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18 March 2005

By Express Post

Australian Competition and Consumer Commission
470 Northbourne Avenue
Dickson
ACT 2602

Attention: Mr Scott Gregson
General Manager, Adjudication Branch

Your Ref: C2004/1241
Our Ref: 2545843

Dear Mr Gregson

Milk Vendors Association (SA), Inc (MVA)
Application for authorization A90972

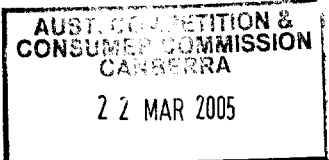
Please see attached originals of our letter and our client's submission e-mailed to Michael Green today.

Yours faithfully

per 

Richard Lewis
Partner
Deacons

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





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18 March 2005

By e-mail: michael.green@accc.gov.au
gavin.jones@accc.gov.au

Australian Competition and Consumer Commission
470 Northbourne Avenue
Dickson
ACT 2602

Attention: Mr Scott Gregson
General Manager, Adjudication Branch

Your Ref: C2004/1241
Our Ref: 2545843

Dear Mr Gregson

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).

Our client's further submissions in advance of the pre-decision conference on Tuesday, 22 March 2005, are enclosed. Our client will be handing up a summary of the enclosed submissions at the conference.

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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18 March 2005

National Foods Milk Limited

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

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**). This submission:
- (1) responds to the draft determination issued by the ACCC on 9 February 2005 (**Draft Determination**), and the MVA's submissions placed on the ACCC's public register around 15 December 2004 (**MVA Further Submissions**); and
 - (2) should be read together with NFML's submission dated 22 October 2004 (**First NFML Submission**), and capitalised terms and abbreviations in this submission have the meaning given in the First NFML Submission unless otherwise noted.
- 1.2 NFML opposes the ACCC's proposal to grant an authorization to the MVA for the following reasons:
- (1) the conduct which the MVA seeks to have authorised **either**:
 - (a) does involve a collective refusal to deal, contrary to the assertions of the MVA, in which case it will have a seriously anti-competitive effect outweighing the marginal public benefits noted in the Draft Determination, in which case an authorization should not be granted; or
 - (b) does not require an authorization, in which case there would be no public benefit arising from an authorization and accordingly the ACCC should refuse to grant it; and
 - (2) even taking the MVA's assertion that the proposed conduct does not involve a collective refusal to deal, the proposed conduct would not result in a net public benefit having regard to the likely outcomes which the proposed conduct is intended to achieve. In particular, the MVA has indicated that it would wish to retain arrangements which restrict Distributors from competing with one another.
- 1.3 If, contrary to NFML's wishes, the ACCC proposes to grant an authorization, NFML is concerned to ensure that:
- (1) the terms of the authorization specify with precision what conduct is authorized, and what conduct is not authorized;
 - (2) appropriate conditions are imposed to ensure that:

- (a) the possibility of industry-wide terms and conditions developing is minimised to the greatest extent possible;
 - (b) the potential for other anti-competitive conduct is minimised to the greatest extent possible; and
 - (c) the MVA and Distributors must maintain the confidentiality of information provided to them; and
- (3) the circumstances on which the ACCC bases its determination are clearly specified.

2. Conduct for which authorization is proposed to be granted

2.1 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.*

2.2 The Application does not seek authorization for conduct which involves an exclusionary provision, i.e. conduct in breach of sections 45(2)(a)(i) and 45(2)(b)(i) of the Trade Practices Act.

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

- (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.*

2.4 In the MVA Further Submissions the conduct which is sought to be authorized is further described as follows:

(a) The MVA 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 MVA to negotiate contract terms and conditions on their behalf.

(b) Vendors may then nominate the MVA to negotiate on their behalf.

(c) The MVA 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 MVA will then engage in negotiations on behalf of those vendors with the relevant processor.

