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9 November 2004

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Mr Michael Green
Project Officer
Australian Competition & Consumer Commission
PO Box 1199
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FILE No.
DOC:
ALISON MEARES

Dear Mr Green

Dairy Vale Foods Limited, trading as "Dairy Farmers"
Interested party consultation on arrangements for the distribution of dairy products in South Australia

We refer to the letter from the Australian Competition & Consumer Commission ("ACCC") of 6 September 2004 and our letter of 1 October 2004.

We are instructed to respond to the application for authorisation lodged by the Milk Vendors Association (SA) (Inc) ("MVA") for proposed collective bargaining and to the questions set out in the ACCC's letter of 6 September 2004 in respect of that application. Enclosed with this letter is Dairy Farmers' response to these matters. We are instructed that Dairy Farmers does not request confidentiality over its response.

As discussed during the telephone conference on Monday, 27 September 2004, we will separately address the questions raised by the ACCC concerning the notifications lodged by Dairy Vale Co-operative Limited in November 1992 and February 1993.

Please contact Alison Meares if you have any questions.

Yours sincerely



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Encl.

DAIRY VALE FOODS LIMITED

Response to Authorisation Application No. A90927 by Milk Vendors Association (S.A.) Inc (“MVA”)

9 November 2004

SUMMARY

Dairy Vale Foods Limited opposes the application under section 88(1) of the *Trade Practices Act 1974 (Cth)* for authorisation lodged by the Milk Vendors Association (S.A.) Inc (“MVA”) for proposed collective bargaining arrangements and dispute resolution facilities and submits that:

1. The benefits which the MVA claim will result from the proposed collective bargaining arrangements are not public benefits and are in fact benefits for the MVA and its members rather than the public.
2. If the proposed collective bargaining arrangements result in any benefit to the public, such benefit does not outweigh the detriment to the public constituted by the lessening of competition from the arrangements.
3. Many of the benefits the MVA claims will result if authorisation is granted already exist under the Dairy Farmers’ Franchise System and will not result from the proposed collective bargaining arrangements. These benefits will continue under the Dairy Farmers’ Franchise System even if authorisation is refused.
4. The MVA’s application does not detail the precise terms of the proposed collective bargaining arrangements. Dairy Farmers is concerned that the arrangements may be seeking to authorise collective boycott conduct between Franchise Owners. Because the terms of the proposed collective bargaining arrangements are unclear it is not possible to conclusively detail all of the public detriments which may arise.
5. The test set out in section 90(6) of the *Trade Practices Act 1974 (Cth)* is therefore not satisfied and authorisation should be refused.

BACKGROUND MATERIAL

Dairy Farmers Franchise System

Dairy Vale Foods Limited is a wholly owned subsidiary of Australian Co-operative Foods Limited ("ACF"). ACF and its subsidiaries trade as "Dairy Farmers".

Dairy Farmers has in place a Franchise System for the distribution of its products to residential and trade customers in New South Wales, Queensland and South Australia. The franchise system is governed by the Dairy Farmers Franchise Agreements and is regulated by the *Franchising Code of Conduct* under the *Trade Practices Act 1974 (Cth)*.

The Dairy Farmers Franchise System was first launched in New South Wales in 1997, in Queensland in 1998 and in South Australia in 2000. Prior to the launch and introduction of the franchise system in each State, Dairy Farmers conducted consultation with various interested parties including the MVA. Dairy Farmers' Franchise Agreements have been developed through negotiations with vendor representative bodies and Franchise Councils.

The Dairy Farmers Franchise System involves the distribution of Dairy Farmers Products to home delivery customers and route trade customers under leading market brands.

Home delivery customers are residential homes. Route trade customers are milk bars, take away food shops, offices, factories, restaurants, caterers, convenience stores, petroleum outlets, independent supermarkets, schools, nursing homes, hospitals, gaols, universities, coffee shops and other trade customers that trade under a banner group or use a group buying arrangement.

The Franchise System is, subject to competitive pressures and recognises that customers are free to purchase products from whoever they choose and that Dairy Farmers and Franchise Owners must respond to these competitive pressures and customers' needs and wishes.

Franchise Owners sign a Home Delivery Franchise Agreement if they service home delivery customers, or a Route Trade Franchise Agreement if they service route trade customers. There are approximately 569 Franchise Owners in the Dairy Farmers Franchise System in New South Wales, Queensland and South Australia.

