



**Australian
Competition &
Consumer
Commission**

Our Ref: A90961 & 90962
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22 March, 2005

Dear

**Applications for Authorisations A 90961 & A90962
lodged by Dairy Western Australia Ltd (Dairy WA)**

The Australian Competition and Consumer Commission (the ACCC) has received an application for authorisation from Dairy Western Australia Ltd (Dairy WA) in relation to a proposed collective bargaining / collective boycott arrangement for Western Australian dairy farmers. The proposal relates to the supply of milk by members to processors and retailers.

The purpose of this letter is to seek your comments in relation to the Dairy WA proposal as a potentially interested party.

By way of background, the ACCC is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from the Act for anti-competitive conduct in certain circumstances.

Authorisation is a process whereby the ACCC, in response to an application, has the power to grant immunity from court action for arrangements or conduct which might otherwise be in breach of the Act. In order to grant authorisation the ACCC must be satisfied the public benefit arising from the arrangements outweighs any anti-competitive detriment. The authorisation process is conducted in an open and transparent manner – submissions from applicants and interested parties are generally publicly available from the ACCC's website, as is further general information regarding the authorisation process (www.accc.gov.au).

An outline of the Dairy WA proposal is provided for your information at attachment A, a copy of the submission provided by Dairy WA in support of the application is also enclosed.



Request for submissions

To assist the ACCC in assessing this application you are invited to provide comments in relation to the application, in particular your view is sought as to the likely benefits to the public and the potential effect on competition of the proposed arrangement.

In this respect I note that Dairy WA has submitted that the following public benefits are likely to flow from the proposed arrangements:

1. improved bargaining power for small producers;
2. significant transaction cost saving, particularly in the area of transport costs and providing better economies scaled to processes;
3. the re-distribution of current monopsony profits;
4. easing the transition to industry deregulation;
5. improving the viability of small dairy farming businesses; and
6. opening up new marketing opportunities by co-ordinating the supply of dairy farmers' milk negotiating agency.

If you intend to provide a submission in relation to Dairy WA's application for authorisation, I would be grateful if you could do so by **15 April 2005**.

Interim authorisation

Dairy WA has requested that the ACCC grant 'interim' authorisation to these arrangements. In particular Dairy WA has sought interim authorisation to allow:

1. the establishment of the Milk Negotiation Agency;
2. the Milk Negotiation Agency to enter into preliminary negotiations with processors seeking to enter new contracts;
3. the Milk Negotiation Agency to enter into discussions with processors in relation to proposed unilateral changes to ongoing contracts;
4. the Milk Negotiation Agency to enter into negotiations with transportation and milk testing companies, in particular obtaining estimates/quotes; and
5. Dairy WA to take steps to put milk on the interstate spot market.

In simple terms, interim authorisation allows parties to engage in the proposed conduct while the ACCC considers the substantive merits of the application. The ACCC has previously stated that it is unlikely to grant interim authorisation where to do so would permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if authorisation is later denied, unless there are special circumstances.

The ACCC is also seeking comments from interested parties regarding Dairy WA's request for interim authorisation. I note that ACCC generally seeks to complete its assessment of an application for interim authorisation within one month of receiving the application. With this in mind, should you plan to make comment on the application for interim authorisation, I would appreciate if you could do so by **4 April 2005**.

General information

The ACCC asks for submissions to be in writing so that they can be made publicly available. Submissions are placed on a public register and may also be placed on the ACCC's website. The ACCC may, where appropriate, supplement written submissions with discussions with relevant parties on a mutually convenient basis.

Should you lodge a submission with the ACCC you may request that information included in the submission be treated as confidential and not placed on the public register or the ACCC's website. The ACCC may take confidential information into account during its assessment of an authorisation application. Guidelines for seeking confidentiality are attached for your information ([attachment B](#))

Should you wish to lodge a submission, please address it to:

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Submissions can also be lodged by email to adjudication@acc.gov.au, or by facsimile on 02 6243 1211.

Should you have any queries or if you wish to discuss any aspect of this matter please do not hesitate to contact Siobhán O'Gara on (08) 9325 0608 or Susan Philp on (02) 6243 1354.

