



Coles Myer Ltd.

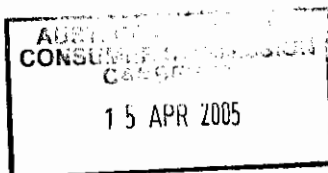
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**Coles Myer Ltd.**

A.C.N. 004 089 936

15 April 2005

Mr Scott Gregson  
Acting General Manager – Adjudication Branch  
Australian Competition and Consumer Commission  
470 Northbourne Ave  
DICKSON ACT 2602

By Facsimile (02) 6243 1199

Dear Mr Gregson,

**Application for Authorisations A90961 & A90962 lodged by Dairy Western Australian Ltd (Dairy WA)**

Further to our letter of 4 April opposing the interim authorisation for the Dairy WA application please find below our complete response.

**Dairy farmers collective authorisation A90782 effective until 1 July 2005**

Coles Myer Ltd (CML) strongly objects to the current applications A90961 & A90962 (the Applications) by Dairy WA for collective negotiation by the proposed Milk Negotiation Agency (MNA). CML's view is that the Applications would bring no public benefits.

In our view the Applications do not reflect the main principles required to preserve competition as determined on 12 March 2002 by the Australian Competition and Consumer Commission (ACCC) in authorisation A90782: *"The Commission, in its determination granting authorisation, acknowledged that significant anti-competitive effects, including those identified by National Foods Limited, would likely result from the proposed conduct. However, in an effort to alleviate those anti-competitive concerns to the point where authorisation was appropriate, the Commission imposed eleven conditions on the authorisation pursuant to s 91 (3) of the Act.*

The Australian Competition Tribunal (ACT) further reinforced this view when giving reasons for its decision on the matter on 16 August 2002. The ACT decision varied the eleven conditions originally imposed under the ACCC determination and in doing so imposed further limitations on the authorised conduct. In CML's view these conditions were and still are fundamental criteria that spell out how real competition between any collectives would be preserved in the designated geographic markets.

It is CML's view that the Applications do not recognise the need stated by the ACCC in its media release of 20 August 2002 *"to ensure that any collective negotiations between farmers do not significantly affect the price consumers pay for milk"*. More importantly, it is CML's view that the Applications also do not

address the terms imposed by the ACT in its determination regarding authorisation of dairy farmer collectives in 2002. Key aspects of this determination are set out below:

*2. Subject to conditions C1 to C12 in paragraph 3 of this determination:*

- (a) groups of dairy farmers are authorised to form collective bargaining groups through which they may collectively negotiate terms of supply, including pricing, with a dairy processing company that each member of the group wishes to supply; &*
- (b) the ADFF is authorised to hold general, non-specific, discussions with supermarkets, on an individual and voluntary basis, regarding the impact of tender processes on dairy farmers.*

CML notes that item 2(a) of the ACT determination restricts any collective (which has been formed to conduct terms or pricing negotiations) to conducting such discussions with dairy processing companies. It does not permit negotiations with retailers. Further, condition 2(b) clarifies that any discussions with supermarkets can only be voluntary and of a general, non-specific basis regarding the impact of tender processes on dairy farmers.

Item 3 of the ACT determination set out more stringent conditions to ensure that any collectives formed by dairy farmers and their agents would not be anti-competitive. The most significant of these are set out below:

*C1 ADFF or any other common agent (including a farmer) is not to be involved in price and supply negotiations between dairy farmers and dairy processing companies.*

*C2 Collective bargaining groups can only be formed by dairy farmers that have a "shared community interest". Dairy farmers will have a shared community interest for the purposes of this authorisation where they have a common interest in being long-term suppliers acceptable to the processor concerned and satisfy one of the following criteria:*

- (a) the dairy farmers all have similar supply patterns and are all located within a distance in which milk can economically be delivered to a processor's plant;*
- (b) the dairy farmers supply a specialty raw milk product.*

*For the purposes of C2 there are two general categories of "supply patterns":*

- seasonal supply; and*
- all year round supply.*

*C3 Dairy farmers that satisfy one of the criteria in C2 can form cross-regional collective bargaining groups, however these groups must not comprise all of the dairy farmers that operate within any of the following regions: Far North, Central or Southeast Qld; Northern, Central or Southern NSW; Western, Eastern or Northern Victoria; South Australia; Western Australia and Tasmania.*

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It is CML's view that the Applications would permit conduct which would be in breach of all three of these significant conditions:

- C1 - WA Dairy, through MNA, would be acting as a common agent for all participating WA dairy farmers,
- C2 - In CML's view it is unlikely that all the dairy farmers in a geographic state as large and climatically diverse as WA would meet the shared community interest criteria and satisfy one of either sub-conditions (a) or (b) above;
- C3 - This condition does not permit all WA dairy farmers in the geographic region of WA from being in the one collective.

