

Draft Determination

Application for Authorisation

Lodged by

Milk Vendors' Association (SA) Inc

in respect of

Collective bargaining on behalf of South Australian
milk vendors with National Foods Milk Limited
and Dairy Vale Foods Limited.

Date: 9 February 2005

Authorisation no. A90927

Public Register no. C2004/1242

Commissioners:

**Samuel
Sylvan
King
Martin
Smith
Willett**

Executive summary

The Application

On 3 September 2004, the Milk Vendors Association (SA) Inc (the MVA) lodged application for authorisation A90927 (the application) with the Australian Competition and Consumer Commission (the ACCC).

The authorisation process

A key objective of the *Trade Practices Act 1974* (the TPA) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The TPA however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The ACCC conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

The proposed arrangements

The MVA seeks authorisation to collectively bargain on behalf of its members in relation to the terms and conditions of distribution contracts with the processors for whom vendors distribute, namely National Foods Milk Limited and Dairy Vale Foods Limited. Authorisation is also sought to give effect to any contracts agreed to by the MVA and the processors. As well as seeking authorisation for itself and its members, the MVA has also expressed the application so as to apply in relation to future parties. Specifically, future MVA members and current and future South Australian milk vendors who are not MVA members but who choose to participate in the proposed collective bargaining arrangements.

Generally speaking, ‘collective bargaining’ describes arrangements where a number of businesses form a group to engage in collective negotiations on the terms of trade (including price) with a supplier or acquirer of goods or services. Absent authorisation, collective negotiation amongst competitors is likely to raise concerns under the competition provisions of the TPA.

The MVA also seeks authorisation to represent any vendor or group of vendors in any dispute which may arise between: any vendor or vendors and NFML or Dairy Farmers; any vendor or vendors and any customer, and any vendor or vendors and any other vendor or vendors.

Assessment of public benefit and anti-competitive detriment

The ACCC considers the anti-competitive detriment generated by the proposed arrangement to be low. The ACCC considers that, even absent of the proposed arrangements, vendor distribution contracts are subject to somewhat standard terms and conditions. The ACCC is of the view that the difference between the level of competition amongst vendors over contract terms and conditions with or without the proposed arrangements would be small.

To the extent that, absent authorisation, there is scope for individual vendors to vary the terms of distribution contracts, the proposed arrangements will not reduce their scope to do so. Processors will still enter into individual contracts with each vendor, with the capacity to negotiate variations to collectively agreed contracts, or alternatively, negotiate individual contracts outside of the proposed arrangements.

In addition, the ACCC notes that, even where vendors are able to negotiate increases in prices paid to them as a result of bargaining collectively, competitive pressures in retail markets limit the capacity for such increases to be reflected in prices paid by consumers.

The ACCC considers that there is some potential for the proposed arrangements, if they were to result in a set of standard, industry wide terms and conditions being adopted, to reduce competition between vendor bargaining groups and inhibit competition between processors.

The ACCC considers that the proposed arrangements will result in some public benefit. In particular, the ACCC considers that improving the bargaining power of vendors, thereby providing vendors with the opportunity for more effective input into contract terms and conditions, will result in some public benefit.

The ACCC also considers that the proposed arrangements are likely to result in some, albeit small, transaction cost savings, which, given competitive pressures within the industry, are likely, at least in part, to be passed on to consumers.

Balance of public benefits and anti-competitive detriment

Accordingly, on the evidence before it and for the reasons given above, the ACCC considers that the proposed arrangements give rise to a small public benefit and limited public detriment.

Where it is difficult to determine precisely the magnitudes of public benefit and detriment that appear to be of similar size – as is the case here – there may be some uncertainty about whether the public benefit outweighs the public detriment.

In these cases, the ACCC will generally not be satisfied that the public benefit generated by the application outweighs the anti-competitive detriment. However, it may consider whether it is possible to grant authorisation subject to conditions aimed at reducing, as far as possible, any uncertainty about whether the public benefit is greater than the anti-competitive detriment. These conditions would either seek to increase the public benefit or, more typically, reduce the anti-competitive detriment sufficiently to remove any concern that authorisation was being granted inappropriately.

In this instance, the ACCC considers that restriction on the exchange of information regarding contract negotiations between bargaining groups will address concerns that the proposed arrangements might result in a set of standard, industry wide terms and conditions being negotiated. The ACCC considers that with such a restriction in place, the anti-competitive detriment generated by the arrangements would be minimal and that any anti-competitive detriment would be outweighed by the public benefits resulting from the arrangements.

Therefore, the ACCC proposes to grant authorisation subject to the following condition:

- *the MVA must put in place a mechanism to ensure that information obtained in one bargaining group is not provided to another bargaining group*

The ACCC is not satisfied that the benefits to the public from the proposed dispute representation arrangements will outweigh any anti-competitive detriment and as such does not propose to grant authorisation to the dispute representation aspect of the application. However, the ACCC notes that on many occasions, the MVA's proposed representation of vendors in disputes will not raise concerns under the TPA.

Draft determination

The ACCC therefore proposes, subject to any pre-determination conference requested, to grant authorisation to application A90927, subject to the above condition, for a period of five years.

Interim authorisation

The MVA also sought interim authorisation for the proposed arrangements. On 6 October 2004, the ACCC granted interim authorisation for the MVA to collectively bargain with National Foods Milk Limited and Dairy Vale Foods limited on behalf of its members in accordance with its application for authorisation. As requested by the MVA, interim authorisation does not extend to the proposed dispute representation system.

The terms of this proposed authorisation differ to the interim authorisation granted to the MVA on 6 October 2004. The ACCC considers it appropriate to amend the interim authorisation in accordance with the proposed conditions as stated at paragraph 10.15 of this draft determination.

Interim authorisation will continue to protect the proposed arrangements from action under the TPA until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

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1 Introduction

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.3. The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.4. The TPA requires that the ACCC then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.5. This document is a draft determination in relation to application for authorisation A90927 lodged with the ACCC by the Milk Vendors Association (SA) (the MVA or the Applicant).
- 1.6. Once a draft determination is released, the Applicant or any interested party may request that the ACCC hold a conference. A conference is generally called by a party dissatisfied with the ACCC's decision and provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.7. The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment the ACCC may grant authorisation. If not, the authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefits and decrease the public detriment.
- 1.8. The ACCC also has the power to grant interim authorisation, at the time the application is lodged or at a later stage. Interim authorisation protects the arrangements for which authorisation is sought from legal action under the TPA while the ACCC considers and evaluates the merits of the application.

