

**Australian Competition
&
Consumer Commission**

PRE-DECISION CONFERENCE

Minutes

**Authorisation A90927
lodged by the Milk Vendors' Association (SA)**

22 March 2005

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

Pre-Decision Conference: Authorisation A90927 lodged by Milk Vendors' Association (SA)

22 March 2005
ACCC Adelaide office
14th floor, 13 Grenfell St, Adelaide

Attendees:

Australian Competition and Consumer Commission

Ms Louise Sylvan, Deputy Chair
Mr Gavin Jones, Director Adjudication Branch
Mr Michael Green, Project Officer Adjudication Branch

Interested Parties

Mr Roger Prime, Executive Officer, Milk Vendors' Association (SA)
Mr John Royle, Royle and Co Lawyers
Mr Geoff Byrne, Group Executive, Sales, National Foods Milk Limited (NFML)
Mr Gary McMahon, National Distributor Manager, NFML
Mr Wayne Humphries, State Distribution Manager, NFML
Ms Yi Foong Ng, Lawyer, Deacons
Mr Brett Wright, Group Secretary and Legal Officer, Dairy Vale Foods Limited (Dairy Farmers)
Mr Greg Byers, Franchise Development Manager, Dairy Farmers
Mr Andrew Severin, State Franchise Business Manger – SA, Dairy Farmers
Ms Alison Meares, Partner, Addisons Lawyers
Ms Marilyn Hidvegi, C & M Hidvegi
Mr Charlie Igllo

Conference commenced: 2:15pm

Introduction

Deputy Chair Louise Sylvan welcomed attendees, made some introductory remarks outlining the purpose of the conference, declared the pre-decision conference open and invited the party that called the conference, Mr Geoff Byrne, on behalf of National Foods Milk Limited (NFML), to make an opening statement.

Opening Statements

Mr Geoff Byrne noted NFML's written submission in response to the draft determination, submitted to the ACCC on 18 March 2005.¹ Mr Byrne stated that NFML had a good relationship with the Milk Vendors' Association (SA) (the MVA) and given this relationship, questioned the motivation behind the application for authorisation. Mr Byrne noted that the MVA has stated that it does not intend to

¹ Copies of this submission, 'National Foods Milk Limited – Further response to application for authorisation by Milk Vendors' Association (SA) Inc A90927', are available on the ACCC's public register.

include a collective boycott in the proposed arrangements or to negotiate over price. Mr Byrne stated that the reason for the application may be that the MVA is seeking to maintain exclusive customer lists in vendor contracts. Mr Byrne stated that NFML has had discussions with milk vendor associations Australia wide which have resulted in a nationally agreed contract which is currently being implemented and does not include exclusive customer lists. NFML considers that the continued inclusion of exclusive customer lists in vendor contracts will result in public detriment.

More generally, Mr Byrne questioned what conduct, other than that which it already engages in as the representative body for its members in discussions with processors, the MVA intends to undertake which would require authorisation.

The Deputy Chair asked Mr Roger Prime, on behalf of the applicant, the MVA, if he wished to address the conference.

Mr Roger Prime provided a written submission on behalf of the MVA.² Mr Prime clarified that the MVA is not seeking authorisation to collectively boycott and is not seeking to negotiate with the processors regarding prices. However, he noted that the MVA would be willing to discuss prices if NFML wished to do so. Mr Prime stated that the MVA supports the ACCC's draft determination and considers that it has addressed all the concerns that have been raised by the processors.

The Deputy Chair asked Mr Brett Wright, on behalf of Dairy Vale Foods Limited (Dairy Farmers), if he wished to address the conference.

Mr Brett Wright noted that Dairy Farmers has had a franchise system in South Australia since 2001. Mr Wright explained that Dairy Farmers has 40 vendors in South Australia and only a small number of these are MVA members. Mr Wright stated that Dairy Farmers disagrees with the public benefits accepted by the ACCC in its draft determination – improved input into contract terms and conditions and limited transaction cost savings – and also disagrees with the MVA's submission of a public benefit in the form of the continued viability of the independent distribution sector. Mr Wright maintained that Dairy Farmers' franchise system already allows for the realisation of these three benefits.

