

MILK VENDORS' ASSOCIATION (SA) Inc

**RESPONSE TO SUBMISSION OF NATIONAL FOODS MILK LIMITED
DATED 18 MARCH 2005**

1. The characterization of the proposed conduct as conduct capable of involving an exclusionary provision within the meaning of Section 4D(c) (National Foods submission para 3.1).
2. Under Section 4(D), a provision of an agreement, or the proposed agreement, is an exclusionary provision if :
 - the agreement was made, or is to be made, between parties “any two or more of whom are competitive with each other”;
 - the provision of that agreement or proposed agreement has the purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons (in particular circumstances or particular conditions).
3. The National Foods submission confuses the concept of a proposal which may be made in the negotiation process with a provision of an agreement or a proposed agreement.
4. The National Foods submission does not address the required purpose, namely that of preventing, restricting or limiting supply or acquisition. That purpose is to be determined subjectively. No such purpose is evident in the hypothetical scenario sketched by National Foods at para 3.2 and discussed at para 3.3.
5. The concern of National Foods (see submission para 1.3 (2)(a) to ensure that “ the possibility of industry wide terms and conditions developing is minimized “ is misplaced. The current, pre-authorization, situation is that uniform industry wide terms and conditions have been imposed by National Foods. The proposed new National Foods contract seeks to impose such terms and conditions nationally.
6. The proposed arrangements will not lead to the anti-competitive detriments asserted at para 4.8 of the National Foods submission.
7. There will be no interference with the process of rationalisation as there will be no change to the *status quo ante* in terms of listed customers and

defined retail areas. In seeking to discontinue the inclusion of listed customers in defined areas, National Foods seeks to advance its own interest on its own terms without compensation to vendors.

8. The proposed arrangements would not lead to the exclusion of efficient distributors as alleged at para 4.8(2) of the National Foods submission. Distributors who are not part of a collective bargaining group would not necessarily be subject to any contractual provision preventing them from soliciting business from the listed customers (or from within the defined territories) of members of the bargaining group.
9. In the same paragraph, the submission erroneously refers to customers who are “part of exclusive arrangements”. Customers are not and have never been party to any such agreements. Customers have always retained, and will retain, the right to deal with the vendor or vendors of their choice.
10. National Foods now asserts (paragraph 4.9 of its submission) that it will not consider the retention of exclusive arrangements on the basis that such arrangements create an anticompetitive detriment. This is contrary to National Foods’ earlier submissions (for example, in Notification) to the effect that such exclusive arrangements are, in fact, pro-competitive.
11. Once again, at paragraph 4.10 of the submission, National Foods misstates the position in relation to potential entrants. Such entrants would not be “locked-out of competing for customers who are part of the exclusive arrangements” because,
 - Their contracts would not necessarily contain such exclusive provisions; and
 - The customers are not, have never been and will not be party to such arrangements. Consequently, customers would be entitled to deal with any such new entrant.
12. At paragraph 4.14 of its submission, National Foods cites the ACCC’s collective bargaining issues paper in support of its contentions in relation to the anticompetitive effects of price agreements.
13. It should be noted that references to markets and “market determined price” in the issues paper are references to properly functioning competitive markets. Presently, the market for the supply to vendors of white milk and dairy products in South Australia is not a competitive

market. Hence, the analysis presented in the bargaining issues paper is inapplicable and its inclusion in the National Foods submission is misleading.

14. Contrary to the assertions at para 4.18(2) of the submission, National Foods may access a wide range of alternative distribution services from any person or entity who complies with the requirements of the Dairy Industry Act and is Cold Chain compliant.
15. Contrary to the assertions in para 5.2 of the submission, the association does not obtain legal advice “on behalf” of any of its members. It has, from time to time, sought advice in its own right. Similarly, in negotiating with National Foods, the Association has acted in its own right and not “on behalf” of any of its members.
16. In contrast, under the proposed arrangements, the Association would negotiate on behalf of those of its members and non-members who choose to appoint it to do so.
17. As National Foods is aware, the Association proposes that separate bargaining groups deal with National Foods and Dairy Farmers. Each bargaining group will comprise several vendors and a secretary. Mr Roger Primce, the Secretary of the Association, will act as Secretary to both bargaining groups. This mirrors the existing provisions in relation to the representations described in paragraph 12 above, of which National Foods is well aware and in relation to which it has made no complaint.
18. Given that legal and professional advisers are bound by obligations of confidentiality in relation to all of their clients, the Association can see no reason for the imposition of a condition such as that proposed para 6.2(2). Given the very different business models followed by National Foods on the one hand and dairy farmers on the other, the Association submits there is no realistic possibility or “the de facto development of similar terms across both processes”.
19. In relation to the proposal at sub-para 6.5 of the National Foods submission, the Association has no objection to the proposals at sub-paragraphs (1) (2). Given that those requirements will be complied with, sub-paragraph (3) would appear to be redundant. The Association therefore opposes their proposal.