2 Background to industry

Milk distribution in South Australia

Dairy Industry

- 2.1 Historically in Australia, State Governments had regulatory control over most elements of the fresh milk supply chain. This control has gradually diminished since the early 1990s.¹

*Milk Vendors' Association (SA) Inc.*²

- 2.2 The MVA began with the formation of the Adelaide and Suburban Milk Distributors and Dairymans' Association in 1931. The name was changed in 1944 to The Master Retail Milk Vendors Association Inc and to its present name in August 1992.
- 2.3 The MVA is a non-profit organisation and is controlled by a Committee of Management elected by its members. Membership of the MVA is voluntary. MVA member vendors distribute in excess of 70% of the volume of milk distributed in South Australia.

Milk vendors

- 2.4 Milk vendors (vendors) distribute milk and milk products to retail customers and private residences. They are independent small businesses and are almost exclusively owner operated. Traditionally vendors purchased product from the processors and resold it to retailers and consumers. Although this system still applies to home delivery and route trade customers, 'Direct Billing' is becoming more prevalent, whereby the processors sell directly to the larger retailers. This system involves the processors assuming the role of supplier to the retailer, with the licensed vendors providing an ordering, delivery, and merchandising service in return for a delivery fee from the processors.³
- 2.5 Vendors are required to be licensed pursuant to the terms of the *Dairy Industry Act (SA) 1992* (the Dairy Industry Act). Under the Dairy Industry Act, licensed vendors are required to have a credit contract with a processor and comply with certain health and hygiene standards.⁴ Currently there are 203 licensed vendors in South Australia.

Processors

- 2.6 National Foods Milk Limited (NFML) and Dairy Vale Foods Limited (Dairy Farmers) are the two major processors in South Australia. Parmalat Australia

¹ ACCC, *Impact of farmgate deregulation on the Australian milk industry: study of prices, costs and profits*, April 2001, page 111

² Information under this heading taken from MVA submission, 3 September 2004, page 7

³ MVA submission, 3 September 2004, page 3

⁴ MVA submission, 3 September 2004, pages 3-5

Limited, trading as Pauls, entered South Australia as a processor in 2001.⁵ The processors purchase bulk milk supplies from primary producers and process it into various dairy products.

National Foods Milk Limited (NFML)⁶

- 2.7 National Foods Limited (NFL) is an Australian publicly listed company with a range of food related businesses, in particular the processing and sale of milk, fresh dairy food and specialty cheeses. NFL is the parent company of NFML, which is the dairy processor with whom South Australian distributors of National Foods products contract.
- 2.8 NFML currently has distributor agreements with 149 South Australian vendors. 106 of these current agreements expire on 12 May 2005. 32 of the current agreements expire on 1 November 2005. Eleven of the current agreements expire after 1 November 2005, the latest of these expiring on 11 November 2006.
- 2.9 The current agreement provides that the parties may (but are not obliged to) negotiate the terms and conditions of a new agreement in the year prior to the stated expiry date of the current agreement. If the parties are in such negotiations but have not reached agreement by the stated expiry date, the current agreement continues for a further six months after its stated expiry date.
- 2.10 Under the current agreement, a vendor is:
- the exclusive distributor of specified NFML products to specified route customers and all home delivery customers within a specified territory (collectively, trade customers). Generally, these products are white milk and flavoured milks;
 - the exclusive provider of delivery services of National Foods products to NFML's customers at the locations specified in the Agreement; and
 - a non-exclusive distributor of specified NFML products to trade customers. These include yoghurts and cheeses.
- 2.11 NFML is in the process of arranging new contracts with vendors. NFML states that if vendors enter into a new agreement prior to the expiry of their current agreement, the remaining term of their current agreement will be added to the new agreement. However, NFML submits that it does not intend to, and it is not obliged to, offer new agreements to all existing vendors.
- 2.12 Under the new agreements, vendors will be free to compete for customers with other NFML vendors.

⁵ NFML submission dated 22 October 2004, page 8, paragraph 5.2

⁶ Information in relation to NFML contracts is taken from part B of NFML's submission dated 22 October 2004.

- 2.13 One of the key features of the new agreements is that vendors will not be appointed as the exclusive distributor of National Foods products to any person and will be free to compete with other NFML vendors. However, the agreements will include some restrictions on competition for customers and home delivery territories until all current agreements expire or are replaced.
- 2.14 NFML also proposes to offer a shortened, simplified new agreement with a shortened term to smaller vendors whose business is home delivery.

Dairy Vale Foods Limited (Dairy Farmers)⁷

- 2.15 Dairy Vale Foods Limited is a wholly owned subsidiary of Australian Co-operative Foods Limited (ACF). ACF and its subsidiaries trade as 'Dairy Farmers'.
- 2.16 Dairy Farmers introduced its Franchise System in South Australia in 2001. The franchise system is subject to the Franchising Code of Conduct, a mandatory code as prescribed under the TPA. Vendors signed two year Home Delivery Franchise Agreements or Route Trade Franchise Agreements with Dairy Farmers which contained an option for renewal. The Franchise Agreements came up for renewal in 2003 and Dairy Farmers offered five year Home Delivery Franchise Agreements or Route Trade Franchise Agreements with options for renewal.
- 2.17 There are currently 32 Franchise Owners who have five year Franchise Agreements with Dairy Farmers. Dairy Farmers submits that there are six Franchise Owners that will finalise their new Franchise Agreements shortly. There are four Franchise Owners with Franchise Agreements that expired in September 2004, October 2004 or December 2004. There are also five vendors who have not signed Franchise Agreements but who operate as part of the Dairy Farmers Franchise System.
- 2.18 In addition, Dairy Farmers have seven vendors who deliver Dairy Farmers Products to metropolitan supermarkets under separate delivery arrangements.
- 2.19 The Dairy Farmers Franchise System involves the distribution of Dairy Farmers Products to home delivery customers and route trade customers. Franchise Owners either sign a Home Delivery Franchise Agreement or a Route Trade Franchise Agreement. Home delivery customers are residential homes. Route trade customers include milk bars, take away food shops, offices, factories and restaurants.
- 2.20 Franchise Owners are granted the exclusive right under the terms of the Franchise Agreement to use the Dairy Farmers System and the Dairy Farmers Trade Mark to deliver Dairy Farmers Products to the Designated Customers listed under their Franchise Agreements.

⁷ Information in relation to Dairy Farmers' Franchise System is taken from pages 2-4 of Dairy Farmers' submission dated 9 November 2004.

