

FILE No:
DCC **D05/**
MARS/PRISM

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To: Mr Scott Gregson	From: Jenni Mattila
ACCC	
Fax: 02 6243 1199	Pages: 20 (including cover page)
Phone: 02 6243 1132	Date: 11 May 2005
Re: Additional Information	

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*Withdrawn
19/5/05*

Dear Mr Gregson

Please see attached documents

- o Letter from Dairy Western Australia
- o Schedule of Questions & Answers

Please note that in relation to the information contained in both of these documents confidentiality is claimed.

Yours faithfully,

Jenni Mattila
Jenni Mattila

Attorney General
Consumer Protection
11 MAY 2005

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email: JenniMattila@bigpond.com.au

11/05 2005 13:17 FAX

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Mr Scott Gregson
A/g General Manager
Adjudication Branch

Fax: 02 62431211

Your ref: A90961/A90962

~~Confidentiality Claimed~~

Dear Scott,

Additional Information on the Proposed Structure and Operations of the WA Milk Negotiating Agency

Thank you for providing us with your final list of questions prior to you making a decision on our request for an interim authorization.

As you are aware, the situation for the WA dairy industry is time-critical. Creditors have been seriously disturbed by Peters and Brownes recent announcement in the West Australian newspaper, that there would be no price increases. National Foods has indicated that in terms of price it was waiting to see what the other processors would pay in the run up to its own contracts being presented to dairy farmers.

Victorian Chicken Meat Authorisation

We are aware that there has been an appeal against the Victorian Chicken Meat Authorisation, particularly in relation to the approval of the boycott provisions. We understand the matter is before the Australian Competition Tribunal in the first week in September 2005.

Whilst you have not indicated that the decision in relation to our application would be affected by the outcome of that case, we wish to reiterate, that we do not seek an interim authorization for the boycott application – only for the collective bargaining proposal.

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Victorian Dairy Farmers Collective Bargaining Authorisation

We are also aware that an authorization has been granted to a small number of Victorian dairy farmers to collectively negotiate across a range of processors. We understand that they have approached four dairy processors offering to sell their milk after their contract with National Foods lapsed.

We understand the ACCC has granted their final authorization under the existing authorisation. Whilst this is basically a similar proposal to our own, we do not believe it is desirable or appropriate in our case, to leave dairy farmers with no contract, or processors with insufficient milk in the short term. Also we believe our authorization should be open to all dairy farmers in Western Australia. We would be attempting to obtain a smoother transition. In particular we note they required an authorization to undertake their negotiations.

This is consistent with our own understanding of the Trade Practices Act requirements and consistent with our Application.

Interim Authorisation

We therefore request again that you approve our request for an interim authorization for our Application B – please note our request for collective bargaining approval was not subject to the approval of the Application A request for boycott powers.

During the Interim Authorisation period we propose to:

- Establish the Milk Negotiating Authority;
- Enter into negotiations with proposed dairy farmer members as to the content of their proposed contracts with the MNA;
- Enter into negotiations with proposed processor clients as to the content of their proposed contracts with the MNA;
- MNA may possibly sell milk into the spot market to “road test” our proposals for transport, milk testing and logistics.

On that basis we do not believe it is necessary at this stage to obtain an interim authorization relating to collective boycott.

Please let us know if there are any additional questions you have relevant to your consideration of our application for an interim authorization.

Yours faithfully,

N. Marino

Nola Marino

Chairman

11.5.05

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Schedule of question and answers

Dairy WA is owned by all active dairy farmers in Western Australia. The MNA will therefore seek to minimise costs for its Dairy WA shareholders, who are also are contracting with the MNA. The Board of the MNA must however ensure that it remains financially viable and has adequate retained earnings and capital to ensure its economic stability in the long term.

Dairy WA has engaged a consultant to develop a business plan for the Milk Negotiating Agency (MNA). The consultant, as part of the business plan, will advise on the resources required to fulfill the MNA role including management structure, financial resources, three year forward budget projections and logistical requirements. A fully developed business plan will also be provided as part of this process.

