AC of the Act. Instead, it has argued that unequal bargaining power when compared to the processors has caused financial detriment to vendors, while processors and major retailers have enjoyed increased profitability.

Clearly changing market circumstances in South Australia have had an impact on vendors. However, as both the processors and major retailers principal operations are outside South Australia, and they have, since deregulation, taken steps to improve their efficiency and profitability across all their operations, such increased profitability is not solely or significantly due to an unequal bargaining position with South Australian vendors.

The "*fairness*" sought by the Association would appear to be of benefit to the Association and to vendors only. As the Association and vendors do not appear to constitute the public,¹ this claimed benefit does not appear to be a public benefit.

¹ See generally *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385; ATPR 40-023

2. **Compliance with Statutory Requirements**

It is to be expected that vendors meet their statutory requirements and the public is entitled to rely on this. If collective negotiation is likely to assist vendors to comply with statutory requirements, this should be seen as a benefit to vendors and not to the public.

3. **Efficiency of Operations**

The Association's argument based on improved efficiency of operations appears to be contradictory. If collective bargaining is likely to deliver only marginal increases in vendor margins or delivery fees, it follows that any resultant increase in the value of those businesses would also be expected to be marginal. It is therefore unlikely that vendor business value would rise sufficiently to tempt vendors to sell their businesses.

If, despite this, the value of vendor businesses did rise, consolidation of vendor rounds may be more difficult to achieve as purchasers would need to pay a higher price for rounds.

Additionally, the Association's expectation that an increased average size of rounds will deliver lower costs to vendors:

- (a) appears to be of greater benefit to vendors than to the public;
- (b) is overly simplistic as it ignores the geographical size of rounds, the number of customers per round, the mix of customers in rounds (supermarket, route, home delivery) and the average order size per customer. Consolidating rounds will not always lower the vendor cost per unit of product delivered; and
- (c) may limit efficiency if it prevents or restricts processors delivering product direct to customers (particularly supermarket distribution centres) using the most effective transportation facilities, which may or may not include vendors, rather than having to use a number of vendors.

4. **Continued Viability of the Independent Distribution Centre**

It is not the processors, the Association, or vendors who will determine whether the current Vendor Distribution Sector in South Australia continues to be viable. It will be determined by the market.

Following deregulation, the South Australian market appears to have changed in such a way so as to make it more difficult for the Vendor Distribution Sector to continue in its current format. It is acknowledged that this may cause a loss of employment and a reduction in certain services to consumers. However the growth of supermarket and convenience store milk sales indicates that alternate sources of employment and of services to the consumer are being developed and utilised by consumers. Additionally, new distribution models may provide further sources of employment. The Association's submission fails to recognise that promotion of industry cost savings, resulting in contained or lower prices at all levels in the supply chain has been found to be a public benefit². If the authorisation is granted, there is a risk that market forces may be defeated and that the South Australian public may be denied opportunities available in other States and markets.

5. **Reduction in Transaction Costs**

The Association's submission with respect to transaction costs also appears to be of benefit to vendors rather than to the public.

² *Re ACI Operations Pty Ltd* (1991) ATPR 50-108

The level of savings available to vendors is moot. If the contract with a processor is the principal basis of a vendor's business, it would not be unreasonable to expect vendors to seek commercial accounting or business advice as well as legal advice on the contract. Although a collectively negotiated contract may be the same for all vendors, obviously not all vendors are the same. It would therefore be expected that, regardless of who negotiated the contract or how the contract was negotiated, prudent vendors should and would still seek appropriate independent advice. Any expected savings to vendors in transaction costs may be negligible.

6. Better Information

The Association may have substantial records and data bases and be able to use those when negotiating on behalf of vendors. However, any collectively negotiated contract will be unable to accommodate individual vendor requirements.

Yet again the benefits claimed in the Association's submission appear limited and of benefit only to the Association and to vendors.

7. Improvements in Health and Safety

The Association notes that "*the changing retail environment*" has caused problems for vendors. The Association and its members are not the only people to face increased levels of work and higher stress levels as a consequence of a changing market. Here, the Association again appears to be seeking to use collective bargaining in order to defeat market forces that are affecting the now substantially deregulated South Australian dairy market.

8. Dispute Resolution

Parmalat fails to see how any public benefit could arise from the Association negotiating an agreement with processors and then being the exclusive provider of dispute resolution services for such an agreement. This distinct lack of independence would appear to be of substantial public detriment rather than public benefit.

The Association's submission fails to recognise the detriments that may arise if authorisation is granted.

Authorisation may prevent processors from negotiating the best contract commercially available to them, thereby adding to their costs and reducing economic efficiency.

The Association's submission fails to identify whether it is seeking to negotiate one agreement for all processors or separate agreements for individual processors. As this is a fundamental feature of the negotiation process, authorisation should not occur until this has been clarified. Furthermore, if the same contract is to be used for all processors, it may not meet their individual requirements, thereby imposing inefficiencies on the processors.