Exclusive Dealing Notifications

- 2.21 Five notifications of exclusive dealing agreements were lodged by Dairy Vale Cooperative Limited (Dairy Vale) and National Dairies SA Limited (National Dairies) in the early 1990s⁸. The notifications relate to processors' contracts with vendors which, among other things, require that vendors do not carry competitors' products.
- 2.22 The TPA prohibits corporations from engaging in exclusive dealing conduct. Generally speaking, exclusive dealing involves a corporation imposing restrictions on another's freedom to choose with whom, or in what, it deals. Section 47 of the TPA includes prohibitions relating to exclusive dealing of the type known as full line forcing. Full line forcing involves the supply of goods or services on the condition the purchaser will not acquire goods or services directly or indirectly from a competitor of the supplier. It also involves the supply of goods or services on the condition that the purchaser will not resupply, or will resupply only to a limited extent, goods to particular persons or classes of persons or in a particular place or places. Full line forcing conduct only breaches the TPA if it has the purpose or effect of substantially lessening competition in a relevant market.
- 2.23 Businesses wishing to engage in full line forcing conduct can notify the ACCC of the conduct. Notification provides immunity from legal action by the ACCC and any other party for potential breaches of the exclusive dealing provisions of the TPA where the conduct is in the public interest. Under the notification process immunity from full line forcing conduct is obtained automatically on the date of lodgement and continues unless the ACCC issues a notice revoking the immunity.
- 2.24 For full line forcing notifications, the ACCC may issue a notice revoking the immunity only if it finds that the conduct substantially lessens competition (or is likely to) within the meaning of section 47 of the TPA and that any public benefit flowing from the conduct is outweighed by the detriment to the public constituted by any lessening of competition.

Dairy Vale Cooperative

- 2.25 On 24 November 1992 and 9 February 1993, Dairy Vale lodged notifications (N60014 and N60015) in relation to an exclusive dealing agreement between Dairy Vale and selected milk vendors in South Australia. The agreement gave vendors the exclusive right to distribute all Dairy Vale products in particular areas and specified the territory in which the vendor would operate. Dairy Vale retained the right to sell products direct to retailers. The agreement also provided for vendors to carry competing products provided Dairy Vale agreed in writing.

⁸ N60014, N60015 lodged by Dairy Vale Cooperative Ltd on 24 November 1992 and 9 February 1993, N60016 lodged by National Dairies S.A. Ltd on 13 April 1993 and N60017 and N60018 lodged by National Dairies S.A. Ltd on 29 March 1994.

- 2.26 The notifications were in relation to agreements with 23 milk vendors in the south east of South Australia and with six milk vendors in the Riverland region of South Australia. The term of the agreements were 18 months and have since expired. Dairy Farmers and milk vendors are no longer operating under the terms of the agreements.⁹
- 2.27 Dairy Vale became Dairy Vale Foods Limited in 1994 and then became part of the Dairy Farmers Group in 1998, with Australian Cooperative Foods Limited as the parent entity.¹⁰

National Dairies

- 2.28 On 13 April 1993 Farmers Union Limited (which subsequently became National Dairies) lodged a notification of exclusive dealing (N60016) in relation to an agreement with milk vendors in some country areas of South Australia. The agreement gave vendors exclusive rights to distribute National Dairies' white milk, modified milk and flavoured milk. Vendors were given non-exclusive rights to distribute other National Dairies products. The agreement also provided that vendors could distribute non National Dairies products provided National Dairies granted an exemption to do so. Distributors were not zoned and they could compete with National Dairies for the business of new customers.
- 2.29 The agreement was for an initial term of 12 months and could be extended for two further terms of 24 months each. Agreements were offered to 11 vendors in the Murray Districts, 13 vendors in the Far North, 24 vendors in the Barossa Mid-North, one vendor in the Riverland, one vendor on Kangaroo Island and one vendor in Broken Hill NSW.
- 2.30 On 29 March 1994 National Dairies lodged two further notifications of exclusive dealing (N60017 and N60018) in relation to agreements with milk vendors operating in Adelaide. The first gave wholesale vendors, who distributed products to retail outlets and other large buyers, the exclusive right to distribute National Dairies' white milk, modified milk and flavoured milk within a specified territory of metropolitan Adelaide. The second notification provided retail vendors with the exclusive right to distribute National Dairies' white milk, modified milk and flavoured milk to households and small retailers. Both agreements gave vendors non-exclusive rights to distribute other National Dairies products. The agreements also provided that vendors could distribute non National Dairies products provided National Dairies granted an exemption to do so.
- 2.31 The agreements were for an initial term of 18 months and could be extended for two further terms of 18 months and 24 months each.

⁹ Dairy Farmers letter to the ACCC, dated 19 November 2004

¹⁰ Ibid.

Trade Practices Commission consideration

- 2.32 At the time of assessing the Dairy Vale and National Dairies notifications in 1993 and 1994, the Trade Practices Commission (now the ACCC) considered that the exclusive dealing arrangements were likely to have little impact on competition in the short term, although it noted that their impact after deregulation was unclear. The Trade Practices Commission also considered there was little public benefit in the agreements themselves.
- 2.33 However, on the basis of the information before it, the Trade Practices Commission was not satisfied that the agreements would substantially lessen competition and that any public benefit flowing from the agreements was outweighed by the detriment to the public constituted by any lessening of competition. Consequently, the agreements were allowed to continue.

Current status of the notifications

- 2.34 The MVA's submission in relation to its application for authorisation states that the new contracts issued by both processors continue to rely on these notifications.¹¹
- 2.35 In light of the MVA's submission the ACCC decided to review the notifications at the same time as considering the MVA's application for authorisation.
- 2.36 Dairy Farmers advises that it does not rely on the notifications in respect of either its franchise or supermarket delivery arrangements in South Australia.¹² NFML advises that it does not in any way rely on the National Dairies notifications.¹³
- 2.37 The ACCC did not receive any other submissions in relation to the notifications.
- 2.38 The ACCC notes that the notifications related to specific contracts which have expired. Both processors have informed the ACCC that they no longer rely on the notifications. The ACCC accepts this position and is of the view that it does not need to further consider these notifications.