Bis Shrapnel has been engaged to advise on a recommended milk pricing methodology, taking into account the peculiarities of the WA dairy industry. Subject to the finalization of the Business Plan and Bis Shrapnel Report, the Dairy Industry Working Group provides the following preliminary information.

MILK NEGOTIATION AGENCY – STRUCTURE

Question 1: Legal status

- 1a. Will the Agency be an incorporated body operating as an independent legal entity or will it operate as a wholly owned subsidiary of Dairy WA?**

Answer:

The MNA will be a wholly owned subsidiary of Dairy WA with an independent, professional board with a Constitution tailored to take into account the MNA's relationship with its key stakeholders, the WA dairy farmers.

- 1b. Under this structure, who will be responsible for the settlement of any liabilities incurred by the Agency in the event that the agency is unable to satisfy those liabilities?**

Answer:

The MNA will be capitalized at commercial levels in accordance with the Business Plan and carry all relevant insurance (and public liability/indemnity). The MNA will be an agent and will therefore not need access to the level of working capital that would be required if it was required to pay the dairy farmers from its own funds. The dairy farmers will continue to carry the risk of payment from the processors as they do at the present time.

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Question 2: Management of the activities of the Agency

2a. What will be the composition of the management and administrative teams?

Answer:

At present the aim is to have two full time staff employed by the Agency (subject to the business plan):

- o A full-time co-ordinator responsible for logistics*
- o A full accountant/ office administrator*

- o A small team of negotiators engaged on contract*

2b. Participation of dairy farmers in decision making – will dairy farmers participate in the management/decision making – will dairy farmers participate in the management/decision making process of the Agency? If so, how will this participation be managed?

Answer:

Dairy farmers will have no direct participation in the day-to-day management of the MNA. The MNA will be professionally run at board and management level.

There will be a dairy farmer liaison panel for participation and exchange of information.

The contract will provide a farmer with equitable solutions to any difficulties arising between the MNA and a supplier and will be settled after significant farmer input and negotiation.

Question 3. Any other information relevant to the Agency's structure and operations.

Answer:

Three professional directors will be appointed by Dairy WA to operate the MNA in accordance with the Business Plan taking into account dairy farmer stakeholder interests whilst ensuring the ongoing financial viability of the MNA.

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Question 4.

- o Arrangements with dairy farmers
- o Appointment of the Agency by dairy farmers

4a. Will the Agency seek to negotiate supply contracts with processors prior to it being formally appointed to do so by dairy farmers?

Answer:

The Agency will begin negotiations on supply contracts between dairy farmers and processors, the total dairy farmer contract volumes, terms and conditions must match the total processor contracts.

The negotiations will be carried out concurrently and on the basis stated above.

4b. Will dairy farmers be required to formally appoint the Agency (for example by way of written agreement) prior to it commencing to act on their behalf?

Answer:

Dairy farmers will formally appoint the MNA to act on their behalf by written agreement prior to MNA acting on their behalf. The dairy farmers must of course enter negotiations with the MNA prior to formalizing the contracts.

Dairy farmers will individually contract with the MNA to supply milk to meet the contracts arranged by the MNA with the processors.

4c. Will dairy farmers be entitled to appoint the Agency to commence negotiations on their behalf prior to the expiration of any existing supply arrangements?

Answer:

Dairy farmers may appoint the MNA prior to serving notice on the processor with the arrangement to take effect on the termination of the contract. Dairy farmers may appoint the MNA after serving notice of termination on the current processor, but prior to the notice period expiring.

Alternatively, if the dairy farmer had a contract with a processor, they might wish to wait till the contract expired rather than give notice. The dairy farmer could contract in the interim with the MNA to begin to supply the MNA from the date that the prior contract was completed.

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- 4d. How will the Agency respond to the period of milk supply transition, i.e. the progressive 'roll over' period between cessation of existing dairy farmer contracts and commencement of agency negotiated supply contracts?**

Answer:

Agreements between the MNA and dairy farmers will be entered into in a gradual, progressive, managed process as existing contracts expire with processors. Alternatively, some dairy farmers may serve notice of termination on their existing processors in accordance with the conditions of their contracts

The possibility may also be canvassed that dairy farmers and processors could be encouraged and could agree to terminate current contracts as part of negotiations to allow for a smoother transition. Of course this would depend on the advantages to both supplier and processor.

