

Deacons

Level 24
385 Bourke Street
Melbourne Vic 3000
Australia
GPO Box 4592
Melbourne Vic 3001
DX445 Melbourne
Tel +61 (0)3 8686 6000
Fax +61 (0)3 8686 6505
www.deacons.com.au

22 October 2004

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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

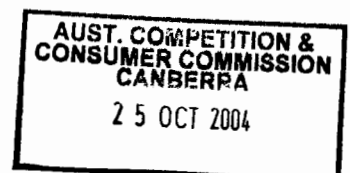
**Milk Vendors Association (SA), Inc (MVA)
Application for authorization A90972 (Application)
ACCC review of exclusive dealing notifications (Notifications)**

Please see attached originals of our letter and our client's submission faxed to you today.

Yours faithfully



Richard Lewis
Partner
Deacons
Contact: Richard Lewis
Direct line: +61 (0)3 8686 6565
Email: richard.lewis@deacons.com.au





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Level 24
385 Bourke Street
Melbourne VIC 3000
Australia
GPO Box 4592
Melbourne VIC 3001
DX 445 Melbourne
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Fax + 61 (0)3 8686 6505
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22 October 2004

By facsimile: (02) 6243 1211

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470 Northbourne Avenue
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Attention: Mr Tim Grimwade
General Manager, Adjudication Branch

Your Ref: C2004/1241
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Dear Mr Grimwade

Milk Vendors Association (SA), Inc (MVA)
Application for authorization A90972 (Application)
ACCC review of exclusive dealing notifications (Notifications)

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.

Our client's submissions on the Application and the Notifications are attached.

Please do not hesitate to contact me to discuss them.

Yours faithfully

Richard Lewis
Partner
Deacons
Contact: Richard Lewis
Direct line: +61 (0)3 8686 6565
Email: richard.lewis@deacons.com.au

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22 October 2004

National Foods Milk Limited

**Response to application for authorization by Milk Vendors'
Association (SA) Inc A90927**

Response to review of exclusive dealing notifications

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A. Introduction

1. Executive summary

1.1 This submission is made by National Foods Milk Limited (**NFML**), the processor named in the application for authorization by the Milk Vendors' Association (SA) Inc (**MVA**) dated 3 September 2004 (**Application**). NFML is the relevant operating subsidiary of National Foods Limited (**NFL**).

1.2 The MVA's Application is for an authorization:

- (a) *to make a contract or arrangement or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of Section 45 of the Act; and*
- (b) *to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of Section 45 of the Act.*

1.3 The conduct which is sought to be authorized is described in the following terms:

- (a) *An arrangement between members and non-members (both present and future) of the Milk Vendors' Association (SA) Inc for the Association to collectively bargain on their behalf with National Foods Milk Limited (**National Foods**) and Dairy Vale Foods Limited (**Dairy Farmers**) in relation to the terms and conditions of distribution contracts between those parties and National Foods and Dairy Farmers.*
- (b) *An arrangement between members and non-members (both present and future) of the Milk Vendors' Association (SA) Inc to give effect to contracts agreed by the Association with National Foods and/ or Dairy Farmers.*

This submission refers to the conduct above as the **Single Bargaining Agent Conduct**.

1.4 NFML does not fully understand what conduct is sought to be authorized as the Single Bargaining Agent Conduct and, in particular, what is meant by the term "collective bargaining" in the context of the MVA's application.

1.5 The first possible interpretation is that the MVA is seeking to be able to obtain information from its members as to what their concerns are in

relation to distribution contracts and to negotiate with each processor as to appropriate terms and conditions to address those concerns. The MVA and NFML have engaged in negotiations of this nature in the past. An authorization is not required for this type of conduct. NFML would not object in principle to this type of conduct.

- 1.6 The second possible interpretation is that authorization is sought for conduct by South Australian milk distributors (**Distributors**) and the MVA which would otherwise breach the general prohibition in sections 45(2)(a)(ii) and (45(2)(b)(ii) of the Trade Practices Act as conduct that has the purpose or likely effect of substantially lessening competition in a relevant market. This conduct, if authorized, would permit price-fixing arrangements, i.e. conduct which because it has the purpose or effect of fixing, controlling, or maintaining prices, is deemed by section 45A to breach sections 45(2)(a)(ii) and 45(2)(b)(ii).
- 1.7 The third possible interpretation is that the authorization is sought for the Distributors to agree as amongst themselves on what terms they will contract with NFML, and to refuse to deal with NFML except on such terms. This is conduct which involves an exclusionary provision under section 4D, i.e. a collective boycott, which is a breach of sections 45(2)(a)(i) and 45(2)(b)(i). This would be a per se breach for which substantial lessening of competition need not be shown.
- 1.8 The MVA's application in relation to the Single Bargaining Agent Conduct is confusing as to which type of conduct is sought to be authorized, since it:
 - (1) appears to seek authorization only for conduct which has the purpose or effect of substantially lessening competition, i.e. that falling within the general prohibition in sections 45(2)(a)(i) and 45(2)(b)(i); but
 - (2) contemplates an arrangement between Distributors as to the terms and conditions of distribution contracts between them and processors, which appears to involve an exclusionary provision; but then specifically provides that collective boycott behaviour is not sought to be authorized.
- 1.9 In addition, the MVA asserts that the grant of the Single Bargaining Agent Conduct would provide Distributors with "competitive parity", and asserts that there would be increased Distributor input on the terms of the contract. NFML does not understand on what basis this competitive parity would arise except out of a power to refuse to deal with NFML, especially bearing in mind that, on the express terms of the Application, NFML cannot be compelled to negotiate with the MVA.
- 1.10 A summary of NFML's concerns in relation to the Single Bargaining Agent Conduct is as follows:

- (1) the public benefits asserted by the MVA to flow from the Single Bargaining Agent Conduct are illusory, and have no rational connection to the Single Bargaining Agent Conduct (however that is defined);
- (2) if the Single Bargaining Agent Conduct is intended to permit the conduct described in paragraph 1.6 above:
 - (a) it would authorize anti-competitive conduct such as price-fixing, which would not be outweighed by the public benefits asserted by the MVA; and
 - (b) there is a real possibility for there to be anti-competitive behaviour beyond what is sought to be authorized (i.e. a collective refusal to deal with NFML except on terms agreed as amongst Distributors); and
- (3) if the Single Bargaining Agent Conduct is intended to permit the conduct described in paragraph 1.7 above, it would authorize not only price-fixing conduct, but exclusionary provisions, the anti-competitive effects of which would not be outweighed by the public benefits asserted by the MVA. However, authorization for exclusionary provisions is expressly denied in the Application.