The South Australian Government's Dairy Industry Plan has as one of its stated objectives the establishment of further processors in the South Australian dairy industry. Being forced into collective bargaining negotiations with vendors may reduce the viability and flexibility of any processor considering establishing operations in South Australia.

It is apparent that the Association's submission seeks to delay or eliminate customer and retailer sourced changes occurring in the South Australian dairy industry. Retailers and customers are moving away from corner shops "*deli's*" and home delivery. They are choosing generic home-brands and other products sourced from supermarkets and petrol/convenience stores.

Additionally, the larger retailers, with multiple store sites, in seeking to reduce their own costs are requesting and, in some instances, requiring processors to deal directly with them, thereby eliminating the traditional vendor role. Being able to negotiate collectively with processors will not change retailer and customer trends and any attempt to do so is expected to be seen as detrimental to retailers and customers.

The Association's market analysis also appears erroneous. It is submitted that the two relevant markets in South Australia are the market for the supply of milk and dairy products ("*Products*") to retailers and the market for the supply of Products to consumers.

In the market for the supply of Products to retailers there is strong competition between processors. Since deregulation there has been a greater choice of Products available (including generic brands). However retailers, in seeking to reduce their costs, are also looking to change the way they conduct their businesses, including the way they receive and handle Products. The Association's proposal may be reasonably expected to restrict the ability of processors to respond to changing market forces, resulting in detriment to the South Australian public as the implementation of newer, more effective distribution systems may be delayed or prevented.

In commenting that "*No consideration was ever paid for the transfer of customers from vendors to processors*" the Association implicitly indicates a failure to recognise the needs of retailers. Neither vendors nor processors "*own*" retail customers. The introduction of "*direct billing*" arises from the desire of large retailers to have one contact and payment point for the same products, rather than numerous contacts and accounts. The Association is seeking to remove or prevent efficiency in the market, thereby causing detriment.

In the market for the supply of Products to consumers, vendors are in competition with retailers, including their own customers. It is submitted that the greater convenience and choice offered by the various types of retailers vis-à-vis vendors, combined with changing market and social forces has resulted in a trend by consumers away from vendor supplies Products. The Association fails to recognise the right of consumers to seek alternate sources of supply for products. This failure may be seen, in itself, as a detriment.

It is therefore submitted that the above detriments outweigh any expected benefits from the requested Authorisation.

In *Re Lamont*³ the Trade Practices Tribunal, in a decision with some analogies to the present application, refused to grant an authorisation to owner-drivers in the premixed concrete industry in the Australian Capital Territory to collectively negotiate rates and conditions with concrete producers. In its decision the Tribunal noted "*stabilisation of lorry owner-drivers income is of direct benefit only to the lorry owner-drivers themselves*"⁴ and therefore constituted a private and not a public benefit.

The Tribunal also noted "*If lorry owner-drivers provide a better and more efficient service they will not be replaced. If they do not provide a better service there can be no public benefit in entrenching their position.*"⁵ It is submitted the same criteria applies to milk vendors in South Australia.

³ *Re Lamont* (1990) ATPR 41-035; (1990) 96 ALR 475.

⁴ *Re Lamont* (1990) ATPR 41-035; at 51,525

⁵ *Re Lamont* (1990) ATPR 41-035; at 51,525

The Association's synopsis of the future situation incorporating the proposed arrangements is flawed. Neither processors nor retail chains are able to extract monopoly profits, as there is no monopoly in the processing or supply of milk in South Australia. Competition exists at the retail level between Coles and Woolworths/Safeway as well as between these two companies and a number of smaller competitors. This competition will continue whether or not an Authorisation is granted to the Association.

The Association's claim that the range of services available to consumers would be maintained may be correct, however market changes are an indication that a growing number of consumers no longer desire those services. Artificially maintaining the viability of those services would seem to be a dubious benefit.

The Association's claim that it "*would be able to play a far more extensive role in contract negotiations resulting in a greater degree of vendor influence*" indicate that the future benefits expected to arise from Authorisation flow to the Association and to vendors, rather than to the public.

It is submitted that the future situation with the proposed arrangements will result in

- the majority of benefits accruing to the Association and vendors;
- processors being restricted in their ability to implement newer, more cost effective and efficient distribution services;
- consumers being unable to obtain the services they desire; and
- the vendor system being artificially supported and protected, penalising the efficient and forward looking vendor at the expense of the less efficient vendor.

The future without the proposed arrangements is not as bleak as the Association indicates. The independent distribution network may continue to decline. Whether it does or does not will depend on a combination of consumers, retailers, processors and vendors. If the market decides to move away from the independent distribution network, the Authorisation sought will only serve to delay this process, to the possible detriment of consumers, retailers, processors and efficient vendors.

As the processors and retailers do not make monopoly profits, there can be no increase in monopoly profits.

For all of the above reasons, Parmalat is of the view that the Association's request for Authorisation be rejected.

Yours sincerely
PARMALAT AUSTRALIA LTD

D J LORD
Managing Director