- 4e. To what extent will the roll over period impact upon the Agency's ability to negotiate supply arrangements on behalf of dairy farmers?**

Answer:

The roll over period will not impact upon the MNA's ability to negotiate on behalf of dairy farmers as some contracts are due to expire and other contracts will be terminated.

Question 5. Termination of appointment by dairy farmers

- 5a. On what basis may a dairy farmer elect to terminate the services of the Agency?**

Answer:

This will be subject to contractual conditions negotiated with dairy farmers, it may be on the basis of an agreed notice period that may vary from case to case.

- 5b. On what basis, if any, may the Agency refuse a request to terminate its services?**

Answer:

This will be subject to the Termination Provisions contained in the Contracts to be negotiated with dairy farmers. These provisions are comparatively standard in all commercial contracts, the main variance being the notice period.

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5c. At what time may a dairy farmer elect to terminate the services of the Agency?

Answer:

Termination Provisions contained in the dairy farmer's contracts will define the timeframe and may vary from case to case.

5d. Will this right of termination be provided for by the formal agreements entered into by dairy farmers and the Agency?

Answer:

Termination Provisions will be provided for in contracts between the MNA and dairy farmers

Question 6. Terms and conditions of the agency agreement to be entered into by dairy farmers, including:

6a. Term of the agency agreement (e.g. 12 months), including provisions for renewal and termination;

Answer:

Total terms and conditions in dairy farmer contracts will be matched-off with total processor contracts. Additional provisions may be included to allow termination in cases such as illness, death of a joint owner or other hardship.

6b. Rights and obligations of dairy farmers and the Agency under the proposed terms of the agency agreement;

Answer:

The rights and obligations between dairy farmers and the MNA will be negotiated with dairy farmers and subject to contracted conditions. Contracts will cover the specific requirements of different processors and producers for example:

- o Seasonal variations*
- o Fat and protein*
- o Somatic cell counts*
- o Opportunities to increase production if additional milk is required*
- o agreed pricing mechanism*

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- 6c. Matters to be negotiated by the Agency on behalf of dairy farmers with processors and other service providers, including whether dairy farmers will have a discretion to amend or otherwise limit the authority of the Agency to negotiate upon their behalf;**

Answer:

- i.) The supply contracts will be individually negotiated. The power to amend/vary conditions will be contained in the contract in the normal manner.*
- ii.) Specific contract conditions will give dairy farmers the choice of organizing alternative transport and service provisions subject to meeting specified criteria.*
- iii.) Transport arrangements must be of a satisfactory standard and meet processor requirements.*
- iv.) Independent milk testing may be made available subject to the dairy farmers contract*

- 6d. Provisions for the reimbursement of the Agency (for example by way of levy on the quantity of milk sold or as a pre-determined fee for service);**

Answer:

It is anticipated that the Business Plan for the MNA will provide that the MNA will be reimbursed by dairy farmers on a levy basis with structured review periods.

- 6e. Provisions for the retention, or transfer to the Agency, of ownership of milk by dairy farmers;**

Answer:

The MNA will not own the milk. It arranges for the supply of dairy farmer owned milk to purchasers.

- 6f. Provisions relating to the transportation of milk (if applicable);**

Answer:

Dairy farmers will have a choice of transport options. Transport arrangements may be made by the MNA on a cost-effective basis or alternatively a choice of available transport arrangements will be available wherever possible. They may alternatively make their own arrangements as per 6c above]

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6g. Provisions for the disposal of milk produced by a farmer but not supplied to a processor, including recoupment of any cost incurred by the Agency and effect on distributions made to dairy farmers;

Answer:

We are uncertain as to whether this question refers to the processing of surplus milk or the disposal of contaminated milk or milk that does not meet processor requirements we have therefore responded to both interpretations of the question.