(e) The MVA 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

2.5 The MVA will "seek to negotiate such terms as it may be instructed by those vendors who nominate it to negotiate"².

2.6 The Draft Determination proposes to grant an authorization in the following terms:

The authorisation the ACCC is proposing to grant is for the MVA to negotiate separately with NFML and Dairy Farmers on behalf of its members⁴¹ in relation to the terms and conditions of distribution contracts for the processors' products, according to the following arrangements:

a) The MVA 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 MVA to negotiate contract terms and conditions on their behalf.

b) Vendors may then nominate the MVA to negotiate on their behalf.

c) The MVA will then notify the relevant processor (NFML or Dairy Farmers) that it has been authorised to negotiate on behalf of the relevant vendors.

¹ MVA Further Submissions, pages 1-2

² MVA Further Submissions, page 3

d) The MVA will then engage in negotiations on behalf of those vendors with the relevant processor.

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

f) There may then be further negotiations with the relevant processor.

g) Vendors will make individual decisions as to whether or not to contract with the relevant processor.

Footnote 41: As noted, the MVA's application is expressed so that any authorisation granted also applies to future MVA members and current and future South Australian milk vendors who are not MVA members.³

3. What conduct is proposed to be authorized?

Exclusionary provision

3.1 The ACCC is referred to paragraph 1.7 of the NFML First Submission. The conduct to which the ACCC proposes to grant an authorization in paragraph 10.8 of the Draft Determination appears capable of involving an exclusionary provision within the meaning of section 4D of the Trade Practices Act, i.e. conduct breaching section 45(2)(a)(i) and 45(2)(b)(i) of the Act.

3.2 For example, assume that:

- (1) NFML proposes a contract;
- (2) the Distributors agree amongst themselves to propose an amendment to a term of the contract proposed by NFML and this is notified by the MVA to NFML;
- (3) NFML modifies the term in the next draft of the proposed contract but not to the extent required by the Distributors;
- (4) some Distributors then individually decide to sign the contract with the term modified by NFML;
- (5) the other Distributors agree amongst themselves that they should put forward a compromise amendment to the contract, and this is notified to NFML by the MVA;
- (6) NFML refuses to modify the contract any further; and

³ Paragraph 10.8

- (7) the other Distributors individually decide whether or not to sign the contract.
- 3.3 The conduct specified in paragraphs 3.2(2) and 3.2(5) above involves the Distributors being parties to a collective refusal to deal with NFML except on particular circumstances or on particular conditions. It is not to the point that a Distributor may *ultimately* decide on an individual basis (as in paragraph 3.2(4) and 3.2(7)) whether to accept the terms and conditions proposed by NFML – it is the collective understanding during the course of the negotiations which would give rise to the exclusionary provision and which would improve the bargaining power of the collective bargaining group. The conduct which is proposed to be authorised appears to assume that there will be such a *collective* understanding in relation to “such terms as [the MVA] may be instructed by those vendors who nominate it to negotiate”, otherwise there would be no need for “further negotiations” as contemplated by step (f) of paragraph 10.8 of the Draft Determination.
- 3.4 NFML is concerned that a collective refusal to deal by a large number of Distributors during the course of negotiations may result in detriment to NFML. NFML relies on Distributors to provide distribution services since it does not carry out distribution itself. The ACCC observes that NFML is free to agree to enter into collectively negotiated contracts or not. However, NFML is concerned that if negotiations are protracted, it may be placed in a position where it has no choice but to accept the terms put by Distributors in order to continue to maintain access to retail markets for its products (particularly route and home delivery customers). This concern is exacerbated by the MVA’s apparent position that it will seek in collective negotiations to maintain the exclusive customer arrangements in the Current Agreement (see further below, paragraphs 4.4 and following).
- 3.5 NFML does not understand how the conduct which is proposed to be authorized would operate without breaching the prohibition on exclusionary provisions in the Trade Practices Act. It also disagrees with the MVA’s assertion that the authorized conduct neither increases nor reduces the risk of a collective boycott⁴ – on the contrary, “collective” negotiations are likely to increase the risk that Distributors would engage in collective refusals to deal except on the terms agreed by the collective bargaining group. NFML requests that the ACCC gives some guidance as to the reason it is prepared to accept the MVA’s assertion that the conduct proposed to be authorized does not involve an exclusionary provision.
- 3.6 NFML’s concerns would be reduced if all that MVA is seeking to be able to do is:
- (1) obtain information from its members individually as to what their concerns are in relation to distribution contracts;