Vendors are called Franchise Owners and are granted the exclusive right under the terms of the Franchise Agreement to use the Dairy Farmers System developed by Dairy Farmers and the Dairy Farmers Trade Mark to deliver Dairy Farmers Products to the Designated Customers listed under their Franchise Agreements.

Customers are called Designated Customers under the Franchise Agreement. For home delivery customers and most route trade customers, Franchise Owners purchase Dairy Farmers Products from Dairy Farmers and resell them to customers. Within the route trade some customers require their accounts to be owned by and/or handled centrally by Dairy Farmers (called "Key Accounts"). For Key Accounts, Dairy Farmers pays Franchise Owners a delivery fee (commission) for delivering Dairy Farmers Products to Key Accounts.

Dairy Farmers has established Franchise Councils at a local and State level as part of the Dairy Farmers' Franchise System in New South Wales, Queensland and South Australia. Franchise Councils are made up of Franchise Owner representatives elected by other Franchise Owners and Dairy Farmers representatives. Disputes between Franchise Owners and between Dairy Farmers and Franchise Owners can at a Franchise Owner's request be referred to the Local Franchise Council. Changes to the Franchise System and the Franchise Agreements are discussed between Dairy Farmers and each State Franchise Council.

Dairy Farmers uses contractors to deliver products to supermarkets. Supermarket accounts are held by Dairy Farmers. Dairy Farmers pays contractors a delivery fee (commission) for delivering Dairy Farmers Products to supermarkets. These arrangements are not a franchise and are governed by separate delivery arrangements.

South Australian Franchise System

The Dairy Farmers Franchise System commenced in South Australia in 2001 after extensive discussions and negotiations between Dairy Farmers, vendors and the MVA. Vendors signed 2 year Home Delivery Franchise Agreement or Route Trade Franchise Agreement with Dairy Farmers which contained an option for renewal. The first Dairy Farmers Franchise Agreement was signed in South Australia on 1 March 2001. All Franchise Agreements were signed in 2001.

The Franchise Agreements came up for renewal in 2003. Dairy Farmers offered 5 year Home Delivery Franchise Agreements or Route Trade Franchise Agreements with options for renewal. The first renewal Franchise Agreement was signed in South Australia in July 2003. There are currently 32 Franchise Owners who have 5 year Franchise Agreements with Dairy Farmers.

There are currently 6 Franchise Owners with agreements that have expired that will be affected by authorisation if granted. Dairy Farmers and these Franchise Owners are currently completing the process of collecting all necessary licences and insurances etc and waiting the 14 day period required under the Franchising Code of Conduct before signing new Franchise Agreements. Dairy Farmers expects these contracts to be signed within the next few weeks.

There are currently 4 Franchise Owners with Franchise Agreements that have expired in September 2004, October 2004 and will expire in December 2004 that will be affected by authorisation if granted. There are 5 vendors who have not signed Franchise Agreements but who operate as part of the Dairy Farmers Franchise System in accordance with the terms of the Franchise Agreements. Dairy Farmers is currently working through the process of signing these vendors as Franchise Owners. There are 7 dedicated contractors who deliver Dairy Farmers Products to metropolitan supermarkets under separate delivery arrangements.

RESPONSE TO MVA APPLICATION

Dairy Farmers does not accept a number of the claims made by the MVA in its submission to the ACCC. The following response by Dairy Farmers is not intended to be an exhaustive response to all of the claims made by the MVA and should not be taken as indicating that Dairy Farmers agrees with any claim made by the MVA which is not dealt with below.

Dairy Farmers wishes to have recorded on the public record its response to some of the claims made by the MVA in its application.

If the MVA clarifies the precise details of how the proposed collective bargaining arrangements and the exclusive dispute resolution process will operate Dairy Farmers wishes to provide further comments in respect of those details and the public benefits or detriments which may result.

Dairy Farmers seeks confirmation that any authorisation (if granted) would not authorise the MVA to go back and renegotiate current Franchise Agreements.

MVA Introduction

Deregulation of the dairy industry in South Australia commenced in July 1994. Dairy Farmers agrees that deregulation has resulted in significant and ongoing restructuring of the dairy industry as processors, vendors and customers have adapted to competitive market forces. At times significant costs have been incurred and these have impacted on the profitability of all participants in the industry.