¹¹ MVA submission, page 5

¹² Dairy Farmers letter to the ACCC, dated 19 November 2004

¹³ NFML submission, dated 22 October 2004, page 27

3 The MVA's application

- 3.1 On 3 September 2004, the MVA lodged application for authorisation A90927 with the ACCC.
- 3.2 The application was made under section 88(1) of the TPA for an authorisation under that subsection:
- (a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA; and
 - (b) to give effect to a provision of a contract, arrangement or understanding where the provision has, or may have, the effect of substantially lessening competition within the meaning of section 45 of the TPA.
- 3.3 The MVA seeks authorisation to collectively bargain on behalf of its members in relation to the terms and conditions of distribution contracts with the processors for whom vendors distribute, namely National Foods Milk Limited and Dairy Vale Foods Limited. Authorisation is also sought to give effect to any contracts agreed to by the MVA and the processors. As well as seeking authorisation for itself and its members, the MVA has also expressed the application so as to apply in relation to future parties. Specifically, future MVA members and current and future South Australian milk vendors who are not MVA members but who choose to participate in the proposed collective bargaining arrangements.
- 3.4 The MVA also seeks authorisation to represent any vendor or group of vendors in any dispute which may arise between:
- any vendor or vendors and NFML or Dairy Farmers;
 - any vendor or vendors and any customer; and
 - any vendor or vendors and any other vendor or vendors.¹⁴
- 3.5 At the time of lodging its application the MVA also sought interim authorisation for the proposed arrangements. On 6 October 2004, the ACCC granted interim authorisation.¹⁵ Interim authorisation will continue to protect the proposed arrangements from action under the TPA until the date the

¹⁴ The MVA originally sought authorisation to exclusively provide dispute resolution services in relation to disputes between vendors and/or between vendors and their suppliers and/or between vendors and any person or entity to which the vendor delivers product. However, the MVA amended its application in its submission provided to the ACCC on 15 December 2004.

¹⁵ As requested by the MVA, interim authorisation did not extend to the originally proposed dispute resolution arrangements.

ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.¹⁶

The proposed arrangements

- 3.6 The MVA proposes to negotiate separately with NFML and Dairy Farmers in relation to the terms and conditions of distribution contracts for the processors' products, according to the following arrangements:
- a) The MVA will write to vendors (both members and non members of the Association) to notify them of the authorisation and to advise the vendors that they may nominate the MVA to negotiate contract terms and conditions on their behalf.
 - b) Vendors may then nominate the MVA to negotiate on their behalf.
 - c) The MVA will then notify the relevant processor (NFML or Dairy Farmers) that it has been authorised to negotiate on behalf of the relevant vendors.
 - d) The MVA will then engage in negotiations on behalf of those vendors with the relevant processor.
 - e) The MVA will then report back to the relevant vendors.
 - f) There may then be further negotiations with the relevant processor.
 - g) Vendors will make individual decisions as to whether or not to contract with the relevant processor.

¹⁶ As noted at paragraph 10.17 on 9 February 2005 the ACCC amended the terms of the interim authorisation granted on 6 October 2004 in accordance with the condition of authorisation proposed in this draft determination.

4 Statutory test

- 4.1. Application A90927 was made under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA.
- 4.2. In assessing an application made under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA, the relevant test that the MVA must satisfy for authorisation to be granted is outlined in sub-sections 90(6) and 90(7) of the TPA.
- 4.3. Under section 90(6) of the TPA, the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
 - the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 4.4. Under section 90(7) of the TPA, the ACCC may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
 - the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 4.5. In deciding whether it should grant authorisation, the ACCC must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the ACCC may grant authorisation. If this is not the case, the ACCC may refuse authorisation.
- 4.6. The ACCC may also grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the anti-competitive detriment.
- 4.7. Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future. In this instance, as well as seeking authorisation for itself and its members, the MVA has also expressed its application so as to apply in relation to future parties. Specifically, future MVA members and current and future South Australian milk vendors who are not MVA members who but choose to participate in the proposed collective bargaining arrangements.

5 Summary of the Applicant's submission

- 5.1. The conduct for which authorisation is sought is described in section 3 of this draft determination.
- 5.2. The MVA's submissions supporting its application are summarised below. A copy of this submission is available on the ACCC's Public Register.

Public benefits

Fairness in the negotiating process

- 5.3. The MVA submits that the proposed arrangements will lead to greater fairness in the negotiating process. It submits that currently vendors are obliged to accept whatever terms are offered due to the relative bargaining strength of the processors. The MVA submits that the proposed arrangements will help to provide vendors with some competitive parity in contract negotiations with processors, resulting in greater vendor input into contract terms.

Compliance with statutory requirements

- 5.4. The MVA submits that collective negotiation is likely to result in contracts that ensure both processors and vendors comply with statutory requirements as to safety, roadworthiness, environmental protection, pollution control and cold chain compliance. It is submitted that the existing arrangements provide vendors with an incentive to cut corners in these areas.

Efficiency of operations

- 5.5. The MVA submits that collective negotiation will continue to allow for the consolidation of vendors' rounds. This process will increase the average size of rounds, thereby reducing transport costs and total average costs of vendors.

Continued viability of independent distribution sector

- 5.6. The MVA submits that the proposed arrangements will lead to the continued viability of the independent distribution sector. It is submitted that the closure of vendor businesses would result in the reduction of services available to consumers and loss of employment.

Reduction in transaction costs

- 5.7. The MVA submits that collective negotiation will lead to a reduction in transaction costs. Transaction costs vary among the vendors according to a range of factors including the processor and the extent to which they engage in negotiations. It is submitted that all vendors are required to sign a declaration to the effect that they have had or have had the opportunity to have legal, accounting and business advice. The MVA submits that it is reasonable to estimate these costs at approximately \$5000 per vendor per contract. However, the MVA subsequently submitted that few vendors actually seek such advice. The MVA submits that processors may incur transaction costs of

\$2000 per vendor per contract. In contrast, it is submitted that under collective negotiation, the total vendor transaction costs would be in the region of \$10,000-\$20,000 or \$45-\$90 per vendor.

Better information

- 5.8. The MVA submits that the proposed arrangements will lead to better information for vendors. The MVA maintains substantial records and databases in relation to the dairy industry and has access to further material through connections with interstate vendor organisations and the Dairy Industry Council. The MVA submits that many vendors do not have the time or skills to gather and analyse such information. It submits that currently, this problem of asymmetrical information compounds the disparity in bargaining positions between individual vendors and the processors.

Improvement in health and safety

- 5.9. The MVA submits that the proposed arrangements will result in an improvement in health and safety standards. The MVA submits that the consolidation of rounds will have the effect of reducing delivery distance and times, resulting in a safer environment for vendors, their employees and other drivers.