⁴ MVA Further Submissions, paragraph 1.10.(2)

- (2) negotiate with each processor directly as to appropriate terms and conditions to address those concerns; and
- (3) make recommendations to its members, and obtain advice on their behalf, in respect of which terms and conditions the MVA considers appropriate,

with members making individual decisions as to whether they wish to contract with NFML. The MVA and NFML have engaged in negotiations of this nature in the past, and the conduct which is described in the MVA Further Submissions at pages 1-2 is capable of being construed in this fashion. It does not involve any arrangements between Distributors themselves. If this is the type of conduct which the MVA wishes to engage in, then no authorization is required and no public benefit would arise from one being granted.

Terms of collectively negotiated contract

- 3.7 NFML notes that the Application seeks authorization:

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.

- 3.8 If the authorization proposed to be granted is intended to apply only to the conduct of collective negotiations, and is not intended to apply to the terms of any collectively negotiated contract themselves which are intended or are likely to have the effect of substantially lessening competition, then this should be explicitly stated in the authorization. Terms of any collectively negotiated contract which are themselves in breach of the Trade Practices Act should be separately notified or authorized.

Geographic restriction

- 3.9 This submission refers to the collective bargaining group to be formed by Distributors to whom NFML has offered New Agreements as the **"NFML collective bargaining group"**.
- 3.10 In the MVA Further Submissions, it is stated that the authorization is to apply only to South Australian distributors. This should be clarified, particularly having regard to the fact that the Application extends to non-members of the MVA. NFML submits that, if the ACCC does grant an authorization, the NFML collective bargaining group should consist only of:

Members and non-members of the MVA who:

- (a) have:

- (i) **been offered a New Agreement by NFML; and**
- (ii) **consented in writing to being part of the NFML collective bargaining group; and**
- (b) **have their principal place of business in South Australia.**

4. Likely outcomes should be considered

- 4.1 NFML submits that, even if the ACCC accepts the MVA's assertion that Distributors will not engage in any collective boycott behaviour, there is no net public benefit which would result from an authorization of the conduct described in paragraph 10.8 of the Draft Determination.
- 4.2 NFML agrees with the ACCC that the MVA has not substantiated its claims that the public benefits mentioned in paragraph 8.76, and paragraphs 8.93-8.97, of the Draft Determination will arise as a result of the conduct. However, NFML submits that the ACCC has not taken into account all of the relevant information in coming to its conclusion that the conduct is likely to give rise to "small public benefit"⁵.
- 4.3 NFML does not necessarily agree that an improvement in Distributors' bargaining power generates a public benefit.⁶ However, even if it does, NFML submits that the ACCC should also continue to consider the **outcomes** which are likely to flow from the conduct which will be authorized. When these likely outcomes are analysed, there are no net public benefits which would arise from the authorization.

Protection from competition

- 4.4 In the NFML First Submission, NFML noted that it would be seeking in the New Agreement to phase out current arrangements that protect Distributors from competition with each other in the New Agreement, and flagged its concern that Distributors would seek to collectively negotiate terms which entrench those arrangements.⁷ For the purposes of this submission, these arrangements are referred to as the "exclusive arrangements".
- 4.5 The MVA has indicated in its Further Submissions that the exclusive arrangements are a "key issue" which it would seek to negotiate under the proposed collective bargaining arrangement.⁸ The MVA has also directly indicated to NFML that it would seek to include lists of exclusive

⁵ Draft Determination, paragraph 9.7

⁶ Draft Determination, paragraph 8.86.

⁷ Paragraph 9.3.

