



**Australian  
Competition &  
Consumer  
Commission**

Our Ref: A90961 / A90962  
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28 April 2005

Ms Jenni Mattila  
Jenni Mattila & Co Lawyers  
PO Box 1685  
DOUBLE BAY NSW 1360

Dear Ms Mattila

Thank you for your letter of 26 April 2005 inviting Australian Competition and Consumer Commission (ACCC) representatives to attend a meeting of Western Australian dairy farmers on 2 May 2005. In subsequent telephone conversations, you have advised that the purpose of ACCC attendance would be to take submissions from dairy farmers in relation to authorisation applications A90961 and A90962. I also note your letter of 27 April 2005.

As discussed on the evening of 26 April, ACCC representatives are unavailable on 2 May given previous commitments of senior staff. In any event, as earlier discussed, I am concerned that attendance at an industry meeting may not be the most productive means of obtaining submissions from interested dairy farmers – particularly at this stage of our consideration. I will discuss alternative options to ensure dairy farmer input later in this letter.

As discussed in our meetings of 22 April 2005 and in subsequent telephone conversations, while the ACCC has received significant information from Dairy WA on the situation of dairy farmers, the area in which greater information is required is the provision of further detail on the arrangements proposed. You have advised that this information is more likely to be provided by Dairy WA (through yourself) rather than from dairy farmers themselves. I respectfully suggest that your efforts be concentrated on the provision of this detail at this stage.

In this regard I consider that it would be difficult for the ACCC to fully consider the benefits and detriments of the proposal (including as to the effect on dairy farmers themselves) without further information. As requested, I attach a list of questions that will assist you in clarifying details of the proposed arrangements. I advise that the ACCC proposes to defer its consideration of Dairy WA's request for interim authorisation to allow you to provide additional detail on the nature of the proposed arrangements.

I also wish to address your concerns that the ACCC may have placed disproportionate weight on information that may have been provided to it by other interested parties. It is important



that Dairy WA understand the process required to be undertaken by the ACCC in assessing applications for authorisation.

In forming a view as to whether arrangements should be afforded protection from the competition provisions of the *Trade Practices Act 1974* (the Act), the ACCC must ensure it fully understands the proposed arrangements, it has sufficient industry background to assess the impact of the arrangements and it must consult interested parties with a view to identifying and testing claims of public benefit and concerns of competitive detriment. The provision of protection through the authorisation process is not taken lightly and the ACCC considers it appropriate to test the claims made both in support and in opposition to arrangements. In this regard, the ACCC's queries of interested parties should not be seen as a disposition to any particular argument but rather simply the ACCC undertaking its job as it does in all authorisation applications.

The ACCC shares your views of ensuring interested parties – in this case dairy farmers – are given the opportunity to provide input into ACCC assessment. As you are aware, in addition to discussions with Dairy WA (including an active dairy farmer) ACCC staff have fielded numerous calls from Western Australian dairy farmers. We have found the information provided by these farmers particularly helpful and constructive.

As you are aware, the ACCC will accept written submissions from interested parties throughout its assessment. In this regard, you may wish to share with Dairy WA members or dairy farmers more generally, the ACCC's invitation for submissions. While the time available to industry participants to provide written submissions is often limited, it is not uncommon for industry associations to respond on behalf of their members or to otherwise assist in the provision of submissions. Where parties wish to make submissions, I would encourage them, where possible, to focus on the practicalities of the arrangements and their likely effect.

Finally, as discussed with you earlier this week, I note that the Act provides a mechanism for interested parties to request a conference before the ACCC makes a final decision in relation to an authorisation application. This opportunity arises following the release of a draft determination allowing parties to focus on the issues of concern to the ACCC. Conferences are chaired by an ACCC Commissioner and are open to interested parties. Where called, a conference in this matter will provide dairy farmers with a further avenue to provide input directly to a Commissioner who will ultimately be involved in the decision making process.

A copy of the schedule of questions attached to this letter will be placed on the ACCC's public register. I would appreciate your response to these questions by 13 May 2005.

Thank you again for your correspondence on these issues. Should you wish to discuss any aspect, please feel free to call Sue Philp on (02) 6243 1354 or myself on (02) 6243 1132.