1.11 NFML would wish to ensure that, at a minimum:

- (1) any authorization of the Single Bargaining Agent Conduct:
 - (a) does not extend to exclusionary provisions in arrangements between Distributors, and specifically excludes collective boycott behaviour such as refusing to deal with NFML except on terms agreed between Distributors;
 - (b) does not extend to Distributors who are not offered new contracts (**New Agreement**) by NFML; and
 - (c) extends only to negotiations in relation to the proposed New Agreements, and not to any existing distribution contract between NFML and a Distributor (**Current Agreement**);
- (2) the MVA negotiates with NFML and Dairy Farmers separately, and does not seek to negotiate uniform terms across both processors;
- (3) NFML is free to, as it sees fit:
 - (a) offer or not offer a New Agreement to Distributors;
 - (b) agree or refuse to agree to terms proposed by the MVA for the New Agreement;

- (c) negotiate, refuse to negotiate, and/or cease to negotiate with the MVA or with any collective bargaining groups of Distributors represented by the MVA; and
 - (d) approach, negotiate, and contract with Distributors on an individual basis, whether or not they are part of any collective group represented by the MVA, if the Distributor notifies NFML that it wishes this to occur;
- (4) all Distributors are free at any time:
- (a) to join or withdraw from any collective bargaining group represented by the MVA; and
 - (b) to enter into New Agreements with NFML on such terms as they consider appropriate, regardless of the MVA's view on such contracts;
- (5) the MVA and Distributors are required to refrain from disclosing the terms of any contract or proposed contract between a processor and Distributors to another processor or Distributors to whom that other processor has offered contracts (this is of particular importance in relation to pricing and delivery fees); and
- (6) NFML has clarity about which Distributors are represented by the MVA. In the case of non-members of the MVA, it is assumed that they will not be represented by the MVA unless they give positive consent to this, rather than being required to "opt out".

1.12 NFML also wishes to ensure that the MVA and Distributors are aware of the following:

- (1) even if an authorization of the Single Bargaining Agent Conduct were granted, NFML cannot be forced to negotiate with the MVA. The MVA's submission of 5 October 2004 presents some reason for misgivings on this point, since it makes repeated misguided reference to NFML's exercise of its right not to deal with the MVA as "boycotting" and "blackmail". If NFML chooses to negotiate with the MVA as a representative of Distributors' interests (as it has done in the past), this will not be because NFML is compelled to do so by any authorization but as a result of a voluntary, commercial decision by NFML;
- (2) NFML has a clear commercial interest in an effective and viable Distributor network in South Australia. Amongst other things, NFML is dependent on Distributors for access to the route trade. NFML will honour all Current Agreements. However, the Single Bargaining Agent Conduct cannot protect Distributors from the market forces which are leading to a rationalisation of the Distributor industry. NFML does not intend to offer and is under no

obligation to offer New Agreements to all of its existing Distributors. The MVA's assertion that all Current Agreements are subject to renewal is incorrect;

- (3) one of the key features of the New Agreement is that a Distributor will not be appointed as the exclusive distributor of National Foods products to any person. It will accordingly be free to lawfully compete with other Distributors of National Foods products. This is intended to phase out the concept of a Distributor having exclusive customers as contained in the Current Agreements¹; and
- (4) NFML will not be responsible for any delay in finalising the terms of the proposed New Agreement as a result of negotiations with the MVA. The MVA was invited in March 2004, July 2004, and September 2004 to comment on proposed drafts of the New Agreement. No comments from the MVA have been received to date. The MVA has always been able to make representations to NFML about issues and terms which are likely to be of general concern to Distributors in relation to the New Agreement, without an authorization.

1.13 Without understanding the precise nature of the Single Bargaining Agent Conduct which the MVA seeks to authorize, NFML finds it difficult to comment meaningfully on the MVA's application for authorization of the Single Bargaining Agent Conduct. Accordingly, this submission is primarily directed at :

- (1) setting out NFML's view of the public benefits which the MVA asserts will flow from the Single Bargaining Agent Conduct;
- (2) pointing out in a general sense the anti-competitive detriment which would flow in the event that the Single Bargaining Agent Conduct is intended to authorize the conduct described in paragraphs 1.6 and 1.7 above. NFML would wish to make further comments if this is the case; and
- (3) correcting the public record in relation to certain assertions made by the MVA.

NFML would wish to make further submissions when the MVA clarifies what conduct it wishes to have authorized.

1.14 Paragraph (c) of the MVA's description of the conduct sought to be authorized sets out a proposal for the MVA exclusively to provide dispute

¹ NFML would respect exclusive customers and home delivery territories specified in Current Agreements. Accordingly, New Agreements would need to reflect some restrictions on competition for customers and home delivery territories until all Current Agreements expire (or are replaced by consent).

resolution services in relation to disputes between Distributors, their suppliers, and “any person or entity to which the [Distributor] delivers product” (referred to in this submission as the **Exclusive Dispute Resolution Services Conduct**). NFML does not fully understand the scope or purpose of the Exclusive Dispute Resolution Services Conduct, and understands that the ACCC has requested the MVA to clarify the conduct which is sought to be authorized. Accordingly, NFML makes only preliminary submissions on the Exclusive Dispute Resolution Services Conduct and would wish to make further submissions once the MVA clarifies the conduct which is sought to be authorized.

2. Outline of submission

2.1 This submission has 4 parts:

- (1) Part A is this Introduction;
- (2) Part B contains NFML’s submissions on the Application in relation to the Single Bargaining Agent Conduct;
- (3) Part C contains NFML’s submissions on the Application in relation to the Exclusive Dispute Resolution Services Conduct; and.
- (4) Part D contains NFML’s submissions on the ACCC’s review of the National Dairies Notifications.

2.2 A glossary to the abbreviations and acronyms used in this submission is set out in Annexure A.

2.3 NFML’s response to specific assertions made by the MVA in relation to the Current Agreement is set out in Annexure B.

3. Information about NFML

3.1 NFL is an Australian publicly listed company with a range of food-related business, in particular the processing and sale of milk, fresh dairy food, and speciality cheeses.

3.2 NFL is the parent company of NFML. NFML is the dairy processor with whom South Australian Distributors of National Foods products contract.

4. Approach to the MVA’s assertions

4.1 The Application contains a large number of assertions which, in NFML’s opinion, are irrelevant to the question of whether the conduct which is sought to be authorized has a net public benefit. In addition, a number of these assertions, particularly as regards NFML’s conduct and arrangements, are incorrect.

- 4.2 NFML's general approach in this submission is to point out the correct factual circumstances where relevant to the ACCC's consideration of the conduct's net public benefit, or where NFML is concerned to ensure that the public record on these matters is correct. This does not mean that NFML necessarily agrees with those assertions which it does not directly contradict.
- 4.3 NFML's submissions on the MVA's incorrect assertions in relation to the Current Agreements and proposed New Agreement are set out in Annexure B.

B. Single Bargaining Agent Conduct

Market features

5. Market features

- 5.1 NFML submits that the following features should be considered in the ACCC's assessment of the impact of the proposed Single Bargaining Agent Conduct on competition in the market for wholesale supply of milk.
- 5.2 NFML and Dairy Farmers are the two major processors in South Australia. Parmalat Australia Limited, trading as Pauls, entered the market as a processor in 2001.
- 5.3 Rationalisation of the Distributor industry throughout South Australia is unavoidable as a result of consumers now preferring to acquire milk, in particular white milk, from supermarkets². This:
 - (1) reduces the viability of Distributors' own traditional route customer base, particularly for white milk, e.g. independent retailers and milk bars; and
 - (2) puts significant pressure on processors to provide delivery services to processors' own customers more efficiently; and
 - (3) as a result of major supermarket chains restructuring their distribution requirements, reduces the volume of delivery services which Distributors are required to supply to processors' own customers. In particular, both Woolworths and Coles Myer have indicated to NFML that they will in the next 12 months be arranging delivery of National Foods products themselves, bypassing the involvement of Distributors.
- 5.4 NFML as a processor has no ability to influence the distribution requirements of the major supermarkets. NFML is dependent on Distributors to provide access for National Foods products to route customers, since it does not operate its own distribution.
- 5.5 The ACCC has published a report assessing the impact of farm-gate deregulation on drinking milk prices in 2001. Significantly, the ACCC concluded:

² Between 54-58% of white milk in South Australia is now sold through supermarkets.