⁸ MVA Further Submissions, page 4, paragraph 1.12(3)

customers in a collectively negotiated contract – see the letter **attached** as Annexure A to this submission.

- 4.6 The Draft Determination states that “the proposed collective bargaining arrangements do not in themself[ves] limit the capacity for such competition to occur.”⁹ NFML disagrees with this view, and submits that the ACCC should consider the practical outcome if the authorization is framed so as to permit exclusive arrangements to be included in the terms collectively negotiated.
- 4.7 If a collective bargaining group with a significant number of NFML Distributors requires exclusive customer lists as a condition of a collectively negotiated New Agreement, the reality is that NFML would need to consider whether it needed to agree to such a term in order to secure the services of those Distributors.
- 4.8 NFML submits that collective bargaining which seeks to entrench arrangements that protect Distributors from competition with each other ought to be considered to give rise to a significant anti-competitive detriment. Such arrangements would:
- (1) interfere with the process of rationalisation by removing the motivation for Distributors who have exclusive customers to increase the efficiency of their operations and compete for customers; and
 - (2) exclude efficient Distributors who are not part of a collective bargaining group from competing for the exclusive customers of those Distributors who are part of a collective bargaining group, e.g. if a new Distributor wished to enter the market, its ability to compete for customers would be limited to the extent that those customers were already part of exclusive arrangements.
- 4.9 The ACCC should compare this to the situation without collective negotiations, in which NFML would not consider the retention of exclusive arrangements in the New Agreement (except to a limited extent to protect the position of Distributors who remain on Current Agreements whose terms overlap with the terms of the New Agreement). Any retention of exclusive arrangements could eventuate only from collective negotiations. The anti-competitive detriment flowing from this outcome would significantly outweigh the “small public benefit” which would arise merely from an improvement in the bargaining position of Distributor.
- 4.10 NFML disagrees with the view expressed in the Draft Determination at paragraph 8.55 that the proposed arrangements would not reduce incentives for Distributors to negotiate terms and conditions different from those agreed collectively. Further, the ACCC’s view in paragraph 8.63 that

⁹ Paragraph 8.53.

potential new entrants would be able to enter into separate arrangements to those collectively negotiated requires consideration of the practical outcome of authorizing conduct which would result in the perpetuation of exclusive arrangements. Put simply, the continuation of exclusive arrangements in the New Agreement would not be volunteered by NFML but may be acquiesced in by NFML, and if such arrangements are perpetuated (which would occur only as a result of the conduct which is proposed to be authorised) then Distributors, including new potential entrants, would be locked out of competing for customers who are part of the exclusive arrangements whether or not they considered it in their best individual interests to do so. There could be no off-setting public benefit whatsoever in exclusive arrangements.

- 4.11 Finally, NFML submits that the ACCC should re-visit its finding in the Draft Determination that the difference between the level of competition amongst vendors with or without the proposed arrangements would be small¹⁰ in light of the above. While it may be the case that the level of competition between Distributors is *currently* low, this arises not merely from the fact that NFML offers Distributors a contract substantially in standard form, but from the exclusive arrangements in the Current Agreement which NFML intends to phase out. Absent the exclusive arrangements which could only be perpetuated in the New Agreement as a result of the collective negotiations, there would be significantly greater incentives for Distributors to compete with each other for the right to supply customers, for the right to provide delivery services and to acquire products from NFML.
- 4.12 NFML's concerns in relation to exclusive arrangements could be addressed if the grant of the authorization is framed so as not to cover the making of any contract, arrangement, or understanding the substance or effect of which restricts competition between NFML Distributors or which otherwise itself has the purpose or likely effect of substantially lessening competition.

Price-fixing

- 4.13 NFML's concerns in relation to price-fixing are set out in paragraph 11.2 of the NFML First Submission. NFML would not engage in negotiations about price except if Distributors raise this issue during collective negotiations. The MVA Further Submissions appear to suggest that the collective negotiations will not involve discussions about price except if instigated by NFML¹¹.
- 4.14 The Draft Determination merely notes that "even where vendors are able to negotiate increases in prices paid to them as a result of bargaining collectively, competitive pressure in retail markets limit the capacity for

¹⁰ Paragraph 8.38.

