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1 April 2005

By email: michael.green@acc.gov.au
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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
Application for authorization A90972 (Application)**

We act for National Foods Milk Limited.

We refer to the pre-decision conference on Tuesday, 22 March 2005 and, as agreed, now enclose our client's summary of its position in relation to the Application.

Please do not hesitate to contact me to discuss this matter.

Yours faithfully

Richard Lewis
Partner
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**APPLICATION FOR AUTHORIZATION BY
MILK VENDORS' ASSOCIATION (SA) INC A90927**

**NATIONAL FOODS MILK LIMITED
SUMMARY OF POSITION
1 April 2005**

- The authorization should not be granted because the anti-competitive detriment it will cause outweighs any marginal public benefit which it might cause. The ACCC should consider the practical outcomes which would result from the collective negotiations.
 - Arrangements which restrict Distributors from competing with one another could only result from collective negotiations by the Distributors. Notwithstanding that NFML may have to acquiesce to such restrictions in order to secure the services of Distributors, such arrangements would be anti-competitive and significantly outweigh any marginal public benefit resulting from the authorization of collective negotiations.
 - The MVA's submission that the inclusion of exclusive customer lists in a collectively negotiated contract would not restrict new entrants or Distributors who are not party to the collectively negotiated contract from competing for listed customers is confused. The contracts agreed by NFML with new entrants or Distributors who are not party to the collectively negotiated contract would need to reflect restrictions on Distributors soliciting the exclusive customers of other Distributors, otherwise NFML would be open to arguments that it is in breach of the collectively negotiated contract.
- If granted, the scope of the authorization should be clarified to ensure that the authorization is granted only to the collective negotiation conduct itself, and not to any contractual terms which might themselves contravene the Trade Practices Act.
- NFML still does not understand why an authorization is necessary or how it would improve the position of Distributors. If Distributors and the MVA do not propose to engage in conduct amounting to an exclusionary provision (a breach of section 45(2)(a)(i)) or price-fixing (deemed to be a breach of section 45(2)(a)(ii)), what is the conduct in which they are proposing to engage which could be said to "have the purpose or ... likely effect, of substantially lessening competition" in terms of section 45(2)(ii)? Unless the potential breach is identified, the potential anti-competitive detriment cannot be properly assessed. If there are no reasonable grounds for the MVA to consider that it or Distributors would be in breach of the Act, there would be no public benefit arising from an authorization.
- If the ACCC decides to grant authorization the following additional conditions should be imposed:

Geographical condition

- (1) 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.

Ring-fencing of information

- (2) Different MVA personnel must represent the NFML collective bargaining group and the Dairy Farmers collective bargaining group.
- (3) Legal and other professional advice in relation to the respective processor contracts must be sought from different persons.
- (4) Neither:
 - (a) MVA; nor
 - (b) the MVA personnel conducting negotiations with NFMLmay 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.
- (5) 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.
- (6) 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, advisers of the MVA or the NFML collective bargaining group, members of the NFML collective bargaining group, or any other person.

Information about membership of collective bargaining group

- (7) 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.
- (8) 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.
- (9) 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.

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- The detailed reasons for NFML's submissions are set out in NFML's written submissions of 22 October 2004 and 18 March 2005.
