

RESTRICTION OF PART OF PUBLICATION CLAIMED

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Mr Scott Gregson
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Your ref: A90961/A90962

Dear Mr Gregson

Response to National Foods Milk Limited Submission

Please find following our client's response to the National Foods Milk Limited Submission dated 5 May 2005. We have used the same numbering as that in the Submission.

Heading 3

Clause 3.2(1)

Please see answers to Question 1, Schedule of Questions and Answers provided to the ACCC on 11 May 2005 ("Q&A").

Clause 3.2(2)

The proposal to enter into agreements with retailers directly is one which will require negotiations with retailers and the terms would not be available to third parties for the purpose of commercial confidentiality between the relevant parties.

Clause 3.2(3)

Please see answers 4a and 6a of the Q&A.

Clause 3.2(4)

Please see answer 8 of the Q&A.

Heading 5

National Foods submits that the application does not comply with the existing ADFP Authorisation. Dairy WA's application does not purport to be an extension of the existing authorisation. Please see Part 9, pp18 – 21 of the Attachment to the Application for Authorisation provided to the ACCC on 16 March 2005 ("Attachment") for examples of how the existing ADFP authorisation has not been able to assist dairy farmers.

Please see Statutory Declaration (Document 1) (confidentiality claimed).

In considering the likely counterfactual state of affairs, Dairy WA submits that with an extension of the current ADFP authorisation or no authorisation, a collapse in the WA dairy industry would lead to higher prices paid by consumers if milk must be imported from other states.

Heading 6**Clause 6.2**

A collapse in the WA dairy industry would lead to higher prices paid by consumers if milk must be imported from other states.

Clause 6.3(4)

Please see pp5-6 and pp8-9 of the Attachment regarding the lower milk price paid to WA dairy farmers and the cost of production exceeding average farmgate price.

Continuous changes in supply chain management will ensure competition for the supply of raw milk to processors and retailers.

e.g. The CML submission dated 15 April 2005, page 3 Collective bargaining arrangements (i) "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."

Clause 6.3(6)

Competition for supply will occur between farmers as they strive to produce milk with the appropriate quality and composition levels demanded by different processors.

Clauses 6.3(7), (8)

The main aim of the MNA is to negotiate a price for raw milk that is sustainable and on par with the price received by other dairy farmers around Australia. The majority of raw milk in WA is purchased by 2 'scale' commercial milk processors that effectively set the price paid to farmers. Unlike other states, there is no other competition (from export markets or farmer-owned processors) to determine the price paid.

Please see paragraph 13 and 14 of the Statutory Declaration (Document 1).

It is not to the advantage of Dairy WA and the dairy farmers it represents to increase the price of raw milk to such an extent that the processors become uncompetitive or that the WA dairy industry becomes unviable.

Clause 6.3(9)

Same comment as for Heading 5 (re higher retail cost of milk).

Clauses 6.3(10) – 6.3(13)

Same comment as for Heading 5 (re differing authorisation application).

Clauses 6.3(17), (18)

Same comment as for Clauses 6.3(7), (8).

Clause 6.3(19)

Please see answers to question 6 of the Q&A.

Clause 6.3(23)(a)

Dairy WA has no intention to enter into long term, restrictive contracts. Further, there is no basis for the suggestion that the presence of the MNA will raise barriers to entry, either by new processors or farmers. Please see Paragraph 6, page 20 of the Attachment. Also please see answers to questions 6a., 6b., and 7 of the Q & A.

Clause 6.3(23)(b)

Please see answer 6l. of the Q&A. Please also see our letter of even dated "Additional Comments on Arrangements with the MNA."

Clause 6.3(24)

It is unlikely that all dairy farmers in WA would engage the MNA to act on its behalf.

It is not to the advantage of Dairy WA and the dairy farmers it represents to increase the price of raw milk to such an extent that the processors become uncompetitive or that the WA dairy industry becomes unviable.

Clause 6.3(26)

Same comment as for Clause 6.3(23)(a).