**Responses to the summary of the Applications for Authorisation lodged by Dairy WA (as provided by the ACCC as attachment A)**

**Collective bargaining arrangements**

- (i) CML has a direct commercial relationship with the processors. We therefore do not foresee a situation where an MNA could negotiate and enter into contracts for supply and, in certain circumstances, the delivery of milk to retailers. We note that delivery arrangements for milk are undergoing significant rationalisation and change as retailers begin to implement world-class self-distributing supply chain processes.
- (ii) As noted in (i) above, Dairy WA would not be in a commercial relationship directly with CML. It would therefore not be in a position to negotiate price and supply terms with CML.
- (iii) CML has no specific comment on this matter.
- (iv) CML has no specific comment on this matter.
- (v) As noted in (i) above, CML only has a direct commercial relationship with processors (and not with dairy farmers). CML will therefore not enter into individually negotiated agreements with Dairy WA.
- (vi) Based on our current arrangements, CML does not envisage any circumstances where Dairy WA would arrange for deliveries of milk from processors to CML outlets.
- (vii) CML has no specific comment on this matter. Issues to do with testing facilities would be a matter for the appropriate regulatory authority and processors.
- (viii) This issue appears to be relevant to the processing of milk and to negotiating and contracting for the sale and delivery of those products on behalf of WA dairy farmers. The commitment not to undertake sales to retail customers is perplexing. We find it hard to envisage any circumstance where Dairy WA would be able to sell (or undertake milk processing) directly to retailer customers.

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**Collective boycott arrangements**

- (ix) As noted above, CML does not deal directly with dairy farmers. Nevertheless we would be concerned that this particular request would restrict individual dairy farmers from removing themselves (over a significant period of time) from an agreement which may prove no longer satisfactory. WA Dairy does not volunteer details of the basis on which dairy farmers would authorise it "to act on their behalf".

We are also significantly concerned regarding the proposal that other dairy farmers contracted to Dairy WA could collectively boycott a processor or retailer where an individual recalcitrant dairy farmer breached its arrangements with Dairy WA. This proposal (resulting from the actions of one dairy farmer) is out of proportion and should be denied.

- (x) CML has no specific comment on this matter.  
(xi) CML has no specific comment on this matter.

**Other details of the proposed MNA arrangement**

- (xii) As noted above, there would be no direct commercial relationship between CML and Dairy WA.
- (xiii) No contract with Dairy WA can exist, as CML cannot negotiate any terms, conditions or prices with a party with whom it has no direct commercial relationship.
- (xiv) CML has no specific comment on this matter.
- (xv) The Applications contemplate that the arrangements be open to all dairy farmers in WA. This is requested on the basis that there is a "small and declining number of dairy farmers". We note this in the context that there is a large production volume of ~400 million litres. There may be dwindling numbers of farmers, but increased size and therefore bargaining power of individual farmers.

**Public Benefits**

In their submission (pages 23 –30) Dairy WA has submitted a list of claimed public benefits that are likely to arise from the proposed arrangements.

1. Improved bargaining power – It is difficult for CML to see how improved bargaining power of a single collective for the state of WA could be seen as a public benefit. In our view, if approved, the Applications could result in increased cost prices from dairy farmers (resulting, amongst other things, from boycott authorisations) which may ultimately be passed on to consumers. It is our view that Dairy WA has incorrectly asserted without any factual basis that processors and supermarkets are siphoning off all the surplus profit. The claims in relation to retail margins are denied by CML. It is our understanding that, in the ACCC's own findings in relation to retailer milk margins, this was proved not to be the case - with the benefits

of deregulation and lower farmgate prices for milk flowing directly to consumers and indirectly more generally to the economy.