- (1) a new dynamic has developed in the relative competitive position between processors and the retail sector in which processors' bargaining power is relatively weak; and
- (2) supermarkets have pursued a strategy of selling lower-priced house brand milk, encouraging more store traffic rather than higher revenue, which placed competitive pressures on the route channel trade for white milk - market share for white milk has shifted to supermarkets.³

5.6 These trends continue today.

6. NFML Current Agreements

6.1 NFML currently has 149 South Australian Distributors. These Distributors are each party to a Current Agreement. 106 of these Current Agreements have an expiry date of 12 May 2005. 32 of these Current Agreements have an expiry date of 1 November 2005. 11 of these Current Agreements have an expiry date of later than 1 November 2005. The latest expiry date of any Current Agreement is 11 November 2006.

6.2 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.

6.3 Under a Current Agreement, a Distributor is:

- (1) the exclusive Distributor of specified NFML products (**Exclusive Products**) to:
 - (a) specified route customers; and
 - (b) all home delivery customers within a specified territory(collectively, the **Trade Customers**);
- (2) the exclusive provider of delivery services for National Foods products to NFML's own customers (**National Foods Customers**) at the locations specified in the Agreement; and
- (3) a non-exclusive Distributor of specified NFML products to Trade Customers.

³ See Chapter 10 – Conclusion, pages 111-113

- 6.4 As a general rule, the products in respect of which the Distributor is the exclusive Distributor are milk products (white milk and flavoured milks), and the exclusive Distributor arrangements do not apply to other products such as yoghurts and cheeses.

No anti-competitive effect

- 6.5 NFML does not consider that the terms of the Current Agreement have the effect of substantially lessening competition in any market and, accordingly, has not notified them to the ACCC. Accordingly, the MVA's assertion that NFML is "relying" on the notifications lodged in 1992 and 1993 by its now-deregistered predecessor National Dairies SA Limited ACN 007 869 347 to impose anti-competitive terms in the Current Agreement is factually incorrect.
- 6.6 The only provision in the Current Agreement which could be argued to have an effect on competition (and it is not conceded that these effects are substantial) is the provision which prohibits the Distributor from soliciting or enticing an existing customer of another NFML Distributor to purchase products either directly or indirectly from the first Distributor. As noted above, this provision does not appear in the New Agreement. However, NFML would respect exclusive customers and home delivery territories specified in Current Agreements. Accordingly, New Agreements would need to reflect some restrictions on competition for customers and home delivery territories until all Current Agreements expire (or are replaced by consent). NFML does not consider that this limited restriction would substantially lessen competition. If the ACCC disagrees with this view, then NFML would consider lodging a notification to protect the position of Distributors under the Current Agreement.
- 6.7 The MVA has made a number of incorrect assertions about NFML's conduct in relation to the negotiation of the terms of the Current Agreement, and about the actual terms of the Current Agreement themselves. These are discussed further below in sections 14.7 and Annexure B.

7. NFML New Agreements

- 7.1 NFML is in the process of presenting draft New Agreements to those of its South Australian Distributors with whom it wishes to continue having a long-term relationship. Each Distributor on a Current Agreement will continue on the terms of the Current Agreement until it expires or unless the Distributor voluntarily agrees to replace it with a New Agreement. Some Distributors may wish to voluntarily enter into a New Agreement prior to the expiry of their Current Agreement. The remaining term of the Current Agreement would be added to the New Agreement to be entered into by a Distributor who wished to do this. However, whether or not to enter into a New Agreement early is a choice for each individual Distributor.

- 7.2 One of the key features of the New Agreement is that a Distributor will be free to lawfully compete with other Distributors. This is intended to phase out the concept of exclusive customers contained in the Current Agreements.
- 7.3 NFML proposes to offer a shortened, simplified New Agreement to smaller Distributors whose business is home delivery. The home delivery New Agreement also has a shorter term than the New Agreement.

NFML conduct in relation to New Agreement

- 7.4 The MVA has made a number of assertions about NFML's conduct in relation to the New Agreement which are incorrect. NFML wishes to place on the public record its conduct in relation to the New Agreement.
- 7.5 NFML provided a draft of the 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. In May 2004, a representative of NFML attended a meeting of distributor association representatives at which a number of issues were discussed. The New Agreement was raised only in passing at that meeting, with the NFML representative confirming that the New South Wales association's comments had been received and were being considered by the relevant NFML personnel. An updated draft of the New Agreement was provided to Mr Prime on 22 July 2004. A further updated draft of the New Agreement was e-mailed to Mr Prime on 6 September 2004 and (when NFML was informed that he had not received it) re-forwarded to him on 17 September 2004. NFML has not received any comments from the MVA on the New Agreement to date.
- 7.6 Each of the drafts of the New Agreement referred to above was updated to take into account comments received from distributor associations in other States. For example, and as a direct response to such comments from the New South Wales association, the notice period which NFML is required to give when ceasing to require Distributors to deliver products to National Foods Customers has been extended from one month to up to four months depending on the volume of the products distributed by the Distributor in the 3 months preceding the date of the notice. This provision is reflected in the draft New Agreement which will be put to South Australian Distributors.
- 7.7 NFML wishes to repeat for the public record what the correct position is in relation to the New Agreement:
- (1) NFML has not set any timetable for Distributors to sign a New Agreement nor announced, or represented to Distributors that they would be expected to sign New Agreements by November 2004 or prior to the expiry of their Current Agreements;

- (2) NFML has not put any pressure on Distributors to sign the New Agreement; and
- (3) NFML has not made any representations, and does not intend, that Distributors who do not execute New Agreements by November 2004 will not be offered a New Agreement.

7.8 The MVA's assertions that NFML has done any of these things is absolutely incorrect. At no point has it ever been asserted by NFML that it has the right to require Distributors to commit to a New Agreement prior to the expiry of their Current Agreements. Contrary to the MVA's suggestion, NFML specifically said at its meeting with Distributors on 1 September 2004 that it would honour all Current Agreements and (as repeated in its submission to the ACCC on 28 September 2004) that replacement of a Current Agreement prior to its expiry would have to be by voluntary agreement with the Distributor.

7.9 NFML repeats that the proposed timetable outlined at the 1 September meeting was in response to a prior question by a Distributor wanting to understand how soon it would know whether it would be offered a New Agreement, and if so, how soon it could enter into one. There were no "one-to-one" negotiations with this Distributor or any other Distributor, as asserted by the MVA.