Clause 6.3(27)

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The Agency will give dairy farmers access to a more level playing field and professional negotiators. Please see our letter of even date entitled, "Additional Comments of Arrangements with the MNA".

Clause 6.3(28)

Same comment as for Heading 5 (re differing authorisation application).

Clause 6.3(28)(9)(c)

Please see Answer 8, p 10 (Q & A) Term of contract and termination clauses.

Clause 6.3(29)(a)

Please see Answer 12c. p12 of the Q & A. Negotiations with processors will indicate their requirements in relation to specific requirements.

Clause 6.3(29)(b)

Please see Answer 5 of the Q&A.

It is unlikely that all dairy farmers in WA would engage the MNA to act on its behalf.

Clause 6.3(29)(c)

Please see Answers 5a., 9 of the Q&A.

Clause 6.3(30)

Same comment as for Clause 6.3(24).

It is unlikely that all dairy farmers in WA would engage the MNA to act on its behalf.

Clause 6.3(31)

Farmers would have no direct dealings with processors but the incentive to innovate and improve quality would be the prices paid by the MNA to the farmers and conditions contained in contracts between the MNA and farmers.

Processors contractual requirements relating to milk quality and composition negotiated with the MNA would continue to provide incentives for farmers to be innovative and price competitive.

Please see Question 6 b. of the Q & A

Clauses 6.3(32), (33)

Please see answers 6a and 6b of the Q&A.

Clause 6.3(34)

Employees of the MNA would be required to sign confidentiality undertakings. In addition, contracts between the MNA and processors, and contracts between the MNA and farmers, would have standard commercial confidentiality clauses.

Contract negotiators engaged by the MNA would sign confidentiality agreements. Please see our letter of even dated "Additional Comments on Arrangements with the MNA".

Clause 6.3(35)

Same comment as for Clause 6.3(31).

Farmers would have no direct dealings with processors but the incentive to innovate and improve quality would be the prices paid by the MNA to the farmers and conditions contained in contracts between the MNA and farmers.

Processors contractual requirements relating to milk quality and composition negotiated with the MNA would continue to provide incentives for farmers to be innovative and price competitive

Clause 6.4

Dairy WA submits that the most significant detriment from any use of boycott provisions would be suffered by the dairy farmers and not the processors, as dairy farmers would lose not only the income from the milk withheld, but would also incur costs in disposal of the milk. As such, it is most unlikely that boycott provisions would actually be imposed by the MNA, to such detriment to the farmers. However,

we reiterate our submission that the power of collective boycott may be necessary to facilitate collective bargaining occurring, given the reluctance of the scale fresh milk producers to engage in collective bargaining negotiations under the existing ADFP Authorisation.

Clauses 6.5(2), (3)

Please see the Statutory Declaration (Document 1) for an example of the imbalance in bargaining power between the processors (in particular, National Foods) and the farmers.

Please also see Part 9, pp18 – 21 of the Attachment.

Clause 6.5(4)

1. Dairy farmers will have more bargaining power through the collective negotiation undertaken by Dairy WA on their behalf.
2. Dairy WA will remove the direct link between farmers and processors as they will no longer have direct contractual relationships, not as a result of increased bargaining power.
3. Please see answer 8 of the Q&A regarding contractual arrangements between Dairy WA and processors.

Clause 6.5(5)

Please see answers 6g, 7 (Transport efficiencies) and 8 (Processor contracts) of the Q&A.

Clause 6.5(6)(a)

National Foods' suppliers signed a standard form contract (at Tab 23 of documents provided with the Attachment). They had no alternative as other processors were not taking on new suppliers at that time. If they chose not to accept the prices and volume offered, there would be nobody to pick up their milk.