Market definition and anti-competitive detriment

- 5.10. The MVA submits that it is not necessary for the ACCC to comprehensively define the relevant markets. It submits that there are two relevant areas of competition:

- the supply of distribution services to the processors, where vendors compete with each other to acquire distribution contracts from the processors
- the supply of milk and other dairy products to retailers and consumers, where vendors compete with each other and with the processors to supply retailers and with retailers to supply products to consumers

The MVA submits that all competition occurs within the geographic area of South Australia as individual distributor contracts are highly localised and limited to listed customers and designated territories within a particular metropolitan or regional area.

- 5.11. The MVA submits that the level of competition between vendors for distribution contracts is negligible. As new retail outlets or residential territories are constructed, they are allocated by the processors to existing vendors. Similarly, when vacancies occur in the distribution network, the processors reallocate customers to existing vendors.
- 5.12. The MVA submits that competition between vendors for customers is limited by the distributor contracts, which list vendors' customers and define their territories. Vendors are prevented from seeking to supply an existing

customer of another vendor who is contracted to the same processor. The MVA submits that price competition between vendors is extremely limited as margins have been forced downwards since deregulation.

- 5.13. The MVA submits that without the proposed conduct, vendors will continue to have to accept the standard form contracts offered by the processors and attempt to negotiate individually. It is submitted that the independent distribution sector will continue to decline which will lead to a decline in customer choice and the range of available services, while retail prices and profits of processors and retailers will increase.
- 5.14. The MVA submits that with the proposed conduct, there is likely to be a greater degree of vendor influence on the terms and conditions of contracts. It is submitted that services to consumers would be maintained, efficiency would increase and competition will limit retail prices and the profits of the processors and major retailers.

Scope of the proposed arrangements

- 5.15. The MVA states that it is not seeking authorisation for collective boycott activity. The MVA also states that it does not seek authorisation to negotiate collectively on behalf of vendors who are not offered new contracts or to renegotiate existing distribution contracts or franchise agreements.
- 5.16. The MVA submits that prices have not previously been set in standard distribution contracts between vendors and NFML. Contracts have contained provisions to the effect that NFML will supply products to vendors at prices to be determined by NFML from time to time, and that, in respect of direct billing customers, delivery fees will be set by NFML from time to time. However, the MVA submits that if NFML wishes to include explicit pricing provisions in any future distributor agreements, the MVA would be prepared to negotiate on those terms. The MVA also submits that prices and fees are not currently included in Dairy Farmers' franchise agreements.

Term of authorisation

- 5.17. The MVA did not make a submission in relation to a time limit for authorisation of the proposed arrangements.

6 Summary of processor submissions

- 6.1 Both NFML and Dairy Farmers provided submissions to the ACCC in relation to the application and the MVA's supporting submission. Both processors oppose the MVA's application. A summary of these submissions is provided below and copies are available on the ACCC's Public Register.

Consumer purchasing trends

- 6.2 The processors submit that as a result of the competitive pressures of deregulation and growth of large retail chains, consumers are now increasingly purchasing generic brands and purchasing milk from supermarkets. NFML submits that this has reduced the viability of vendors' route customers such as milk bars. It has also put pressure on processors to provide delivery services to their customers more efficiently and reduced the volume of milk that vendors supply to processors' customers. NFML submit that both Woolworths and Coles Myer have indicated that within the next 12 months they will be arranging the delivery of National Foods products themselves.

Anti-competitive detriment

- 6.3 The processors submit that the conduct for which authorisation is sought is unclear and they are concerned that the MVA may be seeking authorisation for collective boycott conduct. NFML submits that should the proposed conduct be authorised, there is a greater likelihood of the MVA engaging in anti-competitive conduct beyond that authorised by the ACCC. NFML also submits that there is no justification for the proposed collective bargaining arrangements in relation to other dairy products such as yoghurts and cheeses and non-dairy products. NFML submits that these products are distributed by a variety of persons outside the distributor network, including food wholesalers.
- 6.4 NFML submits that the proposed collective bargaining conduct would interfere with the rationalisation of milk distribution in South Australia. NFML submits that there are more than twice as many NFML distributors servicing the Adelaide area there are the Melbourne area, for a lower volume of milk. NFML is concerned that the MVA will seek to entrench current distributor arrangements and numbers. In contrast, Dairy Farmers submits that authorisation of the proposed collective bargaining arrangements will not halt or protect vendors from changes brought about by market forces and customer demands.
- 6.5 The processors submit that despite the voluntary nature of the proposed conduct, there would still be significant pressure on vendors to be involved in the process. Dairy Farmers submit that any pressure on vendors applied by the MVA will disrupt the operation of the franchise system and is likely to harm existing industry harmony.
- 6.6 NFML submits that the proposed conduct will increase prices to consumers as any cost increases to processors without offsetting increases in efficiency would need to be passed on to the processors' customers and in turn,

consumers. NFML submits that it should not be required to engage in a wealth transfer to distributors through increased delivery fees which do not arise from improvements in services or efficiency. It is submitted that any such fee increases would decrease distributors' incentive to improve their margins by increasing efficiency. Dairy Farmers submits that it disagrees with the MVA's submission that any increase in vendors' margins or delivery fees resulting from collective negotiation is capable of being absorbed by the processors and/or major retailers.

- 6.7 NFML submits that the MVA's role as a single bargaining agent increases the prospect of a set of industry-wide terms and conditions, including price, in South Australia. This would inhibit the processors' ability to compete with each other to supply their customers and to compete for the acquisition of distributors. NFML submits that as MVA members distribute approximately 70% of milk in South Australia, it would have significant bargaining power against the processors. NFML also notes that the proposed conduct does not allow smaller groups of vendors to negotiate directly with processors.

Public benefit

- 6.8 NFML submits that the public benefits claimed by the MVA do not exist and are not connected to the collective bargaining conduct. Dairy Farmers submit that the claimed public benefits already exist under their franchise system. Dairy Farmers submit that to the extent that any benefits result from the proposed arrangements, they will be private benefits to the MVA and its members and not public benefits.