7.10 In relation to NFML's meeting with its Distributors on 1 September 2004, it is not the case that NFML said that the New South Wales' distributors' association was "happy" with the amended draft contract and that it was being sent to distributors. What occurred was this:

- (1) the NFML representative said that the New South Wales' association had said to its members that the current draft was a workable agreement but had drawn its members' attention to a number of issues;
- (2) Mr Prime stated that his version of the agreement did not reflect some of these issues. The NFML representative then realised that Mr Prime did not have the most up to date version of the agreement, and said so; and
- (3) a draft of the agreement was e-mailed to Mr Prime on 6 September 2004 and (when NFML was informed that he had not received it) re-forwarded to him on 17 September 2004.

NFML refutes absolutely that it misrepresented the position of the New South Wales association to the 1 September meeting.

7.11 The MVA's assertion that the New Agreement prohibits Distributors from disclosing the draft New Agreement to any adviser until that adviser has

executed a confidentiality undertaking in a form specified and approved by NFML⁴ is simply incorrect. The New Agreement contains no such prohibition. The form of the Confidentiality Agreement to be signed by Distributors to whom NFML proposes to offer a New Agreement specifically permits the Distributor to disclose confidential information to the Distributor's legal and other professional advisers.

- 7.12 There are provisions in the New Agreement which require the Distributor to restrict disclosure of confidential information in relation to the New Agreement to employees and advisers of the Distributor and ensure that those persons keep such information confidential. NFML may require advisers to sign a confidentiality undertaking, but this does no more than ensure that NFML can directly enforce the confidentiality obligation against the adviser.

⁴ Page 6 of the Application. Note that references to pages in the Application are to the pages as numbered in the attachment to the Application, unless otherwise noted.

Anti-competitive detriment

8. Introduction

- 8.1 As noted in paragraphs 1.4 to 1.9 of this submission, NFML does not fully understand what conduct is sought to be authorized. Because of this, NFML does not wish at this stage to make detailed comments about the anti-competitive potential of the Single Bargaining Agent Conduct. Its comments below are directed to a situation where Distributors are able to engage in price-fixing, as well as to refuse to deal with NFML except on terms agreed amongst themselves. NFML reserves the right to make further submissions once the Single Bargaining Agent Conduct is clarified.

9. Interference with rationalisation

- 9.1 NFML submits that milk distribution arrangements in South Australia are in the process of rationalisation because of market forces, with the strong possibility that further rationalisation will occur in the near future. The likely result of rationalisation is that there will be a reduction in Distributor numbers. Remaining Distributors will be highly motivated to increase the efficiency of their operations, and to compete with each other and with the Distributors of other processors to supply the route trade and home delivery customers. This will be assisted, in relation to NFML Distributors, by phasing out the restriction on NFML Distributors actively competing to supply persons who acquire National Foods products from another NFML Distributor. Despite the MVA's assertions, neither NFML nor Distributors "own" a customer; a customer is free to choose with whom it will deal.
- 9.2 NFML is conscious that individual Distributors are likely to experience significant personal detriment as a result of rationalisation. The viability of Distributors is clearly linked to an unsustainably large number of Distributors, exacerbated in the case of NFML Distributors by the restriction on Distributors being able to compete with each other. For example, there are more than twice as many NFML Distributors servicing the Adelaide area as there are servicing the Melbourne area, even though the volume of milk delivered in Adelaide is less than the volume of milk delivered in Melbourne. The average annual volume delivered by a Melbourne NFML Distributor is almost three times as much as the average annual volume delivered by an Adelaide NFML Distributor.
- 9.3 NFML is concerned that the MVA would seek to use the Single Bargaining Agent Conduct to try to entrench current Distributor arrangements and numbers, as a response to personal detriment which individual Distributors might suffer, or in response to perceived historical grievances. NFML is, on the terms of the Current Agreement, free to offer or not to offer a New Agreement to any individual Distributor. However, if Distributors are able to collectively refuse to deal with NFML except on agreed terms, there is a real risk that NFML could be forced to offer New

Agreements to an inefficient number of Distributors, and that current arrangements which protect Distributors from competition between each other will be entrenched, with the result that the motivation for Distributors to increase the efficiency of their operations will be reduced.

- 9.4 Finally, it is relevant to note that NFML, as well as ultimate consumers, is dependent on Distributors to deliver National Foods products to retail and other route customers (other than where, in the future, major supermarket chains carry out distribution in-house). NFML is concerned that the Distributors would be able to exercise significant market power unconstrained by section 45 (including price-fixing) of the Trade Practices Act in relation to this segment if the authorization were granted. There is also the possibility, as noted above, that the Single Bargaining Agent Conduct would involve a collective refusal to deal except on terms agreed amongst Distributors, which has the potential to be seriously anti-competitive and also, from a practical point of view, disrupt consumer access to National Foods products.

10. Increase in consumer prices

- 10.1 The MVA appears to concede that increased delivery fees could result from the Single Bargaining Agent Conduct⁵, but asserts that any increase is "capable" of being absorbed by processors or retailers. This appears to assume that Distributors will be permitted to engage in price-fixing.
- 10.2 NFML submits that the commercial "capability" of processors or retailers to absorb increased delivery fees is irrelevant. Processors and retailers should not be required to engage in a wealth transfer to Distributors in respect of increased delivery fees extracted as a result of the Single Bargaining Agent Conduct, rather than as a result of an improvement in services or efficiency. Delivery fee increases would be entrenched during, as well as after, the rationalisation period, and would reduce the incentive for Distributors to seek to improve their margins through increased efficiency. Further, increases in the costs of processors without a corresponding and binding increase in Distributor services and efficiency would need to be passed on to processors' customers and, ultimately, the consumer.

11. Uniform terms and conditions: Price-fixing and other exclusionary conduct

- 11.1 NFML is concerned that the MVA's role as the single bargaining agent increases the prospect of a set of industry-wide terms and conditions, including as to price, in South Australia. This would be the case if the MVA proposes to negotiate the same terms and conditions with both major processors rather than (for example) individual groups of Distributors collectively negotiating with a single processor.

⁵ Page 9 of the Application.

- 11.2 NFML is particularly concerned to understand the MVA's intentions in relation to potential price-fixing conduct by Distributors if the Single Bargaining Agent Conduct were authorized. For example, there is the potential for an industry-wide price-fixing arrangement in relation to the delivery fees which processors pay to Distributors for delivering products to processors' customers (in the case of NFML, the National Foods Customers). Uniform or near-uniform delivery fees would significantly inhibit processors' ability to compete with each other to supply such customers, and for those customers to be supplied at competitive rates. Since the major supermarket chains have already indicated they will carry out delivery services themselves, they would not provide an effective constraint on delivery fees negotiated by the MVA pursuant to the Single Bargaining Agent Conduct.
- 11.3 The role of the MVA as single bargaining agent would also tend to reduce competition between processors for the acquisition of Distributors. For example, since the MVA would be in a position to negotiate similar conditions of supply, an NFML Distributor who is dissatisfied with the proposed New Agreement would be faced with similar terms if attempting to switch to Dairy Farmers.
- 11.4 NFML notes the MVA's assertion that its members distribute approximately 70% of the milk distributed in South Australia. Assuming a significant proportion of these members appoint the MVA as their agent pursuant to the Single Bargaining Agent Conduct, this would give the MVA very significant bargaining power as against the processors under the Single Bargaining Agent Conduct, and would tend to enhance Distributors' ability to extract supra-competitive prices for distribution services across the South Australian industry.

