



**Australian
Competition &
Consumer
Commission**

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Senator David Johnston
Senator for Western Australia
183 Great Eastern Highway
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Dear Senator

Application for authorisation by Dairy WA – A90961 and A90962

Thank you for your letter dated 24 June 2005 in which you provide a submission in relation to the above applications for authorisation and in which you raise concern over the conduct of the Australian Competition and Consumer Commission in the process. There are a number of issues that I would like to respond to. I propose placing both your letter and my response on the ACCC's public register for this matter.

The authorisation process allows businesses to seek protection from legal action under the competition provisions of the *Trade Practices Act 1974* (the Act) where it can be demonstrated that the relevant conduct or arrangements generate sufficient public benefits to outweigh any anti-competitive detriment. The process is an open and transparent one involving public consultation, the issuing of a draft determination and rights of appeal.

Given the potential for anti-competitive arrangements to result in harm to both consumers and industry, the provision of protection under the authorisation process requires careful consideration based on full information.

In your letter you have referred to the ACCC's decision not to grant interim authorisation to Dairy WA at this stage. Under the authorisation process, the ACCC may allow applicants to commence their proposal while the ACCC continues to consult interested parties and assess the information before it. The ACCC maintains the position that interim authorisation is provided in special circumstances only and this has been conveyed to Dairy WA on numerous occasions.

EXECUTIVE OFFICE



Contrary to your understanding, the decision not to grant interim authorisation was not made by ACCC staff, but by the Commission itself. While appreciative of the position of Western Australian dairy farmers, the ACCC considered it was not appropriate to authorise these complex arrangements prior to proper assessment, particularly in light of significant concerns raised by key industry participants. In this regard, I would encourage you to read the submissions posted on the ACCC's website, many of which raise strong concern as to the potential for irreversible harm to result from the arrangements as proposed by Dairy WA (including to all industry participants).

As you noted, the ACCC considered the difficulties in assessing the matter at the interim stage were compounded by the absence of important details as to the operation of the proposed arrangements. The ACCC raised these concerns with Dairy WA on numerous occasions.

In this regard, please find attached the ACCC's letter of 28 April 2005 emphasising the importance of the provision of further information and setting out a detailed request for further information. While Dairy WA's response of 11 May 2005 (also enclosed) provided valuable information, a number of key issues, such as the basis upon which dairy farmers may choose to exit the arrangements, were yet to be determined. Dairy WA also advised that it had engaged consultants to develop a business plan in relation to the proposed arrangements suggesting that details are still being developed.

You also referred to what you describe as the ACCC's 'demand' to publish Dairy WA's commercially sensitive projections. As noted above, the authorisation process is conducted in a transparent manner with the Act requiring the ACCC to maintain a public register of all materials provided to it in relation to an application for authorisation. Information may be excluded from this register where it can be demonstrated to be confidential in nature.

In this matter, Dairy WA has claimed confidentiality over a large number of its submissions. While confidentiality has been provided in relation to some material, in many cases, when questioned as to the basis for confidentiality, Dairy WA has withdrawn their claim. I am not aware of the specific instance of commercially sensitive information you refer to but expect it to be in relation to Dairy WA's response of 11 May 2005. The ACCC formed the view that the submission, particularly in its entirety, was not confidential and was important for interested party consultation. In advising Dairy WA that it did not consider the submission to be confidential, Dairy WA was given the option of seeking the return of the information.

Moving forward, the ACCC will continue to assess the application with a view to issuing a draft determination as soon as possible. Following the release of the ACCC's draft decision, the applicant and any interested parties will be invited to provide submissions commenting upon the proposed decision, including by way of a conference (oral submissions) convened by a member of the Commission. Taking

on board any further submissions, the ACCC will then issue a final determination which itself can be reviewed by the Australian Competition Tribunal. In the context of the authorisation process, the decision to deny interim authorisation is neither unusual nor indicative of the final decision and efforts should now be concentrated on the process ahead.

As you may be aware, dairy farmers have been authorised to engage in collective bargaining since 2002 (Australian Dairy Farmers Federation, A90781). While this arrangement differs from that proposed by Dairy WA, it nonetheless permits dairy farmers to collectively bargain with processors. These arrangements extend to dairy farmers in Western Australia and permit an alternate form of collective bargaining to occur while the ACCC considers the proposal of Dairy WA.

ACCC staff would be pleased to discuss these matters with you further. Scott Gregson, Acting General Manager in the Adjudication Branch can be contacted on (02) 6243 1132.

Yours sincerely

A handwritten signature in black ink, appearing to read 'B. Cassidy', written in a cursive style.

Brian Cassidy
Chief Executive Officer

8 July 2005

cc The Hon Peter McGauran, Minister for Agriculture
cc The Hon Chris Pearce, Parliamentary Secretary to the Treasurer