¹¹ MVA Further Submissions, paragraphs 1.6, 1.10.(2).

such increases to be reflected in prices paid by consumers”¹². The Draft Determination does not consider the anti-competitive detriment which arises as a result of diverting producer (i.e. processor) resources away from efficient uses such as supporting efficient businesses, and towards inefficient uses such as supporting inefficient businesses. As noted in the ACCC’s collective bargaining issues paper:

...the possible anti-competitive effects of agreements as to price are not limited to the potential for such agreements to be reflected in higher prices to consumers. Any price increase as a result of collective bargaining would be a distortion of the market determined price. Where the cost of any increase in price the collective bargaining group is able to negotiate is borne by the other party to the negotiations, this may result in ... resource allocation inefficiencies.

No material has been advanced by the MVA which could support a finding that an increase in delivery fees would result in efficiency gains. It is noted that the ACCC has not found that any such gains would be likely to eventuate from the collective negotiations and has in fact found that no efficiency gains are likely to result from the conduct which is proposed to be authorized.

- 4.15 NFML submits that the ACCC should give further consideration to the anti-competitive detriment which would arise from an authorization for price-fixing, particularly where it is proposed that a common agent (i.e. the MVA) engage in negotiations with both major processors. In the ADFF authorization, the ACCC noted that:

Common, industry wide representation would also increase the potential for an industry wide price fixing arrangement

and declined to authorize the ADFF or any other common agent to represent collective bargaining groups. NFML suggests further conditions to limit the potential for this to occur – see paragraph 6.2.

- 4.16 NFML’s concerns in relation to price-fixing would be addressed if the authorization specifically excludes price-fixing conduct. Given that the MVA Further Submissions contemplate that any discussions in relation to price would need to be instigated by NFML, NFML would not expect this exclusion to be controversial.

Imbalance in bargaining power

- 4.17 The central issue under this Application is whether the imbalance in negotiating positions should or needs to be redressed. The Commission has in the past accepted that there may be a public benefit in equalising

¹² Paragraph 9.3

negotiating positions where a **monopoly** or **monopsony** exists, such as with chicken growers in Tasmania or dairy farmers who effectively are restricted because of geographical constraints to supplying one processor.

4.18 In the case of the milk distribution industry in South Australia, the factors which indicate there may be a public benefit in equalising negotiating positions do not exist:

- (1) NFML does not acquire the services of Distributors on a monopsony basis nor does it supply Distributors with products on a monopoly basis (notwithstanding the assertions of the MVA to the contrary). Previous ACCC collective bargaining decisions, and the ACCC collective bargaining issues paper, have focussed on an imbalance in bargaining power arising from monopoly or monopsony situations. The situation where these do not exist is materially different – for example, if a Distributor is unhappy with the terms offered by NFML, the Distributor is not prevented from seeking to enter into arrangements with other processors.
- (2) NFML would not have realistic alternative sources of access to retail markets or distribution services if a significant number of its Distributors became part of the NFML collective bargaining group. This should be compared to, for example, the Tasmanian chicken growers authorization, where the possibility of the processor importing chicken meat was considered an important constraint on the power of the collective bargaining group.
- (3) The conduct which is sought to be authorised is not, on its face, substantially different from the status quo and it is not apparent how, in the absence of a collective refusal or threat to refuse to deal, it would improve Distributor input into the New Agreement. NFML repeats that would be incorrect to accept the MVA's submissions that Distributors "have had no significant input into distribution contracts"¹³. NFML:
 - (a) made substantive changes to the Current Agreement as a direct result of negotiations with the MVA. See paragraphs 14.6 and 14.7 of the NFML First Submission; and
 - (b) has made substantive changes to the proposed New Agreement as a direct result of negotiations with other State associations. The MVA Further Submissions state that "the various state Associations delegated the task of communicating with NFML to the NSW Association".