Dairy Farmers rejects the assertion that “milk processors have, on the other hand, enjoyed increased profitability”. Improvements in the profitability of processors, vendors and customers are due to effective competition and efficient business practices and not unequal bargaining positions. Deregulation and subsequent competition have resulted in improved efficiencies, pricing and service benefits to the public.

Dairy Farmers rejects the claim by the MVA of “the existence of certain exemptions from Trade Practices Act provisions enjoyed by the processors”. Dairy Farmers like other suppliers in South Australia is governed by and required to comply with the terms of the *Trade Practices Act 1974 (Cth)*. This does not flow from the authorisation (if granted) and will continue even if the authorisation application is refused.

Suppliers in the South Australian Dairy Industry

There are a number of suppliers of milk and dairy products or products that compete with milk and dairy products in South Australia. Dairy Farmers submits that there is intensive competition in South Australia from these suppliers, including:

- (a) processors, including Dairy Farmers, National Foods Limited (“National Foods”), Parmalat Australia Limited (“Parmalat”), Warrnambool Cheese and Butter Factory Company Limited, Peters & Brown Limited, A2 milk and various other smaller processors such as Tweed Vale;
- (b) foodservice distributors;
- (c) beverage companies (soft drink; juice and water companies); and
- (d) supermarkets.

The MVA’s application does not deal with any of the other suppliers set out above and only deals with Dairy Farmers and National Foods. In addition to the other grounds set out in this response, Dairy Farmers submits that the MVA’s application if granted will have a negative impact on the operation of its Franchise System and affect its overall business, but will not affect other participants who compete against Dairy Farmers in South Australia. The overall alleged benefits to the public must therefore be questioned if it only deals with two suppliers in South Australia.

Vendors (Franchise Owners)

Although Dairy Farmers does not have access to MVA membership records, based on historical information Dairy Farmers believes that only approximately 6 of its current Franchise Owners are members of the MVA. Dairy Farmers submits that those Franchise Owners who have already chosen not to be members of the MVA should not be included in the authorisation application (unless they subsequently choose to “opt in”). The MVA should be required to identify to processors those vendors it seeks to represent.

Contracts (Franchise Agreements)

As indicated above Dairy Farmers Franchise System was launched in South Australia in 2000 and has been operating since March 2001. Dairy Farmers did not “unilaterally” prepare its Franchise Agreements as claimed by the MVA. Prior to the launch and introduction of the franchise system in each State, Dairy Farmers conducted consultation with various interested parties including the MVA. These discussions did result in changes to the initial Franchise System and Franchise Agreements.

Dairy Farmers rejects the claim that the Franchise Agreements allow it to unilaterally vary terms. Issues and changes to the Franchise System and the Franchise Agreements are discussed between Dairy Farmers and the State Franchise Council. The handling of customer issues is set out in the Franchise Agreements and provides steps that must be taken to protect wherever possible a Franchise Owner’s existing relationship with Designated Customers. However, both Dairy Farmers and Franchise Owners are subject to competitive pressures and customers’ needs and wishes.

Competition flowing from deregulation and market trends has resulted in all suppliers and sellers of milk and dairy products having to respond to customers' needs and wishes. It is customers who require contactability 24 hours a day, the freedom to change suppliers, competitive pricing and service demands. Neither Dairy Farmers nor the Franchise Owners "own" customers in the sense of being able to bind customers. Customers are free to choose who they will have as suppliers. In order to ensure both Dairy Farmers and Franchise Owners meet customers' demands they have been incorporated into the Franchise System and the Franchise Agreements. These requirements are for the benefit of customers and any attempt to prevent or restrict these requirements will be to the detriment of customers and ultimately consumers in the general public.

Authorisation of the proposed collective bargaining arrangements will not halt or protect Franchise Owners from changes brought about by market forces and customer demands. It is not the role of the *Trade Practices Act 1974 (Cth)* to do so.

As the Franchise System is based upon the sale and delivery of Dairy Farmers Products to Designated Customers Franchise Owners are required to promote Dairy Farmers Products. Franchise Owners are permitted to sell products which are not available from Dairy Farmers provided an exemption request has been applied for and granted.