Fairness in the negotiating process

- 6.9 In relation to the MVA's claims that the proposed conduct will bring fairness to the negotiating process, the processors submit that the MVA has not provided any evidence that they have extracted inappropriate commercial outcomes, treated vendors unfairly or engaged in unconscionable conduct. NFML submits that the unconscionable conduct provisions in the TPA are sufficient to protect distributors from any unfair conduct by NFML. Dairy Farmers notes that it is also subject to the requirements of the Franchising Code of Conduct. Dairy Farmers submits that vendors already negotiate with Dairy Farmers through local and state franchise councils and submits that it provides a variety of business, marketing and promotional support to vendors.
- 6.10 NFML also submits that a number of changes were made to the current agreement as a result of concerns raised by the MVA during negotiations conducted in 1999. NFML submits that the MVA was invited to comment on proposed drafts of the new agreement in March 2004, July 2004 and September 2004 but has not made any comments.
- 6.11 NFML agrees that it has substantially greater bargaining power than some of its smaller distributors, but notes that the proposed conduct is not limited to small businesses. NFML also submits that it is not clear how the proposed conduct will lead to greater vendor input into contract terms, as in the absence of authorisation for collective boycotts NFML cannot be compelled to enter into negotiations with the MVA.

Compliance with statutory requirements

- 6.12 The processors submit that the proposed conduct is unlikely to lead to any public benefit through increased compliance with statutory requirements, as both they and the vendors are already required to comply with the law and the operational safety standards contained in their agreements with vendors.

Efficiency of operations

- 6.13 The processors submit that the proposed conduct is unlikely to lead to any public benefit in the form of efficiency gains. It is submitted that it is the rationalisation process which will lead to consolidation of rounds and efficiency gains, rather than any collective bargaining conduct. NFML submits that a potential increase in delivery fees resulting from the proposed conduct is not consistent with the claimed efficiency gains. Dairy Farmers submits that it is concerned that the application is an attempt to re-impose regulation of prices on the market to the ultimate detriment of consumers.

Continued viability of the independent distribution sector

- 6.14 The processors submit that the proposed conduct is unlikely to improve the viability of the independent distribution sector or preserve the range of services available to consumers. It is submitted that market forces and the ability of vendors to respond to customers' needs will determine whether the current distribution system will continue. The processors submit that there is no public benefit in ensuring the viability of inefficient vendors.

Reduction in transaction costs

- 6.15 The processors do not agree with the MVA's submission in relation to transaction cost savings. They submit that vendors would still need to obtain individual business and accounting advice. Dairy Farmers submit that the franchise system already minimises costs to vendors as changes are discussed through the state franchise council. Dairy Farmers also note that the requirement that vendors sign an acknowledgment that they have been advised and/or chosen not to seek independent legal, accounting and business advice is set down in the Franchising Code of Conduct. Dairy Farmers also submit that any representation by the MVA of non-members will be at a cost to non-members which they do not currently pay.

Better information

- 6.16 The processors submit that authorisation is not necessary for vendors to be supplied with better information by the MVA. They submit that the MVA's capacity to provide market information would be unaffected by the denial of authorisation.

Improvement in health and safety

- 6.17 The processors submit that any improvements in health and safety as submitted by the MVA would arise due to the rationalisation process, rather than any collective bargaining conduct. Dairy Farmers also submit that these benefits are already occurring as a part of the franchise system.

7 Summary of other submissions

- 7.1. The ACCC sought submissions from a wide range of interested parties in relation to the proposed arrangements.
- 7.2. Copies of all submissions received are available on the ACCC's Public Register.

Submissions by vendors

- 7.3. The ACCC received a submission from a milk vendor and member of the MVA, C & M Hidvegi, which supported the application and the submission made by the MVA.

Other interested parties

- 7.4. The ACCC received a submission from Parmalat Australia Ltd (Parmalat) opposing the application for authorisation.
- 7.5. Parmalat submits that the benefits submitted by the MVA in relation to: fairness in the negotiating process; compliance with statutory requirements; efficiency of operations; reduction in transaction costs; and better information are of benefit only to the MVA and its members rather than the public as a whole.
- 7.6. In relation to fairness in the negotiating process, Parmalat also notes that the MVA has not argued that the two processors have engaged in unconscionable conduct in breach of section 51AC of the TPA.
- 7.7. With regard to the MVA's claims in relation to efficiency of operations, Parmalat submits that it is unlikely that collective bargaining would lead to the consolidation of vendors' rounds. However, if that is the case, an increased average size of rounds will not necessarily reduce costs for vendors due to factors such as the geographical size, customer numbers, mix of customers and average order size. In addition, Parmalat submits that collective bargaining may limit efficiency if it prevents processors from delivering products using the most effective transportation facilities.
- 7.8. Parmalat submits that market forces should determine the viability of the vendor distribution sector. Deregulation of the dairy industry has necessitated changes in the vendor distribution sector which may lead to a loss of employment and certain services to consumers. However, alternative sources of employment and consumer services are being developed. Parmalat submits that a public benefit results from the promotion of industry cost savings which lead to contained or lower prices at all levels in the supply chain.
- 7.9. Parmalat submits that the transaction cost savings anticipated by the MVA may not eventuate as vendors would still seek independent advice.
- 7.10. Parmalat submits that the proposed collective bargaining conduct will result in anti-competitive detriment. It may prevent processors from negotiating the

best contract commercially available and thereby add to their costs and reduce economic efficiency.

- 7.11. Parmalat submits that the relevant markets are those for the supply of milk and dairy products to retailers in South Australia and the market for the supply of milk and dairy products to consumers in South Australia. In relation to the supply to retailers, Parmalat submits that the proposed conduct may delay or prevent the implementation of more effective distribution systems.
- 7.12. Parmalat also submits that neither vendors nor processors own customers and that direct billing of customers by processors was introduced as a result of large retailers' desire for single contracts and accounts.
- 7.13. Parmalat submits that in the market for the supply of products to consumers, vendors compete with retailers, including their own retail customers. Parmalat submits that consumers are moving away from vendor supplied products due to greater convenience and choice offered by retailers.

8 ACCC assessment

- 8.1. The ACCC's evaluation is in accordance with the statutory test outlined in section 4 of this draft determination. As required by the test, it is necessary for the ACCC to assess and weigh the likely public benefits and anti-competitive detriments flowing from the proposed arrangements.