2. Transaction cost savings –CML does not have any insight into the opportunities for transport cost savings. However, we again query whether this could be claimed as a public benefit. Whatever savings are made with a more efficient transport service are likely and expected to flow to the particular dairy farmers who can take advantage of consolidated loads and not the public generally. It is accepted that there may be some localised community benefit that flows from keeping small farms in the Great Southern area operating in the short term but it is questionable whether these farms can compete for the market that is available either in WA, interstate or overseas for drinking milk, manufactured dairy goods or ingredients over the longer term.
3. Redistribution of monopsony profits – As outlined above, there are no monopsony profits available from CML retail for re-distribution. In any event, we are perplexed as to how this could lead to a public benefit. The Dairy WA submission relates anecdotal evidence which points to claimed monopsony profits earned by the dairy processors in WA being reduced to some extent by the competitive process, having been competed away in the form of lower prices to supermarkets and subsequently consumers. Dairy WA asserts that current information available to them does not support this contention. However, in their view, it is not an unreasonable assumption.

Clearly CML cannot speak on behalf of processors but our pricing (particularly for Housebrand milk) shows that consumers today are still achieving the benefits of deregulation despite the surcharge to them of the 11c a litre Dairy Industry Adjustment Levy. As noted above, there are no additional profits being made by CML to distribute. In our view, therefore, if a monopoly negotiating agency extracted better returns to farmers from cost increases rather than productivity/efficiency gains, these would result in increased prices to consumers.

CML notes it is not an expert on regional farm production costs, volumes produced or seasonal flow and the eventual dispersal of these volumes to the three market segments of fresh drinking milk, manufactured dairy foods and ingredients either for domestic or overseas consumption. Despite this, we cannot agree with the proposition put by Dairy WA that the slight fall in production since deregulation means there is already a shortage of milk in WA and that if unchecked there will be a dramatic fall in supply resulting in a need to import products from other States.

The question of the competitiveness of production and sustainability of the current ~ 400m litre production volume in WA versus the output from the strong dairy states of SA, Vic & Tas has been extensively canvassed in the WA Economics and Industry Standing Committee Report No 8 in 2003. The

Committee said in Chapter 4 under Reforms to enhance the Sustainability of the Dairy Industry it saw two possible futures:

*"the first is to adopt a domestic market focus that would see production contract to the 150 to 200m litre required for domestic consumption; or, the second to build on the State's existing dairy export capacity to enable growth by the industry and individual businesses"*

CML agrees with the report that the future for WA Dairy is in gaining export growth in high value markets for the surplus milk in WA. It is not in the collective bargaining proposal set out in the Applications.

4. Easing the transition to industry de-regulation – Dairy WA acknowledges in its submission that there was, (and CML contends still is) an oversupply of raw milk in WA. This is possibly because of the use in some instances of a single pricing policy by some processors. However CML does not believe Dairy WA has demonstrated how the activities proposed in easing the transition to industry de-regulation would deliver a public benefit. It is our view that the primary aim of the Applications is to seek out and obtain better prices and terms and that increased prices will inevitably flow on to consumers.
5. Improving the viability of small dairy farms – The WA Standing Committee report noted that the largest 40% of WA dairy farms produce more than 80% of the State's milk. The report went on to say a movement towards a domestically focussed industry could see the State's total milk requirement satisfied by fewer than 80 farms. CML understands and has empathy with the small dairy farmers who have become un-viable since de-regulation. However consumers will pay up to \$1.8 billion nationally in the levy to support dairy farmers and communities with structural adjustment. We concur with the Committee report that the only way forward to support farmers who wish to remain in the WA dairy industry is to increase returns through the development of high value export markets.
6. Opening up new markets - Dairy WA does not need authorisation to seek out new markets for its members' production locally, interstate or possibly overseas. CML does not understand why this seeking out of new markets has not already occurred in the 5 years since de-regulation of farmgate prices. This apparent lack of success in opening up new markets is surprising given this was the alternative direction to contraction outlined in 2003 by the WA Standing Committee and was seen as a way to preserve and ultimately grow the annual production volume of 400m litres. This apparent lack of success in opening up new markets sits in contrast to the claimed competitiveness with the large dairy States of SA, Vic & Tas.


Thank you for the opportunity to follow up our interim letter with the detailed responses to you letter in this submission. However there is one particular matter concerning supermarkets (that arises on page 17 of the Dairy WA submission) that we would like to clarify for the Commission. CML confirms that we do have

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with our WA processor a requirement that all our WA Housebrand milk is derived from sustainable WA sources. CML advises the Commission that this should not be interpreted that our contracted processor is responsible for the sustainability of all dairy farms in WA.

In closing, CML most strongly objects to the authorisation application in its current form. If any further information or clarification is required please contact Ted Moore at 03 9829 5391 or [ted.moore@colesmyer.com.au](mailto:ted.moore@colesmyer.com.au)



Yours faithfully,

Ted Moore