12. "Voluntary" nature of Single Bargaining Agent Conduct

- 12.1 NFML submits that the "voluntary" nature of collective bargaining would not significantly mitigate the anti-competitive effects arising from the Single Bargaining Agent Conduct. In practice, there would be an enormous amount of pressure on Distributors, whether they are members of the MVA or not, to "lock step" with negotiations by the MVA pursuant to the Single Bargaining Agent Conduct, given the highly emotive nature of the rationalisation process. In addition, once the Single Bargaining Agent Conduct commences, Distributors would be under pressure not to withdraw from the MVA's negotiations even if they were otherwise unhappy with the MVA's conduct of such negotiations.
- 12.2 It is noted that the Single Bargaining Agent Conduct entrenches the MVA as bargaining agent, and would not permit groups of Distributors to negotiate directly with processors.

Clarification of voluntary participation

12.3 NFML notes that paragraph 6.9 of the Application is headed “Opt Out Clause”, although it is also said that participation by Distributors “in any collective negotiation structure will be entirely voluntary”. The MVA should be asked to clarify whether members of the MVA and non-member Distributors will be required to opt out of being represented by MVA, and how processors will have clarity about which Distributors are being represented by the MVA. It is not understood at present how this would operate in relation to Distributors who are not members of the MVA.

13. Possibility of anti-competitive conduct beyond that authorized

13.1 Paragraph 6.10 of the Application states that no authorization is sought for any collective boycott ability. NFML’s understanding is that any authorization of the Single Bargaining Agent Conduct would not compel NFML to negotiate with the MVA, and it is noted that any authorization could not compel NFML to do so in any case.

13.2 However, NFML does not understand how the MVA proposes the Single Bargaining Agent Conduct will operate without an arrangement between Distributors as to the terms on which they will deal with NFML and an arrangement between them to refuse to deal with NFML except on those terms. This type of arrangement falls within the definition of an exclusionary provision (i.e. collective boycotts) in section 4D of the Act, authorization for which is not sought. NFML is concerned that there is the potential for Distributors to engage in this type of behaviour even if it is not authorized, and that NFML would have to agree to terms required by the MVA because of NFML’s dependence on Distributors to supply access for National Foods products to the retail market.

Public benefits asserted by the MVA

14. "Fairness" in the negotiating process

14.1 The MVA asserts that authorization of the Single Bargaining Agent Conduct would:

- (1) provide Distributors with "competitive parity" in contract negotiations with processors;
- (2) lead to greater vendor input into contract terms; and
- (3) lead to improved services and other public benefits.

14.2 NFML notes that "competitive parity" would not of itself ordinarily constitute a public benefit. In the ACCC's Collective Bargaining Issues Paper, it is noted that there may, however, be a public benefit in allowing small businesses to collectively negotiate with larger businesses to the extent that this was likely to result in small business being able to extract "more appropriate commercial outcomes".

14.3 The MVA has not provided any evidence that NFML has extracted inappropriate commercial outcomes from Distributors⁶ or that it is likely to do so in the absence of the Single Bargaining Agent Conduct. In particular:

- (1) NFML does not induce Trade Customers to become National Foods Customers. Rather, such changes are prompted by the customer itself. Such changes typically occur when a customer requests that the Distributor offers a lower price for National Foods products. (NFML does not have any control over the price which Distributors charge to their customers.) If the Distributor cannot or will not provide the products at this price, NFML will try to supply the product at the price requested by the customer and, if successful, will engage the Distributor to provide delivery services to that customer. Without NFML's involvement, the Distributor would obtain no further financial benefit from that customer; and
- (2) the statement by a former Managing Director of NFML as to the distribution arrangements in the future⁷ simply reflects NFML's understanding of the trend in wholesale milk distribution arrangements (particularly arising from changes in the distribution arrangements of major supermarket chains).

⁶ As to the incorrectness of the MVA's assertions about the terms of the Current Agreement and the proposed New Agreement, see Annexure B..

⁷ Quoted at page 3 of the Application.

14.4 NFML agrees that NFML may have substantially greater bargaining power than some of its smaller Distributors. However, it is important to note that:

- (1) the Single Bargaining Agent Conduct is not, on its terms, confined to collective negotiation by small businesses; and
- (2) the authorization sought for Single Bargaining Agent Conduct is not limited in time, which may, after the expected rationalisation of the South Australian Distributor industry, result in Distributors who are not small businesses being able to take advantage of the Single Bargaining Agent Conduct.

14.5 NFML also submits that:

- (1) the MVA has not introduced any evidence as to why the Single Bargaining Agent Conduct would be likely to lead to increased competitor parity or greater Distributor input into contract terms in the absence of an express or implied threat not to deal with NFML, especially bearing in mind that, on the terms of the Application, NFML cannot be compelled to negotiate with the MVA;
- (2) the Single Bargaining Agent Conduct is not required for the MVA to make meaningful representations on behalf of its members as to issues which are likely to be of general concern to them in relation to the proposed New Agreement, and the MVA in fact made such representations in relation to the Current Agreement – any lack of South Australian Distributor input in relation to the New Agreement is as a result of the MVA not providing any comments in relation to the drafts of the New Agreement with which it has been provided⁸; and
- (3) the MVA has done no more than assert that some unspecified “service improvements” and public benefits will flow from either the Single Bargaining Agent Conduct or “increased vendor input”⁹, without identifying any such improvements or benefits or without explaining why they would result from the Single Bargaining Agent Conduct. NFML submits that no such improvements or public benefits would flow from the Single Bargaining Agent Conduct. In particular, it is difficult to see how the Single Bargaining Agent Conduct could logically lead to any “service improvements”.

MVA assertions as to unfairness

14.6 In a number of places in the Application the MVA asserts that Distributors are “forced” to accept contractual terms dictated by processors, and paragraph 6.1 of the Application is headed “Fairness in the Negotiating

⁸ See further below, paragraph 14.8.

⁹ Page 8 of the Application.

Process". To the extent that this implies NFML has exerted unfair pressure on processors to agree to the terms of the Current Agreement or the proposed New Agreement, this is refuted absolutely.