¹³ Paragraph 8.17

- 4.19 Paragraph 8.47 states that the “ACCC is of the view that the processors are still likely to have a large degree of power in relation to the vendors, especially in light of the ongoing rationalisation of the milk distribution industry.” With respect, the rationalisation of the milk distribution industry is likely to concentrate market power in the hands of those Distributors who remain in the industry, rather than increase the relative bargaining power of NFML. It is not at all a foregone conclusion that NFML would continue to have a large degree of power in relation to the NFML collective bargaining group, particularly having regard to the MVA’s submissions that “Vendors... are, in fact, amongst [NFML’s] largest customers”¹⁴ and that its members distribute in excess of 70% of the volume of milk in South Australia.

5. Future with and without test

- 5.1 NFML does not consider that the discussion of the “with and without test” which is set out in paragraphs 8.14-8.17 of the Draft Determination adequately captures all of the relevant considerations.
- 5.2 Taking the MVA’s assertion that no collective boycott will occur at face value, and ignoring the potential for price-fixing, the situation without authorization is likely to be one in which:
- (1) the MVA continues to solicit and receive the views of its members as to the terms of the New Agreement;
 - (2) the MVA continues to represent or not represent the interests of its members by negotiating with NFML as to the terms of the New Agreement, and obtaining legal and other advice on their behalf; and
 - (3) members of the MVA continue to decide on an individual basis whether to enter into the New Agreement in the form recommended (or not recommended) by the MVA, in light of the legal and other advice obtained on their behalf.
- 5.3 The situation with authorization is, on the face of the MVA’s submissions, essentially the same as the situation without authorization, i.e. the MVA will receive instructions from its members, negotiate with NFML based on those instructions, and members of the MVA continue to decide on an individual basis whether or not to enter into the New Agreement. Neither the MVA nor the Draft Determination identify the “concerns under the Trade Practices Act” which are likely to be raised by the conduct for which authorization is sought.
- 5.4 The question which therefore arises, if Distributors do not propose to engage in collective boycott behaviour and discussions about price, is

¹⁴ MVA Further Submissions, paragraph 5.3(2)

what the authorization is intended to achieve. This should be clarified at the pre-decision conference and the final determination of the ACCC.

6. Conditions

6.1 NFML submits that the conditions which are presently proposed by the Draft Determination do not sufficiently reduce the anti-competitive detriment which would result from the conduct which is proposed to be authorized, in particular in reducing the prospect of industry-wide price-fixing arrangements.

6.2 NFML strongly submits that conditions should be imposed that:

- (1) different MVA personnel must represent the NFML collective bargaining group and the Dairy Farmers collective bargaining group; and**
- (2) legal and other professional advice in relation to the respective processor contracts must be sought from different persons.**

If such conditions are not imposed, the requirement that information obtained from one collective bargaining group must not be provided to another collective bargaining group will be ineffective to limit the de facto development of similar terms across both processors. It is noted that in the ADFF authorization, the ACCC stipulated that neither the ADFF nor any other common agent was to be used; in addition, the ACCC collective bargaining issues paper and the Draft Determination note (and NFML agrees) that the anti-competitive detriment arising from collective bargaining arrangements is reduced where there are restrictions on the representation of the collective bargaining groups.

6.3 NFML is also concerned to ensure that information about the collective negotiations and the terms of any proposed contract are not disseminated to persons other than the relevant MVA personnel and members of the NFML collective bargaining group. The condition which is set out in paragraph 10.15 of the Draft Determination merely requires the MVA to set up a mechanism for restricting the distribution of information. This is inadequate to protect the commercial position of NFML, and to reduce as far as possible the development of de facto industry-wide terms and conditions.