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Clause 6.5(6)(b)

Please see pp 19 of the Attachment regarding National Foods cutting contracted volumes by 40% without any notice to the Collective Bargaining Group Negotiation Committee, nor to their suppliers, in mid 2003. This demonstrates that giving farmers experience in negotiation did not produce genuine negotiating processes or responses by National Foods

Although National Foods may offer a "contract price" higher than the scale competitors price, the National Foods spot price is dramatically lower. National Foods suppliers have informed us that National Foods only takes a portion of their suppliers' milk on contract. Therefore, those suppliers must take the spot price for the remainder of their milk, resulting in a lower average price.

As a result of only a portion of milk being purchased by National Foods and the rest going to Challenge at 19c per litre, or the National Foods spot price of 14c, farmers average price ends up being less than scale opposition.

Clause 6.5(8)

CONFIDENTIALITY CLAIMED ON THIS PARAGRAPH

In WA, there is no large-scale farmer owned processing sector driving price, competing for the raw milk, therefore there is no mechanism in WA to achieve the world price.

Clause 6.5 (7)

Contracts between the MNA (Please see Answers 6b, 6c and 7 of the Q & A) and farmers and the MNA and processors (Answer 8) would provide flexibility and opportunity for both farmers and processors.

Clause 6.5(10)

Please see Statutory Declaration (Document 1) regarding decreases in contract volumes.

Clauses 6.5(11), (12)

Same comment as for Paragraphs 6.3(7), (8).

Clause 6.5(14)

Dairy WA would submit that transaction costs for suppliers, especially scale fresh milk processors, must be reduced if they no longer need to deal with a collective bargaining group or individual farmers. They would no longer need to provide all the services set out in Clause 6.5(6)(c), pp14 - 15 of the National Foods Submission.

Clauses 6.5(14)- (18)

Please see chapter 5, pp 14 - 15 of the Attachment regarding transport costs.

South Australian Milk Haulage has informed the West Australian Farmers' Federation that transport costs (including testing) would be \$0.016 per litre, based on an average distance of 180 km. This contrasts with the charge imposed on National Foods'

supplier, eg \$0.03 per litre for transport from Bentley to Brunswick (approximately 150km) (Please see Document 9, Schedule 4 to the National Foods Standard Farmgate Milk Supply Agreement dated 23 June 2004).

Please also see Statutory Declaration (Document 2 - Confidentiality Claimed) regarding transport savings that could be made if farmers could arrange their own transport.

Clause 6.5(19)

Please see the letter dated 28 May 2003 regarding a producer not taking on any additional suppliers (at Tab 28 of the documents provided with the Attachment).

We understand that Challenge Dairies is not issuing new delivery rights. Further, National Foods has not issued any new contracts.

Clause 6.5(20)

Please see comments regarding Clause 6.5(6)(b) above.

Clause 6.5(21)

Please see the letters at Tabs 28 and 29 of documents provided with the Attachment.

Clause 6.5(24)

Same comment as for Clauses 6.3(7), (8).

Clauses 6.5(35) – (38)

Please see the Statutory Declarations attached (Documents 2 – 8. Confidentiality is claimed on these documents) regarding the operating efficiency of dairy farmers who have recently exited or are considering exiting the dairy industry in WA.

Please also see the letter at Tab 31 of documents provided with the Attachment.

Clause 6.5(40)

As with any opportunities which may arise with retailers, any proposal to seek new markets is one which will require negotiations with the relevant parties and the terms would be not be available to third parties for the purpose of commercial confidentiality between the relevant parties.

Appendix 2**Clause 4**

National Foods has not denied that it reduced the volumes of the suppliers who were members of the collective bargaining group, but not those of the suppliers who did not participate in collective bargaining. Great hardship was caused to suppliers when National Foods reduced volumes with just one week's notice, as suppliers then had no outlet for the rest of their milk at such short notice.

As mentioned in response to Clause 6.5(6)(c) above, suppliers have no choice but to accept the volume National Foods is willing to purchase. The 40% reduction in winter (the most productive milk production season) and a considerably lesser reduction in summer have resulted in milking patterns that are extremely inefficient.

Please see Statutory Declaration, Document 1.

Yours faithfully,

Jenni Mattila

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