

**RESPONSE TO SUBMISSIONS BY  
NATIONAL FOODS MILK LTD (NFML)  
DATED 22 OCTOBER 2004.**

The Milk Vendors Association (SA) Inc ("The Association") responds to the submissions of NFML as follows, using the paragraph numbering from the NFML submission for ease of reference.

- 1.4 NFML purports not fully to understand what conduct is sought to be authorised and what is meant by the term "collective bargaining". The conduct sought to be authorised is clearly specified in the Association's submission, the relevant part of which is set out at paragraph 1.3 of the NFML submission.

The term "collective bargaining" is a well known expression in common usage. It is a term which has been employed in previous applications for authorisation, such as TAB Agents and CSR Ltd. Its meaning in terms of the Association's application is clearly discernible from the determinations in those applications.

For the avoidance of doubt, it is proposed that the Association will engage in the following conduct in relation to the negotiation of the terms and conditions of distribution contracts:

- (a) The Association will write to vendors (both members and non members of the Association) to notify them of the authorisation and to advise the vendors that they may nominate the Association to negotiate contract terms and conditions on their behalf.
- (b) Vendors may then nominate the Association to negotiate on their behalf.
- (c) The Association will then notify the relevant processor (NFML or Dairy Farmers) that it has been authorised to negotiate on behalf of the relevant vendors.
- (d) The Association will then engage in negotiations on behalf of those vendors with the relevant processor.

(e) The Association will then report back to the relevant vendors.

(f) Steps (d) and (e) may be repeated.

(g) Ultimately, vendors will make individual decisions as to whether or not to contract with the relevant processor.

1.5 The Association does not seek authorisation in respect of any conduct for which authorisation is not required.

1.6 Pricing has never been an issue in contract negotiations. Standard processor contracts have not contained terms which explicitly set the prices; rather, they have contained provisions to the effect that products will be supplied to vendors at prices to be determined by NFML from time to time, and that, in respect of direct bill to customers, delivery fees will be set by NFML from time to time. Nevertheless, should NFML wish to include explicit pricing provisions in any future distributor agreements, the Association would not object.

1.7 The Association's submission explicitly states at (6.10 of the Attachment to its Application) that authorisation is **not** sought in respect of any conduct amounting to a collective boycott.

1.9 The Association accepts that NFML cannot be compelled to negotiate with it. Similarly, no individual vendor can be compelled to negotiate with NFML. The Association asserts that competitive parity would arise as a result of the following:

- The Association's extensive knowledge of the industry.
- The Association's ability to access data from interstate associations and industry bodies.
- Reduced capacity of NFML to pressure individual vendors.
- Reduced capacity of NFML to "play off" vendors against each other.

1.10.(1) The Association maintains that real benefits will flow from the conduct sought to be authorised.

1.10.(2) Prices have not previously been set in distribution contracts between vendors and NFML. Rather, those contracts have contained provisions to the effect that NFML will supply product to the vendor at prices to be set by NFML from time to time. Should NFML wish to include more substantive provisions in relation to pricing in future distribution contracts, the Association would be prepared to negotiate the appropriate terms

The Association has stated explicitly in its Application that it does not seek authorisation for any collective boycott activity: see paragraph 1.7 above. The possibility for collective boycott activity exists regardless of the Association's application for authorisation. That risk is not increased or reduced by the grant of authorisation.

1.10.(3) The Application does not seek authorisation in relation to the conduct described: see 1.7 above. The Association notes that all the vendors are in competition with each other *and with NFML in its capacity as supplier to major supermarkets and other "direct billed" customers*. Consequently, any contractual provision relating to listed customers, territories or nominating NFML as an exclusive supplier, is likely to amount to an exclusionary provision within the meaning of Section 4(D) of the *TPA*. None of the 'anti competitive effects' alleged by NFML are specified.

1.11.(1) The Association confirms that it does not seek authorisation for any collective boycott behaviour. It does not seek authorisation to negotiate collectively on behalf of those vendors who are not offered new contracts. It does not seek authorisation to negotiate collectively in respect of any existing distribution contract between NFML and the vendors.

1.11.(2) The Association will negotiate separately with NFML and with Dairy Farmers. It will seek to negotiate such terms as it may be instructed by those vendors who nominate it to negotiate, as set out in 1.4 above.

1.11.(3) The Association agrees to the conditions specified at 1.11(3)(a)-(d) inclusive, provided that any vendor wishing to withdraw from any "collective group" must notify the Association accordingly before entering any direct

negotiations with NFML.

- 1.11.(4) The Association agrees to this proposal: see Attachment to Application paragraph 6.9
- 1.11.(5) Once again, pricing and delivery fees have not previously been dealt with substantively in NFML's distributor contracts.
- 1.11.(6) The desired clarity will be achieved through the process outlined at 1.4 above.
  