The Deputy Chair asked Ms Marilyn Hidvegi if she wished to address the conference.

Ms Marilyn Hidvegi provided a written submission.³ Ms Hidvegi stated that she supports the position of the MVA and the ACCC's draft determination. Ms Hidvegi stated that bargaining power between vendors and processors is highly unequal, favouring the processors, and needs to be more balanced.

The Deputy Chair asked Mr Charlie Iglío if he wished to address the conference.

Mr Charlie Iglío stated that he agreed with Ms Hidvegi's comments. Mr Iglío stated that he had recently signed a franchise agreement with Dairy Farmers. Mr Iglío

² Copies of this submission, 'Milk Vendors' Association (SA) Inc – Response to submission of National Foods Milk Limited dated 18 March 2005', are available on the ACCC's public register.

³ Copies of this submission, dated 22 March 2005, are available on the ACCC's public register.

contended that although he had wanted changes made to the agreement, because of his bargaining power relative to that of Dairy Farmers, he was compelled to accept the terms they were offering.

The Deputy Chair opened the conference for discussion and invited additional questions in relation to the issues raised.

Ms Hidvegi stated that she disagreed with NFML's claim that it has a good relationship with vendors. Ms Hidvegi stated that there are a lot of underlying disputes between vendors and NFML.

The Deputy Chair, in response to NFML's question regarding the need for authorisation, noted that it is possible that the current process for the negotiation of terms and conditions between the MVA and NFML may raise concerns under the *Trade Practices Act* (the TPA) and that the application may have been lodged to address these concerns. The Deputy Chair noted that whether such concerns did arise was ultimately a matter for the courts to determine. However, in respect of an application for authorisation legal precedent dictated that where the applicant believes, on what appear to it to be good grounds, that its conduct may be in breach of the TPA then the ACCC must decide the application on the basis of public benefit and detriment issues and not on the ground that the application appears unnecessary.⁴

Mr Byrne asked a number of questions of the MVA in relation to exclusive customer lists.

Mr Prime, quoting from a submission made by Farmers Union Foods Limited (now NFML) dated 25 February 1993 in relation to notifications N60014 and N60015 lodged with the Trade Practices Commission by Dairy Vale Co-operative, stated that

“the creation by each of the processors of a system of exclusive dealing distributors/franchisees having a right to service specified outlets will protect the value of vendors' businesses, promote competition between vendors selling competing brands and at the same time better serve the needs of consumers.”⁵

Mr Prime stated that maintaining exclusive customer lists would keep delivery areas relatively small and therefore limit transport costs for vendors. Mr Prime stated that currently, the exclusive customer lists are reasonably efficient and maintaining exclusive customer lists is the only way to achieve this efficiency. Mr Prime also noted that Victorian and Western Australian vendors have expressed concern over NFML's decision to remove exclusive customer lists from vendor contracts.

Mr Byrne stated that NFML's position had changed since its support for exclusive customer lists twelve years ago. Mr Byrne stated that although NFML accepts that there are efficiencies in area rationalisation, NFML no longer supports exclusive customer lists, especially in light of changes brought about by deregulation in the both

⁴ *Re Concrete Carters Association* (Vic) (1977) 31 FLR 193; *Re QCMA* (1976) 25 FLR 169; *Re Australasian Performing Rights Association* (1999) ATPR 41-701.

⁵ Farmers Union Foods Limited, submission to the Trade Practices Commission, 25 February 1993, page 2.

dairy industry specifically and the Australian economy more broadly. Mr Byrne contended that efficiency considerations can be addressed without the inclusion of exclusive customer lists in vendor contracts. Mr Byrne stated that exclusive customer lists may prevent competition in one part of the supply chain and NFML would not want to include such lists especially if they are at risk of breaching the TPA. Mr Byrne stated that the benefit of exclusive customer lists to vendors is more significant in terms of the sale price of rounds than in terms of efficiency.