Yours sincerely



Scott Gregson  
A/g General Manager  
Adjudication Branch

### ***Schedule of questions***

#### ***Milk Negotiation Agency - structure***

Information is sought from Dairy WA as to the structure of the proposed Milk Negotiation Agency (the Agency). Key issues that the ACCC seeks Dairy WA's response to are:

1. legal status –
  - a. 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?
  - b. 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?
2. management of the activities of the Agency
  - a. what will be the composition of the management and administrative teams?
  - b. participation of dairy farmers in decision making - will dairy farmers participate in the management / decision making process of the Agency? If so, how will this participation be managed?
3. any other information relevant to the Agency's structure and operations.

#### ***Arrangements with dairy farmers***

Information is sought from Dairy WA as to the arrangements to be entered into by the Agency with dairy farmers. Key issues that the ACCC seeks Dairy WA's response to are:

4. appointment of the Agency by dairy farmers
  - a. will the Agency seek to negotiate supply contracts with processors prior to it being formally appointed to do so by dairy farmers?
  - b. 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?
  - c. will dairy farmers be entitled to appoint the Agency to commence negotiations on their behalf prior to the expiration of any existing supply arrangements?

- d. 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?
  - e. to what extent will the roll over period impact upon the Agency's ability to negotiate supply arrangements on behalf of dairy farmers?
5. termination of appointment by dairy farmers
- a. on what basis may a dairy farmer elect to terminate the services of the Agency?
  - b. on what basis, if any, may the Agency refuse a request to terminate its services?
  - c. at what time may a dairy farmer elect to terminate the services of the Agency?
  - d. will this right of termination be provided for by the formal agreements entered into by dairy farmers and the Agency?
6. terms and conditions of the agency agreement to be entered into by dairy farmers, including:
- a. term of the agency agreement (eg. 12 months), including provisions for renewal and termination;
  - b. rights and obligations of dairy farmers and the Agency under the proposed terms of the agency agreement;
  - c. 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;
  - d. 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);
  - e. provisions for the retention, or transfer to the Agency, of ownership of milk by dairy farmers;
  - f. provisions relating to the transportation of milk (if applicable);

- g. 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;
  - h. provisions for liabilities incurred by the Agency in the execution of its services on behalf of dairy farmers;
  - i. provisions for assignment or transfer of a dairy farmer's rights and obligations under the Agency agreement;
  - j. 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;
  - k. 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;
  - l. 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;
  - m. 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;
  - n. provisions for the payment of monies by the Agency to dairy farmers, if required, including provisions governing distribution.
7. any other information relevant to the arrangements to be entered into by the Agency with dairy farmers.

***Negotiations with processors***

Information is sought from Dairy WA as to the negotiations to be conducted by the Agency on behalf of dairy farmers with processors. Key issues that the ACCC seeks Dairy WA's response to are:

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

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;
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;
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;
12. information provided to processors
  - a. will processors be advised of the identity of those dairy farmers on whose behalf the Agency is negotiating?
  - b. 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?
  - c. will processors have the ability to nominate dairy farmers from whom they wish to obtain supply?
13. any other information relevant to the negotiations to be conducted by the Agency on behalf of dairy farmers with processors.

***Negotiations with service providers***

Information is sought from Dairy WA as to the negotiations to be conducted by the Agency on behalf of dairy farmers with service providers. Key issues that the ACCC seeks Dairy WA's response to are:

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

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;
16. payment for supply – provisions for the payment by dairy farmers and/or the Agency in relation to services provided pursuant to arrangements entered into through the Agency arrangement;
17. any other information relevant to the negotiations to be conducted by the Agency on behalf of dairy farmers with service providers.

**General**

18. milk composition and quality

- a. is it anticipated that milk supplied through the Agency will be regarded as a homogenous product?
- b. will milk supplied through the Agency be priced on a differentiated basis (eg. price variations to allow for variations in butterfat and protein)?
- c. will the Agency be responsible for negotiations with processors of disputes as to quality of milk supplied pursuant to the agency arrangements?

19. dairy farmer participation

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

20. provision for handling of excess milk

- a. 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)?
- b. what effect, if any, will an absence of notice have on the ability of the Agency to respond to periods of excess supply?

21. Challenge Dairy Co-operative (CDC)

- a. how will the agreements entered into under the Agency arrangements interact with the Delivery Right Unit (DRU) system adopted by the CDC?
  - b. 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?
22. any other information relevant to the ACCC's considerations of the Dairy WA proposal and, in particular, the operations and activities of the Agency.