- 14.7 The MVA asserts that the MVA has made representations to processors about distribution contracts "without satisfaction".¹⁰ These assertions are incorrect insofar as they apply to NFML. In particular, and in direct response to concerns raised by the MVA, the Current Agreement:
- (1) has a standard term of 5 years (from a proposal which would have given Distributors a 3-year term with the prospect of renewal for 2 additional 3-year terms);
 - (2) clause 34.2 was amended to require significant changes to the market and industry, and NFML to consult with the Distributor, as a pre-condition to NFML varying the Current Agreement;
 - (3) Distributors are permitted to operate through trust structures, provided details are notified to NFML; and
 - (4) amendments were made in relation to operational matters such as ullage (waste milk) and receipting of National Foods Customer orders.
- 14.8 The MVA has also made a number of serious misstatements about the content of the Current Agreement; these are dealt with separately in Annexure B. For example, the MVA has wrongly quoted clause 34.2 of the Current Agreement and wrongly asserted that it gives NFML the right to terminate the Current Agreement; in fact it permits NFML to **vary** the terms of the Current Agreement in circumstances and subject to important conditions which are not stated by the MVA. This is discussed in more detail in Annexure B, at page 33 below.
- 14.9 As noted above, NFML has provided three drafts of the proposed New Agreement to the MVA on the understanding that the MVA would comment on those drafts in the interests of its members. The MVA has not provided any such comments. As noted above in paragraph 7.6 of this submission, NFML has had useful discussions with Distributor associations in other States such as New South Wales, and successive drafts of the New Agreement have been amended to take into account the comments and issues raised by these associations.
- 14.10 In a number of instances, the MVA appears to assert that NFML is relying on the Notifications to unfairly increase its bargaining power¹¹. This is simply incorrect. The National Dairies Notifications are dealt with in Part D of this submission. However, those Notifications are no longer relied on

¹⁰ Page 6 of the Application.

¹¹ For example, at pages 2 and 6 of the Application.

and do not in any way increase NFML's bargaining power against Distributors.

- 14.11 In the absence of NFML having exerted unfair pressure on Distributors in the past and in the absence of any likelihood that it will do so in the future, there is no basis on which the MVA could assert the Single Bargaining Agent Conduct would improve the fairness of NFML's negotiating conduct.
- 14.12 As noted in the Collective Bargaining Issues Paper, the Trade Practices Act contains independent protections against unconscionable conduct, including section 51AC. NFML submits that these protections are sufficient to protect Distributors from any unfair conduct by NFML, without the need for the Single Bargaining Agent Conduct.

15. Compliance with statutory requirements

- 15.1 The NFML does not agree that the Single Bargaining Agent Conduct is likely to lead to any public benefit by way of increased compliance with statutory requirements on the part of Distributors or NFML. Logically, Distributors already have to comply with the law and the operational and safety standards adopted in the Current Agreement. To the extent that the Single Bargaining Agent Conduct would lead to a reduction in such standards, this would lead to a public detriment rather than any public benefit.

16. Efficiency of operations

- 16.1 NFML does not agree that the Single Bargaining Agent Conduct is likely to lead to any of the benefits claimed under the heading "6.3 Efficiency of Operations" in the Application, and does not understand how this could be the case. It is the process of rationalisation which will permit the consolidation of Distributor arrangements in South Australia, not the Single Bargaining Agent Conduct; any efficiency gains in the Distributor operations will similarly flow from rationalisation, not the Single Bargaining Agent Conduct. It is noted that the Application appears to contemplate an increase in delivery fees – it is not understood how this is consistent with an increase in Distributor efficiency
- 16.2 There could be no public benefit in any increase in Distributor margins other than as a result of increased efficiency in a Distributor's operations.
- 16.3 The MVA asserts that processors have enjoyed increased profitability as a result of deregulation and "certain exemptions from the Trade Practices Act enjoyed by the processors"¹². This is misleading. As noted in the ACCC's 2001 report on the impact of dairy industry deregulation, processor margins, including NFML's, reduced after deregulation. In relation to white milk especially, NFML's profit margin has continued to be

¹² Page 2 of the Application.

squeezed. The MVA's allegation that NFML has enjoyed a significant increase in profitability as a result of the terms on which it has contracted with Distributors¹³ is incorrect. NFML's improvements in its margins derive from its concerted efforts to adapt to the de-regulated milk industry and respond to market drivers such as the shift in consumer consumption of white milk through supermarkets, including by ongoing reductions in operating costs, investment-driven efficiency gains, investment in acquisitions and the development and launch of new products. In relation to the incorrect claim that NFML "enjoys" any exemption from the Trade Practices Act, see paragraph 6.5 above and Section D of this submission (page 27).

17. Continued viability of the independent distribution sector

- 17.1 NFML does not agree that the Single Bargaining Agent Conduct is likely to improve the viability of Distributors, or that it is likely to preserve the range of services available to consumers. Efficient Distributors will remain viable or become increasingly profitable as they compete to acquire customers and achieve economies of scale. It is noted that there could be no public benefit in ensuring the viability of inefficient Distributors.
- 17.2 As noted in the Application¹⁴ and above at paragraph 5.3(1), a number of Distributors' traditional customers are themselves facing increasing pressure as a result of the shift to milk consumption through supermarkets. NFML sympathises with the pressure this places on Distributors, but the Single Bargaining Agent Conduct could not have any effect on this trend.
- 17.3 It is noted that some Distributors have already started to adapt to the changing retail and distribution environments by acquiring smaller, less efficient rounds, and consolidating them into existing businesses.¹⁵ NFML is aware that in South Australia, 7 rounds were sold by its Distributors in 2003, and 5 have been sold to date in 2004. It is therefore not correct that rounds are "unsaleable"¹⁶. The question of capital losses incurred by Distributors in acquiring rounds or businesses of other Distributors is not something on which NFML can meaningfully comment since it has had no role in determining what consideration was paid by a Distributor. However, as a general principle any valuation of a Distributor's business would need to take into account the following factors:
- (1) customers are not "owned" by a Distributor, and are free to choose whether to be supplied by a Distributor or not; and

¹³ Page 8 of the Application.

¹⁴ Page 4.

¹⁵ In this respect, NFML agrees with the MVA's statement at the foot of page 3 of the Application.

¹⁶ Page 7 of the Application.

(2) a Distributor's agreement with a processor is for a defined term.

18. Reduction in transaction costs

- 18.1 NFML does not agree with the MVA's assertions in relation to transaction cost savings, nor the way in which those claimed savings have been calculated.
- 18.2 In relation to legal advice, it is unclear whether there would be actual costs savings to individual Distributors if they take advantage of the Single Bargaining Agent Conduct or not, since the MVA's historical practice has been to obtain legal advice on behalf of its members. NFML does not understand why the Single Bargaining Agent Conduct is required for the MVA to do this in relation to the New Agreement.
- 18.3 Most Distributors would need to obtain individual business and accounting advice appropriate to their particular circumstances, since this could not be covered by Single Bargaining Agent Conduct or indeed any form of collective negotiations. There would be no savings to any individual Distributor in relation to such advice. Given the significance of the New Agreement in a Distributor's business, it would seem prudent to obtain this advice.
- 18.4 Accordingly, NFML does not accept that individual Distributor transaction costs could be reduced to \$45-\$90 as a result of the Single Bargaining Agent Conduct.

19. Better information

- 19.1 NFML does not agree that the Single Bargaining Agent Conduct will lead to Distributors being provided with better access to the MVA's information or being able to use such information more effectively. The MVA's own efforts at making such information available to its members, and assistance with its use, would lead to better information being provided to its members; no authorization is required for this to occur.

20. Improvement in health and safety

- 20.1 NFML agrees that rationalisation of the Distributor industry is likely to have the benefits to individual Distributors claimed by the MVA in the second paragraph under the heading "6.7 Improvement in Health and Safety" of the Application. However, it is rationalisation that will lead to these benefits, not any authorization of the Single Bargaining Agent Conduct.