- i.) The MNA offers the opportunity of treating surplus milk more effectively than the current situation. Currently the surplus is treated by four processors who are not able to achieve economies of scale.*
- ii.) Alternatively, the MNA may enter into a contracted arrangement with existing processors with regard to effluent. The MNA will also reserve the right to dispose of or recycle milk not supplied to a processor, including if possible the sale of milk subject to health laws, for example: as pig food*
- iii.) Provisions in contracts between the MNA and the dairy farmers will cover recoupment of costs or financial benefits to the Agency*

6h. Provisions for liabilities incurred by the Agency in the execution of its services on behalf of dairy farmers;

Answer:

The MNA will hold commercial risk management insurance to mitigate losses that will form part of the normal operating cost of the MNA.

In addition to this, it is anticipated that the MNA may also hold a contingency fund in accordance with usual commercial practices.

6i. Provisions for assignment or transfer of a dairy farmer's rights and obligations under the Agency agreement;

Answer:

It is envisaged that dairy farmers may have the power to novate their contracts, with the consent of the MNA and subject to specified terms and conditions. However this is of such critical importance that it needs to be discussed at length with dairy farmers.

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- 6j. Provisions for assignment of authority by dairy farmers to the Agency, including whether this authority will provide for the Agency to enter into arrangements on behalf of dairy farmers with processors and other service providers;**

Answer:

Yes, the contracts will provide for the assignment of authority to negotiate with processors and to supply to alternative processors if that provides a more efficient cost-effective outcome.

This will be covered by contracts between dairy farmers and the MNA, including provision for dairy farmers to arrange alternative processors and/or service providers as defined by the contracts.

- 6k. Provisions for the participation of dairy farmers in negotiations with processors and other service providers, including process for nomination and appointment of dairy farmer representatives;**

Answer:

The professional negotiators contracted by the MNA will conduct negotiations with processors on behalf of dairy farmers. It is fair to say dairy farmers have not proven to be adept at negotiating.

Provisions in dairy farmer contracts may on a case by case basis allow for dairy farmers to individually negotiate with other service providers with the consent of the MNA should they wish to do so.

- 6l. Provisions for participation of dairy farmers in consideration of, and decision in relation to, matters negotiated by the Agency with processors and other service providers, including voting rights as applicable;**

Answer:

Dairy farmers will not directly participate in matters to be negotiated with processors. They will negotiate their own contracts containing relevant terms and conditions and provide feedback to the MNA through the liaison committee.

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6m. Provisions for resolution of disputes between dairy farmers, including those with the Agency, in relation to matters negotiated by the Agency with processors and other service providers;

Answer:

The contract would provide for a dispute resolution process, including a disputes panel either elected by dairy farmers or nominated by the liaison committee. This is an issue yet to be settled with dairy farmers. Once agreed, provisions will be included in contracts between dairy farmers and the MNA .

6n. Provisions for the payment of monies by the Agency to dairy farmers, if required, including provisions governing distribution.

Answer:

MNA funds will be held in the first instance in a Trust Account. Funds will then be distributed to dairy farmers in accordance with their contracts and to the general account in payment of the levy and to pay other service providers. All payments will be transparent and accounted for to dairy farmers.

The Dairy Industry Working Group has engaged the services of Biz Shrapnel to model potential distribution options. The distribution method will be decided by dairy farmers.

Question 7. Any other information relevant to the arrangements to be entered into by the Agency with dairy farmers.

Answer:

Contracts between the MNA and dairy farmers will also include:

- o Provisions relating to variations in seasonal production*
- o A flexible mechanism in the contract to increase volumes required by the MNA for spot or short term contracts, additional growth and short supply*
- o Managed exit strategies*
- o Transport*
- o Milk testing*
- o Milk quality*

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Question 8. Negotiations to be conducted by the Agency – including details of the matters to be the subject of negotiations with processors;

Answer:

The MNA will negotiate individual contracts based on the individual requirements of each processor on a case-by-case basis and may include:

- o Volumes of milk*
- o Pricing and pricing methodology*
- o Components – fat and protein*
- o Transport and milk testing arrangements*
- o Five or seven day supply*
- o Seasonal variations*
- o Term of the contract and termination clauses*