6.4 The conditions which NFML strongly submits should be imposed to ensure that proper ring-fencing of confidential information is maintained are as follows:

- (1) Neither:**
 - (a) MVA; nor**

(b) the MVA personnel conducting negotiations with NFML

may disclose any information, including as to contractual terms or the progress of negotiations, obtained by them in the course of collective negotiations with NFML to any other person (including any MVA personnel conducting negotiations with another processor) except NFML or a member of the NFML collective bargaining group.

(2) A member of the NFML collective bargaining group must not disclose any information, including as to contractual terms or the progress of negotiations, obtained by it in the course of collective negotiations with NFML to any person other than:

(a) the responsible MVA personnel; and

(b) other members of the NFML collective bargaining group.

(3) A Distributor who leaves the NFML collective bargaining group must not disclose any information, including as to contractual terms or the progress of negotiations:

(a) obtained by it in the course of collective negotiations with NFML to any person; and

(b) obtained by it after leaving the NFML collective bargaining group to the MVA, members of the NFML collective bargaining group, or any other person.

6.5 NFML also requests that additional procedural conditions be included to ensure that it is kept up to date as to the membership of the NFML collective bargaining group, along the following lines:

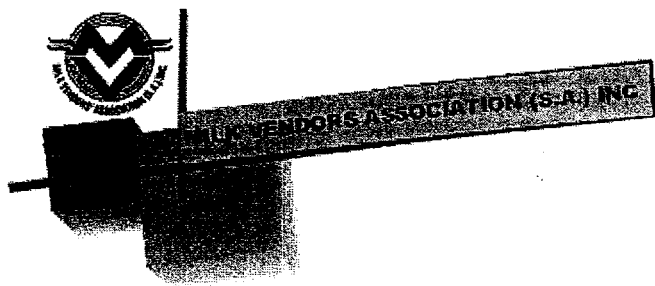
(1) MVA must nominate a deadline for informing NFML of the initial members of the NFML collective bargaining group, and provide NFML with a written list of the initial members of the NFML collective bargaining group by this date.

(2) MVA must inform NFML in writing as soon as reasonably practicable, and in any event no later than 5 business days, after a Distributor leaves or joins the NFML collective bargaining group.

(3) MVA must provide NFML with a written up-to-date list of the members of the NFML collective bargaining group within a reasonable time, and in any event no later than 5 business days, after a written request from NFML.

Annexure A

Letter from MVA to NFML



Executive Officer R. Prime
Telephone 8223 2500
Fax 8223 2789
E-Mail milkvendors@optusnet.com.au

Mr Wayne. Humphries
Distributor Manager
National Foods Milk Ltd
GPO Box 1445
ADELAIDE SA 5001

15/2/05

Dear Wayne,

I confirm my telephone conversation of the 4th Feb 05 advising you that I have had discussions with a representative of the Australian Competition & Consumer Commission in Canberra regarding the inclusion of customer lists in the new National Foods contract. He advised to his knowledge the ACCC had not had negotiations with any representative of National Foods regarding customer lists and that the ACCC would not advise National or any other Company what form a contract should or should not take.

The solicitors for National Foods made it quite clear the direction National Foods wishes to take by clause 9.1 in their submission to the ACCC opposing the Associations Authorisation for Collective Bargaining.

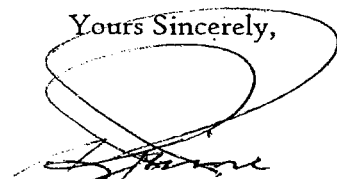
"NFML submits that milk distribution arrangements in South Australia are in the process of rationalisation because of market forces, with the strong possibility that further rationalisation will occur in the near future. The likely result of rationalisation is that there will be a reduction in Distributor 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. 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."

Without a customer list the contract is simply one of supply giving rise to any food service company to decimate the vending system. The MVA's lawyers have advised that they can see no reason why customer lists cannot be included in any new contract.

The ACCC advised the Association on Wednesday 9th February 2005 that they proposed to grant authorisation, subject to conditions noted in their draft determination, for a period of five years.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'R Prime', is written over a large, loopy circular flourish.

Roger Prime
Secretary/Manager