Other matters

21. Scope of the Application

- 21.1 NFML notes the MVA's submission of 5 October 2004 clarifies that the Application is only in relation to South Australia. It is assumed that this means that only Distributors who are located in South Australia will be able to form collective bargaining groups to be represented by the MVA.
- 21.2 The product scope of the Application is unclear. The Application applies to "distribution contracts". NFML's Current Agreements and its proposed New Agreement include arrangements for the distribution of non-milk products such as yoghurts and cheeses, and non-dairy products. NFML submits that there is no justification for the Application in relation to non-milk products. National Foods non-milk products are distributed by a variety of persons outside the Distributor network, including by food wholesalers.
- 21.3 The Executive Summary of this submission sets out NFML's other concerns in relation to the scope of the Application.

C. Exclusive Dispute Resolution Services Conduct

22. NFML understanding of the Application

22.1 NFML does not fully understand the scope or purpose of the Exclusive Dispute Resolution Services Conduct, and understands that the ACCC has requested the MVA to clarify the conduct which is sought to be authorized. On the face of the Application, the Exclusive Dispute Resolution Services Conduct would constitute the MVA as the exclusive provider of dispute resolution services in relation to all disputes between:

- (1) all members and non-members of the MVA;
- (2) Distributors and other Distributors;
- (3) Distributors and NFML;
- (4) Distributors and Dairy Farmers; and
- (5) Distributors and their own customers.

23. Submissions

23.1 In the absence of any clarity about the Exclusive Dispute Resolution Services Conduct, NFML wishes to make only general submissions at this stage, and reserves the right to make further submissions if the MVA provides further details about the conduct.

Public benefit

23.2 NFML does not consider that any public benefit would flow from constituting the MVA as the exclusive provider of dispute resolution services in the manner currently described in the Application. It is noted that the Application does not describe any such public benefits.

Anti-competitive detriment

23.3 The Exclusive Dispute Resolution Services Conduct as presently described would give the MVA a monopoly on provision of dispute resolution services in respect of all disputes involving a Distributor. There are serious anti-competitive consequences which would flow from this; for example, the MVA would have:

- (1) the right to prevent Distributors and those with whom they are in dispute utilising professional dispute resolution providers such as accredited mediators; and
- (2) the right to set monopoly prices for the provision of such services.

Unsupported MVA assertions

- 23.4 NFML strongly denies that NFML imposes unilateral resolutions in disputes with Distributors¹⁷, and does not accept the assertion that it has engaged in any such conduct in reliance on its “dominant” position. NFML would be concerned if Distributors are under the misapprehension that their concerns would not be given full consideration by NFML. It is noted that nothing prevents the MVA from independently raising with NFML issues which are of concern to its members, and nothing in the Current Agreement or in the proposed New Agreement prevents a Distributor taking legal action to pursue its rights. In addition, NFML regularly meets with a South Australian Distributor action group to ensure that Distributor concerns are given appropriate attention.
- 23.5 NFML notes the concern expressed by the MVA that processors deal directly with Distributors’ own customers in relation to disputes between the customer and Distributor. In the case of NFML, this is driven by the customer itself complaining to NFML, and NFML goes to great lengths to preserve the customer relationship for the Distributor.

¹⁷ Page 11 of the Application.

D. National Dairies Notifications

24. National Dairies Notifications are of historical interest only

- 24.1 The National Dairies Notifications are in respect of exclusive dealing conduct by National Dairies SA Limited ACN 007 869 347. National Dairies SA Limited was the predecessor of NFML in South Australia, and until 24 June 1993 was called Farmers Union Ltd. That company was deregistered in 2000.
- 24.2 Contrary to the assertions by the MVA, NFML does not in any way rely on the National Dairies Notifications. These are of historical interest only.
- 24.3 By way of general background, the ACCC is referred to the following:
- (1) during the early 1980s arrangements existed between Distributors and the MVA (called **Area Agreements**) under which each Distributor was effectively guaranteed that its customer base was protected from competition and maintained;
 - (2) these Area Agreements required Distributors to refrain from soliciting the business of another Distributor's customers and to pay compensation if a customer decided to change the distributor. The amount of compensation was calculated by the MVA with reference to an agreed formula;
 - (3) the practice of using Area Agreements was brought to the attention of the Trade Practices Commission (**TPC**) in 1985. The TPC advised that Area Agreements contravened Part IV of the Trade Practices Act. The Master Retail Vendors Association (the former name of the MVA) responded by seeking authorisation for a code of conduct designed to achieve similar aims to the Area Agreements (see application A60011 dated 4 November 1988). The TPC issued a draft determination on 3 May 1990 proposing to deny authorization, and the Master Retail Vendors Association withdrew its application on 25 October 1990;
 - (4) as noted in the submission dated 10 June 1993 in relation to the Farmers Union Notification:

Most distributors have either purchased or set up their business when the area agreement system operated. The demise of the area agreements has therefore reduced the value of the distributors' businesses and created uncertainty;

- (5) prior to 1992, there were no formal agreements between Farmers Union and distributors. When this occurred, notifications were lodged by Farmers Union (and then by National Dairies SA Ltd) out of an abundance of caution, particularly in light of the TPC's then recent decision to the Master Retail Vendors Association application. It is noted that the TPC's decision in relation to the Farmers Union Notification found that the arrangements would, amongst other things, "preserve the status quo in the market for delivery of white milk" in the regions to which the Farmers Union Notification related.

No substantial lessening of competition

- 24.4 The arrangements the subject of the National Dairies Notifications were not entered into with the purpose of substantially lessening competition, and would not, in NFML's opinion, have been likely to substantially lessen competition in any market. In particular, the restriction on Distributors supplying National Foods products in respect of which they have exclusive distribution rights to Trade Customers of other Distributors was intended to give some protection to the value of the Distributors' businesses where they were transitioning out of the protections afforded by the Area Agreement.
- 24.5 As noted above in paragraph 6.5, NFML does not consider that the Current Agreements have the effect of substantially lessening competition in any market and accordingly did not lodge a notification with the ACCC in respect of them. In particular:
 - (1) the very significant power of major supermarket chains since deregulation to influence the retail price of milk has acted as a major constraint on NFML's ability to increase prices at all levels of the supply chain;
 - (2) National Foods flavoured milks are subject to vigorous competition in the route sector of the impulse beverage market, which includes carbonated soft drinks, packaged water, sports drinks, energy drinks, and fruit juices as well as flavoured milk; and
 - (3) Dairy Farmers remains a vigorous and effective competitor of National Foods at all levels of the market for the supply of dairy products, and it is noted that Parmalat (Australia) Limited trading as Pauls entered the South Australian market in 2001 as a processor (albeit with a much smaller market share than each of NFML and Dairy Farmers).

25. NFML intentions in relation to New Agreements

- 25.1 Under the New Agreement, it is proposed that NFML would no longer impose a general restriction on the Distributor soliciting or enticing an

existing customer of another NFML Distributor to purchase National Foods products either directly or indirectly from the first Distributor.