Yours sincerely

Scott Gregson
A/g General Manager
Adjudication Branch

Summary of the Applications for Authorisation lodged by DAIRY WA¹

Overview of Dairy WA

Dairy WA is an unlisted public company, the majority of current dairy farmers in Western Australia are shareholders. Dairy WA's role is to make strategic commercial investments that will strengthen the Western Australian Dairy industry and improve the stability, viability and profitability of dairy farmers in Western Australia in a manner consistent with its corporate responsibilities.

In September 2004 Dairy WA was appointed to undertake the role of establishing a Milk Negotiating Agency (MNA), it is seeking authorisation from the ACCC in relation to a number of proposed functions of the MNA, these functions are set out below.

Collective bargaining arrangements

'Collective bargaining' refers to an arrangement whereby multiple competitors in an industry come together, either directly or through a representative, to negotiate the terms and conditions of supply with another, usually larger, business. Arrangements whereby competitors come together to discuss and agree on fees and other conditions for the supply or acquisition of goods and services in markets in which they compete, or seek to negotiate collectively on those agreed terms, are likely to breach the *Trade Practices Act 1974*. Parties may however seek 'authorisation' (immunity) for such arrangements on public benefit grounds.

The collective bargaining arrangements for which Dairy WA has sought authorisation are:

- (i) Dairy WA proposes to establish a collective bargaining group (a Milk Negotiating Agency) open to all WA dairy farmers who appoint it to negotiate and enter into contracts for the supply and in certain circumstances the delivery of their milk to processors or retailers. Dairy WA anticipates that the arrangements will create improved economies of scale and encourage improved efficiencies in the WA dairy industry particularly in the area of transport and the provision of milk supply to the closest processing plant.
- (ii) Dairy WA proposes to negotiate on behalf of the WA dairy farmers who have authorized it to do so and enter into contracts with any retailer or processor willing to negotiate with it for the purchase of that milk. It is proposed that each negotiation would take place separately at the conclusion of the dairy supply contracts that are currently in force.
- (iii) Property in the milk does not pass to Dairy WA it is an agency arrangement for the negotiation, sale and where agreed by the parties, the delivery of milk.
- (iv) Dairy WA proposes to enter into voluntary written agreements with dairy farmers in WA to collectively negotiate supply contracts for their milk. It is anticipated that these agreements will be individualized in relation to their terms and conditions based on the requirements for the supply of milk and any special conditions agreed with the dairy farmer, for example 5 day or 7 day supply, transport arrangements, option to supply additional milk should new contracts become available, as well as pricing arrangements.
- (v) Dairy WA proposes to enter into individually negotiated agreements with processors or retailers for the supply of milk collectively owned by WA dairy farmers who have authorized it to do so in writing. It is anticipated that each contract would be individualized based on the agreed outcome of the negotiations.

¹ The information contained in this document is taken from the applications made to the ACCC by Dairy WA on 16 March 2005.

- (vi) Dairy WA may arrange for transport services for milk on behalf of WA dairy farmers who have authorized it to do so, where contracts negotiated with processors or retailers permit a choice of transport services.
- (vii) Dairy WA may arrange access for WA dairy farmers to independent testing facilities for milk for the purpose of complying with standards and quality requirements under the supply agreement entered into by Dairy WA on their behalf with processors.
- (viii) If WA dairy farmers have established a tolling arrangement for the processing of their milk products, Dairy WA proposes, if authorized to do so by them in writing, to negotiate and contract for the sale and delivery of those products on those WA dairy farmers behalf. Dairy WA during the term of the authorisation, will not undertake milk processing or sales to retail customers.

Collective boycott arrangements

In addition to the collective bargaining arrangements, Dairy WA has also sought authorisation to allow its members to engage in 'collective boycotts'. Parties engaging in collective negotiation may also seek to collectively agree not to acquire goods or services from, or supply goods or services to, a business with whom they are negotiating, unless that business accepts the terms and conditions of acquisition or sale offered by the collective bargaining unit. This is often referred to as a 'collective boycott'.