Question 9. Dispute resolution – provisions for resolution of disputes between the Agency and processors in relation to matters negotiated by the parties, including disputes arising in the negotiation process and in relation to any agreement reached between the Agency and the processors;

Answer:

Should this be that the contracts between Processors and the MNA will etc provide a normal dispute resolution process, including arbitration and a nominated disputes panel. Provisions will be included in contracts between processors and the MNA

Question 10. Payment for supply – provision for the payment by processors in relation to supplies made pursuant to arrangements entered into through the Agency arrangement, in particular whether payment will be made direct to dairy farmers or whether payment will be made to the Agency (through a Trust account) for distribution to dairy farmers;

Answer:

Payment will be made to the MNA held in a Trust Account for distribution to dairy farmers in accordance with their contracts and for the payment of MNA levies and fees to service providers.

Dairy farmers will receive payments directly from the MNA Trust Account

The processors should not be aware of the amounts paid to farmers – this is one of the problems with the current situation and gives the processors too much information on production costs and makes it difficult to effectively negotiate with them

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Question 11 Resolution of concerns as to quality or other matters affecting milk supply – including provision for discussions between processors and /or the Agency and/or dairy farmers as required, and the identification of and response to matters requiring external assistance;

Answer:

The MNA will arrange a contracted, independent milk testing facility and will engage a co-ordinator responsible for logistics.

The contracts between the MNA and processor and MNA and supplier will include mechanisms for resolution of such problems.

Question 12. Information provided to processors

12a. Will processors be advised of the identity of those dairy farmers on whose behalf the Agency is negotiating?

Answer:

No, the processors will receive contracted volumes of milk to the contract standards and terms required as negotiated with the MNA.

12b. Will processors be advised of the identity of those dairy farmers that are supplying milk to them pursuant to the arrangements negotiated by the Agency?

Answer:

In the majority of cases there is no need as the processors will receive contracted volumes of milk to the standards negotiated with the MNA. Any dispute will be resolved with the MNA not the dairy farmer.

In specific circumstances such as cheese companies like Mundella and Casa – they may wish to continue to receive milk from current suppliers and the MNA will probably need to negotiate directly between the processor and dairy farmer in relation to very small processors. However a significant benefit of the MNA is to protect dairy farmers from situations where they can be bullied or threatened as a result of their direct links to processors.

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12c. Will processors have the ability to nominate dairy farmers from whom they wish to obtain supply?

Answer:

No, however in some circumstances it would be geographically desirable to source milk from specific dairy farmers but that may change on a day to day basis for a number of reasons such as shortfalls or equipment failure.

The processors will receive contracted volumes of milk to the contract standards negotiated with the MNA.

Flexibility in dairy farmer and processor contracts will provide for specific, alternative requirements of identified processors

Question 13. Any other information relevant to the negotiations to be conducted by the Agency on behalf of dairy farmers with processors.

Answer:

Contracts between the MNA and processors would provide a force majeure clause, co-ordinated transport provisions and the availability of independent milk testing facilities.

Question 14. Negotiations to be conducted by the Agency – including details of the matters to be the subject of negotiations with service providers;

Answer:

The MNA will negotiate price as well as arrange:

- o Milk testing*
- o Collected sampling integrity and*
- o Testing for quality & composition*
- o A reporting process*
- o Review of samples (second test)*
- o price*
- o Transport*
- o Milk collection*
- o Power outage problems*
- o Urgent pick-up*

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Question 15. Dispute resolution – provisions for resolution of disputes between the Agency and service providers in relation to matters negotiated by the parties, including disputes arising in the negotiation process and in relation to any agreement reached between the Agency and the service providers;

Answer:

The MNA would provide a normal dispute resolution process, including arbitration and mediation. Provisions will be included in contracts between service providers and the MNA

Question 16. Payment for supply – provision for the payment by dairy farmers and/or the Agency in relation to services provided pursuant to arrangements entered into through the Agency arrangement;

Answer:

Subject to the terms of the contracts with dairy farmersthe dairy farmers would have to either pay for these services and have the cost deducted or the MNA levy would have to include payment for transport etc arranged on behalf of the dairy farmers. The levy would need to be negotiated to include these costs if this was the approach taken and the costs would have to be transparent.