Dairy Farmers submits that the Franchise Agreements are on commercial terms and provide Franchise Owners with substantial commercial benefits as part of the Dairy Farmers Franchise System, backed by high quality Dairy Farmers Products, Dairy Farmers' leading Trade Marks and the support of Dairy Farmers. These benefits flow through to the public and include:

1. Benefiting from the strength and experience of the Dairy Farmers Group, one of the nation's leaders in the dairy industry.
2. Being associated with the Dairy Farmers name in the marketplace.
3. Having a standard and well known brand and corporate image which can be promoted efficiently.
4. Being able to participate in the local Marketing Program.
5. Having ongoing support and advice from Dairy Farmers.
6. Having access to management, training, meetings and information sessions.
7. Economies of scale in purchasing and administration.
8. Being able to benefit from extensively researched and applied operational systems and equipment.

9. Having access to new products, new ideas and new systems.

Entry and Exit

Dairy Farmers submits that historically over 80% of sales of Franchised Businesses have been brokered by Franchise Owners themselves. In some instances Dairy Farmers has either been asked by Franchise Owners to refer them to other Franchise Owners who are buying or selling Franchised Businesses or suggested that Franchise Owners discuss amongst themselves proposals to sell or buy Franchised Businesses. Dairy Farmers rejects the MVA's claim that "Most sales have, traditionally, been brokered via the Milk Vendors Association (SA)". This has not been Dairy Farmers' experience within the Dairy Farmers Franchise System.

Deregulation of the milk industry throughout Australia has resulted in increased competitive pressure on all players (farmers, processors, vendors and sellers). Deregulation has meant the removal of regulated prices which has affected profitability and sale values for all businesses involved in the dairy industry.

Dairy Farmers denies that "it is now widely accepted that rounds are virtually unsaleable". Since the Dairy Farmers' Franchise System was launched in South Australia approximately 26 Franchised Businesses have been sold. Franchised Businesses are viable and are sold as such. Dairy Farmers submits that any "cushioning" of deregulation is a matter for government and not the ACCC or processors. The fact that the South Australian government has chosen not to offer support to vendors (despite requests by the MVA) should not be made the responsibility of processors such as Dairy Farmers.

RESPONSE TO BENEFITS CLAIMED BY THE MVA

Dairy Farmers submits that the Dairy Farmers Franchise System has been successfully operating in South Australia since March 2001. Although there were some discussions in South Australia between Dairy Farmers and the MVA prior to the launch of the Franchise System, since its launch the success of the Franchise System is solely due to the successful relationship between Dairy Farmers and Franchise Owners and the successful delivery of competitive and high quality Dairy Farmers Products to customers.

For the reasons set out in this submission, Dairy Farmers does not agree that the proposed collective bargaining arrangements will result in benefits to the public which will outweigh the detriment to the public constituted by the lessening of competition.

Fairness in the Negotiating Process

Dairy Farmers submits that there is no need for the MVA to be granted authorisation to collectively bargain with processors such as Dairy Farmers on behalf of members and non-members. Franchise Owners already negotiate with Dairy Farmers through their Local Franchise Councils and State Franchise Council with regards to the operation of and changes to the Franchise System, the Franchise Agreements and disputes. Dairy Farmers submits that the fact that only 6 Dairy Farmers Franchise Owners are members of the MVA supports Dairy Farmers' claim that fairness already exists in the initial and ongoing negotiation process between Dairy Farmers and Franchise Owners.

Dairy Farmers gives a variety of support to Franchise Owners which is provided as part of ongoing negotiations between Dairy Farmers and Franchise Owners, including promotions, marketing, sales support from FBMs, Area Sales Managers ("ASMs"), initial and ongoing training in various aspects of the Franchise System, food safety and business operations where needed and agreed on a case by case basis.

Dairy Farmers submits that Franchise Owners already have fairness in the negotiating process through the Franchise Council process. In addition, Dairy Farmers is and will continue to be subject to the requirements of the *Trade Practices Act 1974 (Cth)*, particularly with regards to the *Franchising Code of Conduct* and the unconscionable conduct provisions which require bargaining positions to be considered. The MVA's application does not contain any evidence of unconscionable conduct by Dairy Farmers and Dairy Farmers strongly denies any inference that it has engaged in any unfair treatment of Franchise Owners

Compliance with Statutory Requirements

Dairy Farmers has been proactive in ensuring that its business and the Franchise System comply with food safety, road worthiness, environmental protection, pollution control and cold chain compliance both with regards to statutory and voluntary requirements. Dairy Farmers submits that it has in fact been processors and in

particular, Dairy Farmers who have led the way in improving health and safety standards which have benefited Franchise Owners, customers, consumers and the general public.