25.2 However, NFML is concerned to ensure the transition to free competition between Distributors for their own customers does not disadvantage Distributors who have exclusive customers and home delivery territories under Current Agreements. As noted above, some Current Agreements could continue into 2007. Accordingly, NFML would wish to continue the restriction in relation to supply to Trade Customers of Distributors on Current Agreements. The effect of this is that as Current Agreements expire or are replaced by voluntary agreement with the Distributor, the restrictions will progressively disappear. NFML does not consider that the continuation of the restriction in the Current Agreements would have the effect of substantially lessening competition in any relevant market. If the ACCC disagrees with this view, then NFML would consider lodging a notification to protect the position of Distributors under Current Agreements.

26. Information requested by ACCC

26.1 South Australian retail market share for National Foods products

	House brand (carried through supermarkets)	National Foods proprietary brands	Dairy Farmers proprietary brands	Other
White milk	53.3%	24.4%	15.8%	2.1% (Parmalat)
Flavoured milk¹⁸		84.1%	9.4%	4.5% (Parmalat)
Other dairy products (yoghurts, cheeses)	2.0%	42%	18%	7.8% (Parmalat) 20.7% (Nestle)

Source: Aztec data for September 2004

26.2 Exemptions for competing products

No exemptions have been granted to NFML Distributors to carry competing products in South Australia.

¹⁸ There is an insignificant amount of House brand flavoured milk.

26.3 National Foods exclusive Distributors

NFML estimates that approximately 40% of its South Australian Distributors carry only National Foods products, and that the remainder carry other (non-competing) products.

Annexure A Abbreviations and acronyms

Application	Application by MVA for authorization of the Single Bargaining Agent Conduct and the Exclusive Dispute Resolution Services Conduct dated 3 September 2004 A90927
ACCC	Australian Consumer and Competition Commission
Current Agreement	NFML's current agreement with South Australian Distributors
Dairy Farmers	Dairy Vale Foods Limited ACN 065 923 597, a dairy processor
Distributor	A Distributor of dairy products in South Australia (referred to in the Application as a "vendor")
Exclusive Dispute Resolution Services Conduct	The conduct described in paragraph (c) of page 1 of the Application, which appears to constitute the MVA as the "exclusive" provider of dispute resolution services.
Farmers Union Notification	Notification given by Farmers Union Foods Limited ACN 007 869 347 (name changed to National Dairies SA Limited, and deregistered 25 September 2000) dated 3 April 1993 N60016
MVA	Milk Vendors' Association (SA), Inc
National Dairies Retail Vendor Notification	Notification given by National Dairies SA Limited ACN 007 869 347 (deregistered 25 September 2000) dated 29 March 1994 N60017 in relation to retail Distributor agreement
National Dairies Wholesale Vendor Notification	Notification given by National Dairies SA Limited ACN 007 869 347 (deregistered 25 September 2000) dated 29 March 1994 N60018 in relation to wholesale Distributor agreement
New Agreement	NFML's proposed new agreement with Distributors
NFL	National Foods Limited ABN 65 004 486 631
NFML	National Foods Milk Limited ABN 63 051 195 272, a dairy processor
National Dairies	The Farmers Union Notification, the National Dairies

Notifications

Retail Distributor Notification, and the National Dairies
Wholesale Distributor Notification

**Single Bargaining
Agent Conduct**

The conduct described in paragraphs (a) and (b) of
page 1 of the Application.

Annexure B

Response to MVA assertions on Current Agreement

Current Agreement

On page 5 of the Application, the MVA makes various assertions about the standard terms of current processor contracts. NFML comments as follows in relation to its Current Agreement.

“Termination”: On page 5 of the Application, the MVA incorrectly asserts that NFML may “terminate” a Current Agreement where

any other change occurs in, or affecting, the Industry or the Market (para 34.2 contract).

In fact, clause 34.2 of the Current Agreement does not give NFML any termination rights. It provides that NFML may **vary** the terms of the Current Agreement in response to **significant** changes in the industry or the market which have a **substantial and direct effect** on the distribution of the Products. NFML may only make such variations after having notified and consulted with the Distributor in an attempt to agree on such variations. Any such variations only have effect no earlier than 3 months’ after being notified to the Distributor. This clause was drafted to take into account representations made by the MVA at the time the terms of the Current Agreement were being negotiated. NFML has never relied on clause 34.2.

Other matters

In relation to the other matters raised in the bullet points on page 5 of the Application:

- (1) NFML is permitted to make the following variations to the Current Agreement on 20 Business Days’ notice:
 - (a) changes to NFML’s standard conditions of sale and prices ;
 - (b) reasonable variations to the Distributor manual (which deals with operational and procedural matters); and
 - (c) terms of delivery and delivery fees in relation to National Foods Customers, although this is in practice driven by the National Foods Customer,but other variations must be in writing signed by both parties;
- (2) the Current Agreement does not require the Distributor to be contactable 24 hours a day;

- (3) the Current Agreement does not require the Distributor to provide any business or marketing plans;
- (4) although the Current Agreement does permit NFML to replace the Distributor in respect of route Trade Customers or National Foods Customers, this is typically at the direction or desire of the customer (in relation to route Trade Customers, see also paragraph 14.3(1) of the submission);
- (5) in the case of home delivery Trade Customers, NFML may only exercise its right to replace the Distributor if either:
 - (a) the Distributor has first notified NFML that the Distributor does not wish to distribute in that part of its home delivery territory; or
 - (b) a customer has itself reasonably objected to being delivered by the Distributor, in which case NFML has a positive obligation to assist the Distributor in good faith to retain the customer – only if the customer remains dissatisfied is NFML then entitled to replace the Distributor;
- (6) NFML cannot guarantee supply to Distributors because of the nature of the Products (in particular because they are perishable and NFML depends on sufficient supply from dairy producers). Accordingly, NFML is not obliged to supply Products to the Distributor **where NFML has insufficient stocks of the Products**, in which case:
 - (a) it must if requested by the Distributor use its best endeavours to rectify the situation and in the meantime supply the Distributor with substitutes; and
 - (b) if the non-supply is caused by force majeure and continues for more than 3 business days, the Distributor may in fact sell competing products to Trade Customers for the period of non-supply (**clause 29.4**);

NFML does not withhold supply except where it has insufficient stocks.

- (7) the Current Agreement specifically provides that a Distributor may sell competing products where so agreed;
- (8) the Current Agreement does require the Distributor to maintain a database containing details of Trade Customers, but since Distributors would in practice keep such records in any case, NFML does not understand the MVA's objection to it;

- (9) the Current Agreement does **not** exempt NFML from legal obligations to Distributors relating to payment of superannuation or workers' compensation insurance – it provides that if a Distributor is deemed to be an employee of NFML by a statutory authority, NFML may deduct payments as a result of that determination from delivery fees payable to that Distributor. NFML has calculated the delivery fees on the understanding that Distributors are independent contractors; to the extent that this understanding is over-ridden by the determination of a statutory authority, it is appropriate for the total cost to NFML of engaging the Distributor to remain the same. It is noted that during the 1999 negotiations with the MVA leading up to the Current Agreement, the MVA specifically noted that the Distributors wished to retain independent contractor status.

Renewal

On page 11 of the Application, the MVA asserts that "all existing contracted vendors have a right of renewal". This is incorrect in relation to NFML Distributors; the Current Agreement does not give any Distributors a right of renewal.