Question 17. Any other information relevant to the negotiations to be conducted by the Agency on behalf of dairy farmers with service providers.

Answer:

The MNA would arrange provisions, documentation and integrity of process with service providers, dairy farmers and processors

**Question 18. General
Milk composition and quality**

18a. It is anticipated that milk supplied through the Agency will be regarded as a homogenous product?

Answer:

No. It is anticipated that the milk supplied through the Agency will be tested for components (e.g. fat and protein) and quality (e.g. tested for contaminants) as is currently the case with all processors. We anticipate that processors will continue to specify components and quality as part of the desired conditions of their contracts.

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- 18b. Will milk supplied through the Agency be priced on a differentiated basis (e.g. Price variations to allow for variations in butterfat and protein)?**

Answer:

We anticipate that as part of the contracts with processors, milk would continue be supplied on a differentiated basis for fat and protein. This is currently the case with all processors. It is anticipated that this would continue to be the case except in the unlikely event a processor choose to pay by volume only. We believe this would be highly unlikely.

- 18c. Will the Agency be responsible for negotiations with processors of disputes as to quality of milk supplied pursuant to the agency arrangements?**

Answer:

Yes. It would be part of the contract with processors that the MNA would handle disputes, the MNA would be responsible for ensuring that the processor received the volume quantity and quality of milk they contracted for and the dairy farmer in turn supplied volume quantity and quality of milk they contracted to provide.

The MNA where necessary may switch dairy farmer suppliers between processors to meet processor contract requirements, particularly if for some reason the tanker load in total did not meet the processor standards. The MNA would also have matching quality and component requirements in dairy farmer contracts.

Question 19. Dairy farmer participation

- 19a. Will there be a minimum threshold of dairy farmer participation which the Agency will seek to achieve before it commences formal supply negotiations with processors?**

Answer:

We would aspire to a 70% minimum by volume indicative amount. This is not however necessary for a start-up and we would seek to achieve this over time.

- 19b. Will dairy farmers be permitted to place a proportion only of the milk supply with the Agency for sale to processors?**

Answer: Yes.

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Question 20. Provision for handling of excess milk

- 20a. How will the Agency and/or farmers respond to circumstances of excess milk supply (eg. In the event that the Agency is unable to exhaust its available supply of milk and is unable to negotiate the use of processing facilities)?**

Answer:

The MNA have contracts in place to process any surplus milk on behalf of its dairy farmer suppliers. We will also arrange the sale of this milk on the spot market.

Dairy Farmer contracts will be intended to match processor contracts

The volume of milk involved would not be sufficient to be of major concern.

Potential seasonal conditions are and will continue to be scoped well in advance under general management processes.

- 20b. What effect, if any, will an absence of notice have on the ability of the Agency to respond to periods of excess supply?**

Answer:

Notice is not a major problem. Dairy Farmer contracts will be intended to match processor contracts. The MNA will have contracts in place to process any surplus milk on its behalf and sale on the spot market.

The volume of milk involved would not be sufficient to be of major concern.

Question 21. Challenge Dairy Co-operative (CDC)

- 21a How will the agreements entered into under the Agency arrangements interact with the Delivery Right Unit (DRU) system adopted by the CDC?**

Answer:

DRU holders would receive the same returns from the MNA as other dairy farmers in accordance with the agreed pricing methodology.

The ongoing benefit to DRU holders is the potential to receive dividends from CDC directly should profits become available for distribution

CDC would have a guaranteed milk supply from the MNA by way of the DRU's.

The DRU's would be supported with a contract with the MNA.

21b. Will the Agency arrangements provide for rights and obligations under the DRU system to co-exist with those rights and obligations arising pursuant to the Agency arrangements?

Answer:

DRU holders would receive the same returns from the MNA as other dairy farmers in accordance with the agreed pricing methodology.

The ongoing benefit to DRU holders is the potential to receive dividends from CDC directly should profits become available for distribution

CDC would have a guaranteed milk supply from the MNA by way of the DRU's.

The DRU's would be supported with a contract with the MNA.