The Franchise Agreements require Franchise Owners to operate their Franchised Businesses in compliance with all laws and in particular to comply with obligations concerning food safety, occupational health and safety, privacy, tax, superannuation and workcover. Dairy Farmers undertakes annual operation reviews of Franchised Businesses to ensure compliance with these requirements. Non-compliance by Franchise Owners is a breach of the Franchise Agreements in addition to any statutory breach.

Dairy Farmers does not believe that the proposed collective bargaining arrangements will improve existing standards and rejects the MVA's claim that the "existing arrangements provide a clear incentive to vendors to "cut corners"". On the contrary, Dairy Farmers submits that the current Franchise Agreements already provide standards that provide public benefits and ensure that both Dairy Farmers and Franchise Owners comply with food safety, road worthiness, environmental protection, pollution control and cold chain compliance requirements. The proposed collective negotiation arrangements will not in Dairy Farmers' opinion add anything to the existing standards nor result in any further public benefit.

Efficiency of Operations

Dairy Farmers' and Franchise Owners' business success depend (amongst other things) on providing a high quality and successful delivery of competitive and high quality Dairy Farmers Products to customers. The growth of large retail chains and competitive pressures under deregulation have resulted in consumers increasingly purchasing the majority of products from these large retail chains. Notwithstanding this, home delivery and small retail chains have remained alternative sources of supply for consumers. Dairy Farmers and Franchise Owners businesses have and will continue to supply such customers where demand exists and competitive supply arrangements can be offered.

Dairy Farmers has established project teams to work with Franchise Owners in working through market changes and competitive pressures on current and future trading arrangements. This has in the past involved assisting Franchise Owners who wish to rationalise. Dairy Farmers will continue to provide such assistance in conjunction with Franchise Councils to Franchise Owners in the future. Any benefits flowing from rationalisation will occur regardless of whether or not authorisation is granted and will not result from any authorisation. Dairy Farmers submits that the benefits to be gained from this will be for Franchise Owners rather than the public and will occur under the Franchise System and not under the MVA's application.

Dairy Farmers rejects the MVA's claim that collective negotiation will result in an increase in "vendors' margins or delivery fees" which can be "absorbed by the

processors and/or major retailers". Deregulation historically has seen competitive forces place pressure on prices downwards which has affected processors, vendors and customers to the ultimate benefit of consumers. Dairy Farmers is concerned that the MVA's application is an attempt to re-impose regulation of prices on the market to the ultimate detriment of consumers. Any attempt to manipulate prices to the detriment of consumers does not constitute a public benefit.

Continued Viability of Independent Distribution Sector

The object of the *Trade Practices Act 1974 (Cth)* is to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection" (section 2). It is not to re-impose regulation on a deregulated market or to protect businesses which have become unviable through inefficient business practices.

Dairy Farmers' decision in 1997 to launch its Franchise System in part is recognition by Dairy Farmers of the benefits of franchising and the role such businesses play in delivering products to customers. Deregulation and competitive forces have led to Franchise Owners consolidating businesses under the Franchise System. Dairy Farmers and the Franchise Councils have assisted in this process where appropriate or requested by Franchise Owners.

The successful relationship between Dairy Farmers and Franchise Owners in providing a high quality and successful delivery of competitive and high quality Dairy Farmers Products to customers has and will continue to ensure the operation and viability of successful competitive and efficient businesses, the employment of workers by those businesses and hence result in benefits to consumers. Dairy Farmers submits that the process of collective negotiation sought by the MVA will not add to these benefits. Market forces and the ability of Franchise Owners to respond to customers' needs will determine whether the current distribution system will continue.

Dairy Farmers submits that the proposed collective bargaining arrangements will not reverse the effect of competition and the trend for consumers to purchase the majority of their products from supermarkets and to increasingly purchase generic branded products. Any arrangement which preserves the status quo to the detriment of consumer choice constitutes a public detriment rather than a public benefit.

Dairy Farmers submits that there is no public benefit in maintaining inefficient businesses. If the proposed collective bargaining arrangements result in benefits to vendors they will be private benefits and not public benefits. The MVA and its members do not constitute the "public" under the test set out in section 90(6) of the *Trade Practices Act 1974 (Cth)*. The "public" refers to the Australian public (*Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385; ATPR 40-023) not a particular group.