- 1.12.(1) The Association accepts that NFML may choose not to negotiate with the Association. The Association notes that NFML has not advanced any reason (commercial or otherwise) as to why it would not negotiate with the Association. In fact, negotiations between the Association and NFML have taken place since the grant of interim authorisation.
- 1.12.(2) The Association accepts that not all NFML contracts are subject to renewal.
- 1.12.(3) In its Submissions in support of Notifications N60017 and N60018, NFML's predecessor stated that:

*"The creation by each of the processors of a system of exclusive dealing distributors/franchisees having a right to service specified outlets will protect the value of distributors' businesses, promote competition between distributors selling competing brands and at the same time better serve the needs of consumers."* (Consideration of Notifications, p.8)

Presumably, therefore, the "key feature" of the New Agreement referred to is designed to destroy the value of distributors businesses, discourage competition and provide poorer service to consumers. These are key issues which the Association would seek to negotiate under the proposed collective bargaining arrangement.

- 1.12.(4) The Association has offered comment at various national meetings which it has attended. As NFML is aware, the various state Associations delegated the task of communicating with NFML to the NSW Association. Since the

grant of interim authorisation, negotiations have taken place between the Association and NFML.

- 1.13 See 1.4 above. The Association will respond further on receipt of further submissions from NFML.
- 1.14 As indicated to the Commission previously, the Association wishes to amend its Application in so far as it relates to the provision of dispute resolution services. The Association no longer seeks to provide any such services. The Association seeks Authorisation to represent any Vendor or group of Vendors in any dispute which may arise:
- Between any Vendor or Vendors and NFML/Dairy Farmers.
  - Between any Vendor or Vendors and any customer.
  - Between any Vendor or Vendors and any other Vendor or Vendors.
- 5.2 As indicated in paragraph 2.2 of the Attachment to the Application, Paul's/Parmalat is not a processor in South Australia. It is a distributor only.
- 5.3(2) The NFML Submission overlooks the fact that Vendors are customers of NFML and are, in fact, amongst its largest customers.
- 5.5(2) The Association acknowledges that the processors' bargaining power as against Woolworths and Coles Myer is relatively weak. The development of this situation has provided a greater incentive to the processors to exercise their overwhelmingly strong bargaining power as against Vendors. By reducing Vendors' margins, and delivery fees, processors have been able to more than recoup any reduction in profit sustained in negotiations with Woolworths and /or Coles Myer. The most recent illustration of this process has been a 10c per litre reduction in Vendors delivery fees in relation to flavoured milks delivered to supermarkets.
- 6.4, 6.6 As NFML and the Vendors are all in competition with each other, Section 4D of the TPA applies. Consequently, no consideration need be given to whether or not there is any substantial lessening of competition.

- 7.5 The New Agreement was discussed for approximately two hours at the meeting referred to.
- 8.1 See comments above at 1.4 – 1.9
- 9.1 NFML's Submission to the effect that "neither NFML nor Distributors 'own' a customer..." is disingenuous. Exclusive rights to deliver to nominated customers have been owned and traded. NFML has itself sold such rights to individual vendors. In one instance, NFML sought payment in the sum of \$70,000.00 for the exclusive right to deliver to a single supermarket.
- 9.2 The structure of the industry in Victoria is quite different from that in South Australia.
- 9.3 No Authorisation is sought in respect of collective boycott activity: see Attachment to Application, paragraph 6.10.  
NFML refers to an alleged danger 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."*  
Once again, this Submission is completely at odds with the Submission put by NFML in respect of the Notifications: see 1.12(3) above. Clearly, NFML is prepared to argue that the same "arrangements" are either pro competitive, or, alternatively, anti competitive, depending upon what may suit NFML's interests at a particular time.
- 9.4 The alleged issues in relation to price fixing and collective refusal to deal have been addressed above.
- 10.1 Once again, the issue of price fixing has been dealt with above.
- 10.2 As indicated in the Association's Submissions, processors' margins have, since deregulation, increased, largely as a result of a substantial diminution in Vendors margins. This increase has been extracted from

Vendors by NFML as a result of the obvious and overwhelming disparity in relative bargaining strengths as between NFML and individual Vendors.