Relevant markets

- 8.2. The first step in assessing the public benefits and anti-competitive detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 8.3. Defining the markets affected by arrangements proposed for authorisation assists in assessing public benefit and public detriment from any lessening of competition from the arrangements. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets, as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 8.4. The MVA submits that there are two relevant areas of competition, within South Australia:
- the supply of distribution services to processors where vendors compete with each other to acquire distribution contracts from the processors; and
 - the supply of milk and other dairy products to retailers and consumers where vendors compete with each other and with processors to supply retailers and with retailers to supply consumers
- 8.5. Parmalat submits that the two relevant markets in South Australia are the market for the supply of milk and dairy products to retailers and the market for the supply of milk and dairy products to consumers.
- 8.6. Dairy Farmers submits that there is a South Australian market for the supply of milk and dairy products. There are number of suppliers of milk and dairy products and they compete to obtain distribution services from vendors and also compete for customers. Dairy Farmers submits that its franchisees compete with each other for new customers and between franchisees and other processors' vendors for customers.
- 8.7. In this matter, the ACCC is of the view that it is not necessary to comprehensively define the relevant markets. In this respect, it is the ACCC's view that its assessment will not be overly affected by the possible variations in precise market definition.
- 8.8. In considering this application, the ACCC has identified three areas of competition, broadly being those associated with:
- the wholesale supply of milk and other dairy products to retailers and route trade customers – that is, competition between vendors and processors to

supply milk and other dairy products to retailers and route trade customers (including supermarkets, milk bars, offices, restaurants, petrol stations and schools);

- the supply of distribution services to processors – that is competition between vendors for the distribution of milk and other dairy products to direct billing customers; and
- the retail supply of milk and other dairy products to consumers – that is, competition between retailers and vendors who provide home delivery services.

8.9. With respect to the wholesale supply of milk and other dairy products to retailers and route trade customers, the ACCC notes the following:

- Parmalat submits that there is strong competition between processors and that since deregulation there has been a greater choice of products.
- In its study on the impact of farmgate deregulation on the Australian milk industry (the milk report), the ACCC found that a new dynamic had evolved between processors and the retail sector in which processor bargaining power and ability to influence price was relatively weak.¹⁷ The ACCC notes that NFML submits that this trend continues today.¹⁸
- Vendors' contracts with processors to date have involved significant restrictions on vendors' ability to compete with each other (through listing of customers and defining territories). These restrictions prevent vendors from supplying a customer of a vendor contracted to the same processor. NFML is proposing to remove these restrictions in its new arrangements.¹⁹
- Vendors' contracts also restrict their ability to distribute products that compete with products made by their processor or distributing non-competing products available from other suppliers, unless approval is given by the processor. The ACCC has not been made aware of any instance in which such approval to supply competing products has been given by either processor.
- The MVA submits that since January 1995, the margin on a one litre carton of white milk has increased by \$0.0325 for wholesale vendors and by \$0.48 for processors.²⁰

¹⁷ ACCC, Impact of farmgate deregulation on the Australian milk industry: study of prices, costs and profits, April 2001, page 111

¹⁸ NFML submission, 22 October 2004, paragraph 5.6, page 9

¹⁹ As discussed at paragraph 2.13, the new contracts offered by NFML will include some restrictions on competition for customers and home delivery territories until all current agreements expire or are replaced.

²⁰ MVA submission, *Response to submissions by Dairy Vale Foods Limited*, 15 December 2004, pages 1-2

8.10. With respect to the supply of distribution services to processors, the ACCC notes:

- Currently in South Australia, these services are provided only by vendors. However, there is the potential for the supermarkets and/or processors to begin to supply distribution services themselves. Submissions from both the MVA and NFML suggest that the major supermarkets may introduce their own distribution arrangements.²¹
- The MVA submits that the level of competition between vendors is negligible. It is submitted that new retailers and retailers that need a different vendor (for example, as a result of the existing vendor leaving the industry) are allocated by processors to vendors.
- The MVA submits that the delivery fee paid to vendors has fallen from 10c per litre in 1995 to an average of 8c per litre currently for brand white milk and 6c per litre for generic-labelled milk. The MVA submits that the delivery fee for flavoured milk has fallen from 41.6c per litre to 34c per litre over the same time.²² These fees, particularly in respect of white milk, are a relatively small percentage of the end retail price of the products.

8.11. With respect to the retail supply of milk and other dairy products to consumers, the ACCC notes:

- The supermarkets have adopted a strategy of driving more store traffic rather than higher revenue from milk. The convenience store and corner store segments of the retail market has found this supermarket strategy particularly difficult to compete against as market share has shifted to the supermarket sector.²³
- More generally, there has also been a trend away from home delivery by vendors and towards supply to consumers by supermarkets in recent years.
- The MVA submits that since January 1995, the margin on a one litre carton of white milk has increased by \$0.1667 for retail vendors.²⁴

The future with and without test (the counterfactual)

8.12. The ACCC uses the 'future with-and-without test' established by the Australian Competition Tribunal to identify and measure the public benefit

²¹ MVA supporting submission, 3 September 2004, paragraph 2.2, page 3. NFML submission, 22 October 2004, paragraph 5.3(3), page 8.

²² MVA supporting submission, 3 September 2004, page 6.

²³ ACCC, Impact of farmgate deregulation on the Australian milk industry: study of prices, costs and profits, April 2001, page 112

²⁴ MVA submission, *Response to submissions by Dairy Vale Foods Limited*, 15 December 2004, pages 1-2

and anti-competitive detriment generated by the arrangements for which authorisation is sought.²⁵

- 8.13. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by the arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.
- 8.14. Given that collective bargaining conduct would be likely to raise concerns under the TPA, it is unlikely, absent of authorisation, that the MVA will be able to collectively negotiate contracts with processors. Consequently, the counterfactual which the ACCC has applied in assessing the proposed arrangements is one where each vendor would be required to individually negotiate the terms and conditions of their contract(s) with either NFML or Dairy Farmers.
- 8.15. The ACCC has previously considered numerous applications for small primary producers to collective bargaining with the processors to whom they supply. In its past consideration of these applications the ACCC generally found that the most common situation in the absence of an authorisation to collectively bargain, or some form of industry regulation, is one where primary producers offering a common good or service in similar circumstances are offered essentially standard form contracts with little capacity to negotiate variations on those standard terms or conditions.
- 8.16. In particular, where imbalances in bargaining power are observed, the result is, generally speaking, the offering of standard form contracts on terms likely to be to the advantage of the party offering the contract. That is not to say that the other party will always be at a disadvantage as a result, but rather that, as with any commercial arrangement, the party offering the contract will seek to ensure the most favourable deal for itself. Such contracts are often offered on a 'take it or leave it' basis, with limited, if any, scope for the other party to have input into the terms of the contract.
- 8.17. The ACCC is of the view that the current case, although not involving primary producers, bears similar characteristics. The MVA submits that in the past, vendors have had no significant input into distribution contracts and have had to accept standard form contracts.²⁶ NFML has submitted to the ACCC that the terms of the current contracts between NFML and its vendors do not generally vary between vendors apart from different territories and customers. NFML's proposed new contracts would also not generally vary between vendors.²⁷ Dairy Farmers also submitted that its franchise arrangements do not generally vary between franchisees, apart from listed customers.²⁸

²⁵ See, for example, *Re Australasian Performing Rights Association* (1999) ATPR ¶41-701.