Reduction in Transaction Costs

Franchise Owner representatives on Local Franchise Councils and the State Franchise Council consult with their fellow Franchise Owners with regards to issues under the Franchise System and the Franchise Agreements which affect or concern Franchise Owners. Issues and changes to the Franchise System and the Franchise Agreements are discussed between Dairy Farmers and the State Franchise Council. Dairy Farmers submits that the negotiating process through the Franchise Council successfully works and in fact prevents “a substantial waste of resources” and already minimises costs to Franchise Owners in entering into Franchise Agreements with Dairy Farmers.

Dairy Farmers encourages franchisees to seek independent advice. The obligation that Franchise Owners sign an acknowledgement that they have been advised and/or chosen not to seek independent legal, accounting and business advice is set down in the *Franchising Code of Conduct*. This obligation will not be eliminated by granting authorisation to the MVA. Dairy Farmers suggests that it was for sound reasons (including ensuring that Franchise Owners obtained independent advice) that this obligation was imposed by the *Franchising Code of Conduct*. The MVA is not equipped to provide independent legal, accounting and business advice to Franchise Owners. Given the importance of the contractual relationship Franchise Owners will still need to consider obtaining legal, accounting and business advice appropriate for their needs at a cost. Any impact on such costs under the proposed collective bargaining arrangements if it is a benefit is a benefit to Franchise Owners and does not constitute a public benefit.

Better Information

In Dairy Farmers’ experience the MVA does not provide extensive assistance to Dairy Farmers’ Franchise Owners. Franchise Owners are independent businesses experienced in operating their businesses and understand the industry and market within which they operate. Any assistance provided by the MVA to vendors in general is unlikely to be affected by the ACCC refusing authorisation. Any benefits would be benefits to Franchise Owners and do not constitute public benefits.

Improvement in Health and Safety

The MVA’s application for authorisation does not seek authorisation to engage in “the rationalisation process, consolidation of rounds” so it is difficult to understand how the proposed collective bargaining arrangements will result in the improvements claimed by the MVA.

Dairy Farmers submits that the Franchise System and the role of the Franchise Councils assist Franchise Owners to ensure a safe environment for Franchise Owners and their employees and with “those with whom they share the workplace and road”. These public benefits are already in place as part of the Dairy Farmers’ Franchise System and occur as a result of statutory requirements and customers’ demands. The

proposed collective negotiation arrangements will not in Dairy Farmers' opinion add to these existing public benefits.

Dispute Resolution

Dairy Farmers submits that an appropriate and effective dispute resolution mechanism is already in place for Franchise Owners. To force Franchise Owners and Dairy Farmers to exclusively resolve disputes through the MVA as proposed by the MVA does not reflect the terms of the Franchise Agreements (to which the MVA is not a party) or the *Franchising Code of Conduct*, will disrupt the effective operation of the Franchise System and result in increased and duplicated costs in operating two dispute resolution systems.

Representatives of Dairy Farmers (called Franchise Business Managers ("FBMs")) discuss the terms of the Franchise Agreements with Franchise Owners before Franchise Owners sign the Franchise Agreements. Franchise Owners can contact FBMs by telephone, email, fax and meetings can be arranged to discuss any issues the Franchise Owner may have. Annual operation review meetings are held between a Franchise Owner and FBM to discuss the operation of the Franchised Business, the Franchise System and any issues the Franchise Owner may have. A State Franchise Manager oversees the operation of the Franchise System in South Australia and is available to any Franchise Owner who wishes to discuss any issues the Franchise Owner may have which have not been resolved at the FBM level.

The Franchise Agreements provide for a dispute resolution mechanism as required by the Franchising Code of Conduct. Disputes between Franchise Owners and between Dairy Farmers and Franchise Owners are often referred to Local Franchise Councils comprised of representatives of Franchise Owners and Dairy Farmers.

In Dairy Farmers' experience, Franchise Owners regularly bring disputes before the Local Franchise Council. In addition the *Franchising Code of Conduct* provides for disputes to be resolved under the guidelines and administration of the Office of Mediation Adviser. Local Franchise Council and State Franchise Council meetings are held quarterly. Local Franchise Councils make recommendations to Dairy Farmers and Franchise Owners in respect of any disputes referred to them. This will continue if authorisation is refused.