- 11.1 Under the terms of the proposed Authorisation, the Association would negotiate separately with each processor.
- 11.2 The Association's response on the alleged issue of price fixing is set out above at 1.10(2).
- 11.3 The meaning of sub paragraph 11.3 is not clear to the Association. As indicated in NFML's Submission, Dairy Farmer's operates a franchise system, whereas NFML does not. It is therefore most unlikely that the Vendor contracts with the two processors would be in similar terms.
- 11.4 As indicated above, prices have not, historically, been set in Vendor contracts. Far from allowing Vendors to extract supra-competitive prices, the proposed single bargaining agent conduct would merely go some way towards redressing the imbalance in relative bargaining strengths between, on the one hand, the Vendors and, on the other, NFML/Dairy Farmers.
- 12.1 This sub paragraph comprises almost entirely verbiage and puffery. References are made to anti competitive effects; an enormous amount of pressure on distributors; the highly emotive nature of the rationalisation process; and pressure not to withdraw from the negotiations. No fact or evidence in support is referred to.
- 12.2 NFML complains that, under the proposed arrangements, groups of Distributors would not be permitted to negotiate directly with processors. This merely reflects the current position. Any such group of distributors who may wish to negotiate directly with processors would, of course, need *themselves* to make application for Authorisation.
- 12.3 See 1.4 above.

- 13.1, 13.2 See 1.4 above. The potential for Distributors to the engage in unlawful behaviour is neither enhanced nor diminished by the existence or otherwise of any authorisation.
- 14.3 The inappropriateness of the commercial outcomes extracted by NFML from Vendors is demonstrated by the substantial reduction in Vendors' margins over the same period in which processors' margins have increased dramatically: see 16.3 below.
- 14.3(1) The process by which trade customers have ceased to be customers of the Vendors and become customers of NFML has been the subject of controversy. Most Vendors take the view that such customers have been induced by NFML to make the switch to "direct billing". Some support for this view is found in the practice of NFML in having its reps visit and liaise with Vendors' customers on a regular basis.
- 14.4 All South Australian Vendors are small businesses, as that term is normally understood.
- 14.7 The Association accepts that certain relatively minor amendments were made by NFML following representations by the Association. More particularly, the Association accepts that the standard five year term was adopted at the suggestion of the Association; clause 34.2 was amended following representations made by the Association, but the amendments made did not satisfy the Association's concerns; the concession in relation to trust structures merely recognised the existing reality; the amendments relating to operational matters were minor.
- 14.8 Clause 34.2 gives NFML the unfettered right to vary the terms of the current agreement to an unlimited extent.
- 14.9 See above.
- 14.12 The Association seeks to prevent the occurrence of any, or any further, unconscionable conduct. Although individual Vendors clearly have



remedies available to them in the event of the occurrence of such conduct, costs and other factors render such remedies impractical.

- 15.1 The reference to some putative reduction in operational and safety standards is totally unsupported.
- 16.1, 16.2 The Processors have the capacity to absorb any increase in delivery fees which may be contemplated. Hence an increase in delivery fees could well enable vendors to maintain and improve services to consumers without raising prices.
- 16.3 Since post-Farmgate deregulation occurred on 1 January 1995, the margin applicable to a one litre carton of white milk attributable to each of the industry groups has increased as follows:
- Farmers \$0.0483
  - Wholesale distributors \$0.0325
  - Retail distributors \$0.1667
  - Processors \$0.48
- (see "Annexure A" hereto)
- 17.1, 17.2 The Association accepts that the more efficient Vendors will remain viable or become increasingly profitable. The viability or profitability of all Vendors may well improve as a result of the proposed arrangements, for example, if the Association is able to negotiate a relaxation of the present restrictions which effectively prohibit the Vendors from maximizing their capital investment by distributing a wider range of products.
- 17.3 NFML plays a role in determining consideration paid on the sale of a round in that it significantly affects the valuation of Vendors' businesses by giving and taking the right to distribute to customers. The Association acknowledges that customers are not owned by any Vendor; however, in the normal course, a given customer will remain with a given Vendor unless:

- That Vendor sells its business or, alternatively, sells the right to distribute to a particular customer; or
- There is some disagreement between the Vendor and the customer (e.g., non-payment of accounts); or
- There is some intervention by the Processor.

Similarly, the Association accepts that Vendors agreements with NFML are for defined terms. These agreements have, subject to compliance with their terms, typically been extended or renewed.

- 18 The Association maintains that the proposed arrangements will result in significant reductions in transaction costs for both the Vendors and the Processors. As NFML is well aware, most Vendors presently receive no legal, accounting or business advice before signing Distributor Contracts. NFML makes no reference to the obvious savings which it would achieve through dealing with the Association rather than with numerous individual Vendors. Individual Vendors would benefit from specific advice rather than advice of a general nature provided to the Association.
- 19 Under the proposed arrangements, the Association will itself be in a position to make the best possible use of all information at its disposal.
- 21.2 It is intended that the proposed arrangements would apply in relation to all products.
- 22.1 See paragraph 1.4 above.

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