Ms Hidvegi stated that her costs as a vendor would increase if exclusive customer lists were removed as this would result in an increase in the geographical area she covered. Ms Hidvegi contended that these cost increases would be passed on to consumers. Ms Hidvegi stated that the purchase price paid by vendors for their rounds was predicated on the existence of exclusive customer lists. Ms Hidvegi contended that these purchase costs could take up to 25 years to recover and vendors' capacity to do so would be jeopardised if exclusive customer lists were removed.

Mr Wright stated that he believed that there are efficiencies in each vendors serving defined geographical areas. Mr Wright stated that under the Dairy Farmers franchise system vendors have a list of designated customers based on geographical location. However, importantly, if a customer has a problem with a vendor they can discuss the problem with Dairy Farmers in order to reach an acceptable solution, which may involve changing vendors.

The Deputy Chair, in response to a question from NFML regarding the ACCC's view of exclusive customer lists, stated that subject to the limitations of the authorisation, the nature of any commercial agreement between processors and their vendors is a matter for negotiation between the parties.

Mr Byrne noted that the MVA had stated that it was not proposing to negotiate on price with processors on behalf of vendors, but that if a processor wished to negotiate prices collectively it was prepared to do so. Mr Byrne stated that NFML did not wish to negotiate prices under the proposed arrangement and asked if, given this, the MVA would be prepared to amend its application so as to not include negotiation over prices.

Mr Prime stated that the MVA did not consider it necessary to amend the application.

Mr Andrew Severin, in response to comments made by Mr Iglie, stated that vendors sign contracts voluntarily. Mr Severin noted that all franchise contracts are essentially the same although there may be some variation between them in relation to price assistance provided by Dairy Farmers.

Mr Byrne asked at what point collective bargaining arrangements, such as those proposed by the MVA, might constitute a collective boycott.

The Deputy Chair noted, in respect of the MVA's application, that while the MVA might put a collective position on behalf of vendors, ultimately each vendor would independently decide whether to accept the terms and conditions offered by their processor.

Mr Gavin Jones noted that for an arrangement to constitute an exclusionary provision within the meaning of the TPA, the arrangement had to have the purpose of restricting or limiting supply.

Mr Wright stated that Dairy Farmers' vendor franchise structure involves both local and state franchise councils through which vendors are represented. Mr Wright questioned what the MVA, bargaining collectively on behalf of vendors, would add to this process, particularly given that 35 of Dairy Farmers' 40 vendors had just committed to five year contracts. Mr Wright also sought clarification of how the MVA would communicate with Dairy Farmers through the collective bargaining process.

Mr Prime stated that the reason that the MVA had applied for authorisation was in case any of its actions in negotiating with processors on behalf of its members raised concerns under the TPA. Mr Prime stated that the MVA would keep Dairy Farmers informed of who it was representing in negotiation with them throughout the collective bargaining process. Mr Prime stated that the MVA would represent vendors if they came to the MVA with specific problems but that it was not seeking to re-negotiate existing contracts.

The Deputy Chair noted that there are a small number of vendors who have yet to sign or re-sign their franchise agreement with Dairy Farmers and these vendors could be represented by the MVA if authorisation was granted.

The Deputy Chair, in response to a question from NFML, stated that the MVA would only be authorised to collectively bargain contracts on behalf of its members and non-members for the life of the authorisation.

Mr Jones stated that if the term of a contract negotiated under the arrangements was less than the period for which authorisation was granted, or where an existing contract expired before the authorisation expires, then the MVA would be authorised to collectively negotiate further contracts. Mr Jones noted that with respect to this, and all other negotiations under the proposed arrangements, processors would not be compelled to enter into collective negotiations.

Mr Prime stated that, with respect to the ACCC's proposed condition of authorisation prohibiting the exchange of information between bargaining groups, the MVA would be prepared to accept a tightening of this condition to require that the two collective bargaining groups not have any common representation.

The Deputy Chair then called for any further comments. No further comments were made. The Deputy Chair closed the conference by noting that the ACCC would provide a further opportunity for parties to make written submissions in respect of its draft determination and requested that any submissions be provided to the ACCC by Friday 1 April 2005. The Deputy Chair also noted that the ACCC would provide participants with a record of the conference, which would also be placed on the ACCC's public register.

Conference closed: 3:40pm