The collective boycott arrangements for which Dairy WA has sought authorisation are:

- (ix) Provisions preventing a dairy farmer who has authorized Dairy WA in writing to act on their behalf from negotiating directly or entering directly into contracts with processors or retailers without the consent of Dairy WA. It is intended that the contract entered into by dairy farmers with Dairy WA is to be binding and exclusive. Non-compliance to result in collective boycott of that processor or retailer by other dairy farmers contracted to Dairy WA.
- (x) Provisions to permit Dairy WA or dairy farmers who have authorized Dairy WA in writing to negotiate and enter into contracts for supply on their behalf, to refuse to supply processors where no current contract is in place.
- (xi) Provisions to permit WA dairy farmers who have appointed Dairy WA as their agent may refuse to supply processors where no current contract is in place or where there is changes to the terms and conditions and price offered by a processor that has not been agreed with Dairy WA and the processor seeks to enforce the contract with the dairy farmer.

Other details of the proposed MNA arrangement

- (xii) Authorisation is sought by Dairy WA for an initial period of 5 years to allow Dairy WA to negotiate with processors or retailers on a processor-by-processor and retailer-by-retailer basis on behalf of WA dairy farmers who authorize it to act on their behalf for the supply of milk.
- (xiii) It is anticipated that each contract between Dairy WA and a processor or retailer would be individual based on the agreed outcome of the negotiations in relation to terms conditions and price. In some circumstances Dairy WA may also arrange for testing or delivery if those terms are included in the contract.
- (xiv) Dairy WA will separately negotiate contracts for the supply of milk from WA dairy farmers who authorize it to act on their behalf. It is not intended that there be a direct relationship between the dairy farmer and any particular processor as the terms and conditions of supply would be between the Agency and the processor.

- (xv) Dairy WA intends that the agency arrangements be open to all dairy farmers in WA given the small and declining number of dairy farmers remaining in the industry.

Parties covered by the Dairy WA arrangements

Dairy Farmers- Dairy WA is seeking authorisation to allow all present and future dairy farmers in Western Australia who enter an agreement to appoint Dairy WA (or a body established by it for that purpose), to collectively negotiate with dairy processors or retailers in Western Australia, Australia and internationally, on their behalf.

Dairy Processors- including:

- a) Peters and Browns Limited;
- b) National Foods Milk Limited;
- c) Harvey Fresh Pty Limited;
- d) Challenge Co-operative Limited;
- e) Challenge Australian Dairies Pty Ltd;
- f) Casa Dairy Products;
- g) Mundella Foods Pty Ltd; and
- h) Harvey Cheese.

Retailers – including:

- i) Woolworths Limited;
- j) Coles Supermarkets Australia Pty Ltd; and
- k) Foodland Associated Limited.

Dairy WA has sought authorisation for arrangements that may be entered into in the future with any other dairy processor or retailer – the arrangements are not intended to be limited to only the abovementioned dairy processors and retailers.

GUIDELINES FOR CONFIDENTIALITY CLAIMS

The process whereby the Commission assesses applications for authorisation or notification is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the Commission to maintain a public register in respect of authorisation and notification applications.

Applicants and interested parties can request that a submission, or part of a submission, be excluded from the public register.

The Commission is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or process;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

However, even if a document does not meet these technical requirements, the Commission may still grant confidentiality where, in the Commission's view, it is desirable to do so.

The Commission also has the discretion, under s89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the Commission:

- (a) where the request is that a whole document be excluded, the words "**Restriction of Publication Claimed**" should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words "**Restriction of Publication of Part Claimed**" should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

Applicants, as a matter of course, should remove headers claiming "confidential communication" from all Emails and otherwise, unless they have a particular piece of information that they justify to the Commission deserves exclusion from the public register. If confidentiality is not requested but a header cannot be removed, it should be clearly stated at the beginning of the communication that confidentiality is not requested.

If the Commission denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the Commission will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the Commission will return the original material and destroy all associated copies. The Commission will not consider this material when reaching its decision.

If the Commission does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the Commission pursuant to its powers generally under the *Trade Practices Act*.

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