Deregulation has ensured that customers retain the right to obtain products from whatever processor or vendor they want. Dairy Farmers has developed a system for handling customer disputes with Franchise Owners and to enable Franchise Owners to have every opportunity to resolve disputes with customers. Ultimately however, neither Dairy Farmers nor Franchise Owners can force customers to deal with them.

To force customers to resolve their disputes with Franchise Owners through the MVA as proposed by the MVA is not consistent with the object of the *Trade Practices Act 1974 (Cth)* to "enhance the welfare of Australians through the promotion of

competition and fair trading and provision for consumer protection” (section 2). Customers should not be forced to deal with the MVA to resolve disputes with Franchise Owners. The MVA’s proposal does not constitute a public benefit and would instead constitute a deterrent to customers and a public detriment in restraining the free choice of customers to choose who they deal with and how disputes are resolved.

Opt Out Clause

Dairy Farmers believes that granting authorisation to the MVA will result in aggressive canvassing of Dairy Farmers’ Franchise Owners by the MVA (regardless of whether they are members or non-members of the MVA) on the basis that the MVA is able to negotiate Franchise Agreements. Pressure will be applied on Franchise Owners to allow the MVA to act on their behalf regardless of whether or not they have a past association with the MVA.

Dairy Farmers submits that this behaviour will disrupt the operation of the Franchise System, Franchise Owners’ and Dairy Farmers’ businesses. This will cause disruptions to the distribution of products to customers including consumers. Such disruption is likely to harm rather than improve existing industry harmony and constitute a public detriment.

Dairy Farmers suggests that any representation by the MVA of non-members will be at a cost to non-members which they do not currently pay. This is not reflected in the MVA’s application.

Dairy Farmers is concerned that the MVA’s application did not expressly exclude any proposal by the MVA to try to renegotiate the current Franchise Agreements. Authorising the MVA to collectively negotiate Franchise Agreements which are already in place will disrupt existing relationships with Franchise Owners and potentially with customers.

Franchise Owners should be entitled to “opt in” rather than “opt out” as proposed by the MVA. In respect of the Dairy Farmers’ Franchise System the MVA’s proposal appears to force Franchise Owners to deal with the MVA by including them from the outset rather than allowing them to choose to be part of any such proposal. In light of the fact that only 6 Franchise Owners have chosen to be members of the MVA, by automatically including them presumably at a membership cost, this will impose additional costs and disruption to Franchise Owners’ businesses with potential flow on effects to their ability to service customers and consumers.

Market Assessment

Dairy Farmers submits that in considering whether the proposed collective bargaining arrangements will, or are likely to result in any public benefits which outweigh the

detriment to the public constituted by the lessening of competition, the ACCC must consider the South Australian market for the supply of milk and dairy products.

There are a number of suppliers of milk and dairy products or products that compete with milk and dairy products in South Australia. Suppliers compete to obtain distribution services from vendors and customers. Franchise Owners compete with each other for new customers and between Franchise Owners and other processors' vendors for customers. Dairy Farmers' Franchise System is based on customers not geographic territories. These factors should be considered by the ACCC.

The Future With or Without

Dairy Farmers does not believe that the public benefits claimed by the MVA will eventuate either at all or to the extent claimed. Furthermore, Dairy Farmers submits that any such public benefits already exist under its Franchise System and will continue if the ACCC denies the authorisation application. The successful operation of the Franchise System since 2001 directly shows that the proposed arrangements are not needed. Dairy Farmers does not believe that denying the MVA's application will affect the provision of the MVA's existing services to members.

Dairy Farmers believes that granting authorisation to the MVA with regards to collective bargaining and dispute resolution will disrupt the Franchise System which has successfully operated in South Australia since March 2001. This will negatively effect the distribution of products to customers including consumers and affect Dairy Farmers' and Franchise Owners' reputation and relationships with customers in the marketplace.

Dairy Farmers rejects the MVA's claim that "without the proposed arrangements, the decline of the independent distribution network will continue to the point of extinction". Market competitive forces will continue to be exerted by customers even if authorisation is granted. The MVA's proposal seeks to restrict processors' abilities to respond to competition from other suppliers and as required by customers. This will negatively affect industry cost savings and business efficiencies at both supplier and customer levels, impacting on the delivery of services and products to the public and constituting a public detriment.