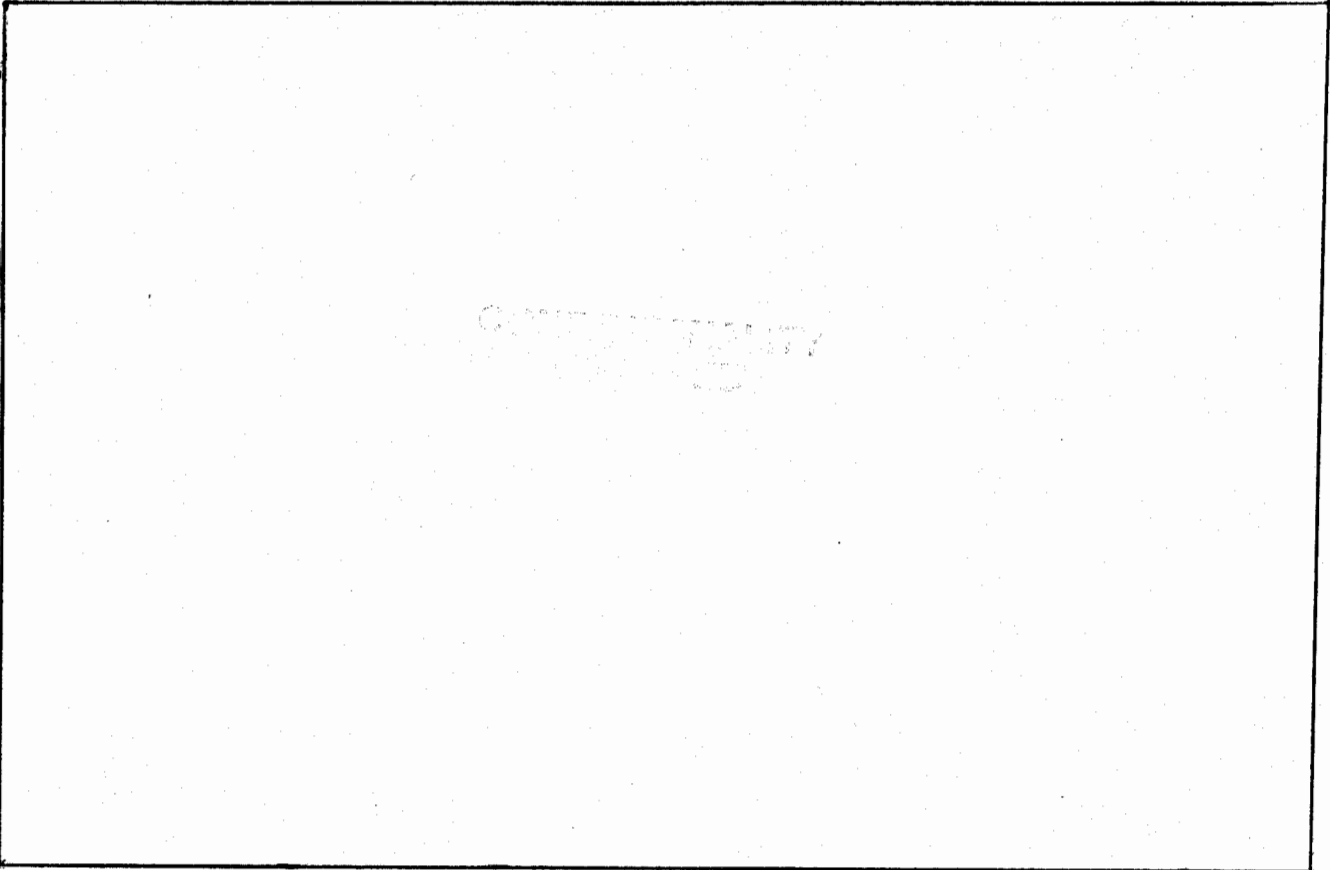
Question 22. Any other information relevant to the ACCC's considerations for the Dairy WA proposal and, in particular, the operations and activities of the Agency.

Answer:

We provide this following information in relation to Challenge Dairy Co-op Ltd

Please also see Minutes of their Meeting and Annual General Meeting in 2004 attached.

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