²⁶ MVA supporting submission, 3 September 2004, page 12

²⁷ Notes of phone conference with NFML, 28 September 2004

²⁸ Notes of telephone conference between Dairy Farmers and the ACCC, 27 September 2004, page 2

- 8.18. In addition, NFML and Dairy Farmers are large, well resourced businesses with significant commercial and negotiating expertise. In contrast, the vendors are, in general, small family run businesses with often limited resources and expertise to engage in effective negotiation with businesses with the size and negotiating experience of the processors.
- 8.19. It could therefore be expected, as is currently the case, that the consequence of such an imbalance in bargaining positions would be the continued offering of standard form contracts by processors to each of their vendors, with little input from the vendors or scope to vary the terms and conditions of such contracts.

Effect on competition

- 8.20. As discussed in Section 4, the ACCC must assess the extent to which the proposed arrangements give rise to detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.
- 8.21. In respect of the current arrangements the ACCC considers that there are four main areas where they may potentially have an anti-competitive effect:
- lost efficiencies resulting from collusion;
 - loss of efficiencies otherwise resulting from industry rationalisation;
 - reduced scope for new market entry; and
 - increased potential for collective activity beyond that authorised.

Lost efficiencies resulting from collusion

- 8.22. A major feature of most collectively negotiated agreements is an agreement as to the (generally common across the bargaining group) price to be paid to the group and other terms and condition of supply or acquisition.
- 8.23. Competition between buyers or sellers ordinarily directs resources to their most efficient or productive use. Where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses.
- 8.24. This distortion in competition can often result in increased prices to consumers, less choice, lower quality of product or services and increased costs to producers than would otherwise exist.
- 8.25. In particular, agreements between competitors which interfere with the price at which they are willing to supply or acquire goods or services will ordinarily divert resources away from those more efficient uses and towards less efficient uses.

- 8.26. This is the foundation of the principles of competition and, as such, Parliament has deemed agreements between competitors as to price to substantially lessen competition in breach of the TPA.²⁹
- 8.27. Aside from price, businesses compete on issues such as quality, service and other terms of trade. Just as price agreements stifle competition on price, non-price agreements can stifle competition in areas such as quality and service.
- 8.28. In its past consideration of collective bargaining arrangements the ACCC has accepted that where collective bargaining results in an increased price being paid to the bargaining group, or reduced competition on other terms of supply, where there is capacity for any such increase to be passed on in the form of higher prices, less choice or lower quality of products offered to consumers, this could constitute an anti-competitive detriment. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 8.29. In this case, NFML submits that the proposed conduct may interfere with industry rationalisation and may also lead to increases in prices to consumers and industry-wide standard contracts.
- 8.30. However, the MVA contends that the proposed arrangements will not result in higher prices for consumers. The MVA notes that previous contracts offered by NFML have not specified prices; rather, they have included provisions to the effect that products will be supplied to vendors at prices to be determined by NFML from time to time and delivery fees will be set by NFML from time to time. The MVA also submits that Dairy Farmers' current franchise agreements do not include specified prices or fees. The MVA submits that it would be willing to negotiate explicit pricing provisions if the processors wished to do so.³⁰ The MVA submits that any increase in vendors' margins is likely to be marginal and capable of being absorbed by the processors and or major retailers.³¹ The MVA contends that the supermarkets set the retail price for both generic and processor branded products.³²
- 8.31. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies are likely to be more limited where the following features are present:
- the current level of competition, between members of the bargaining group, with respect to those terms on which they are seeking to collectively bargain, is low;
 - there is voluntary participation in the arrangements;

²⁹ Section 45A of the TPA

³⁰ MVA submission, *Response to submissions by National Foods Milk Limited*, 15 December 2004, page 2

³¹ MVA supporting submission, 3 September 2004, page 9

³² MVA supporting submission, 3 September 2004, page 4

- there are restrictions on the coverage, composition and representation of the bargaining groups; and
 - there is no boycott activity.
- 8.32. With respect to these four features, as they relate to the proposed arrangement, the ACCC notes the following.
- 1. Competition between vendors absent of authorisation*
- 8.33. The MVA submits that the level of competition between vendors for distribution contracts is negligible. Processors allocate new retail outlets or residential territories to existing vendors and reallocate customers to existing vendors when vacancies occur in the distribution network.³³ Further, the MVA submits that competition between vendors for customers is limited by the distributor contracts, which list vendors' customers and define their territories. Vendors are prevented from seeking to supply an existing customer of another vendor who is contracted to the same processor. The MVA also submits that in the past, vendors have had no significant input into distribution contracts and have had to accept standard form contracts.³⁴
- 8.34. NFML has submitted to the ACCC that the terms of the current contracts between NFML and its vendors do not generally vary between vendors apart from different territories and customers. The proposed new contracts would also not generally vary between vendors³⁵ although they will allow for vendors to compete for customers with other NFML vendors. Dairy Farmers also submitted that its franchise arrangements do not generally vary between franchisees, apart from listed customers.³⁶
- 8.35. The ACCC notes that even businesses with a high degree of bargaining power are influenced by supply and demand forces in the manner in which they set their prices. In setting their prices, processors are likely to have regard to how much each vendor is willing to accept. In this respect, vendors do compete (at least to some extent) with each other.
- 8.36. This is not to say that such competition manifests itself in more overt forms such as bargaining or undercutting. At times it is hard to describe how this less overt form of competition exists. A simple way is to ask the question why, for example, processors do not set a lower delivery fee. Surely processors would choose to save on processing costs where they could without reducing the number of vendors willing to distribute at a lower price. The answer is that the processors believe that by setting lower delivery fees, more vendors will choose not to (or will not be able to) continue to offer their services. This is reflective of competition (albeit not necessarily high) between vendors.

³³ MVA supporting submission, 3 September 2004, paragraph 7.1, page 11

³⁴ MVA supporting submission, 3 September 2004, paragraph 8.1, page 12

³⁵ Notes of phone conference with NFML, 28 September 2004

³⁶ Notes of telephone conference between Dairy Farmers and the ACCC, 27 September 2004, page 2

- 8.37. However, more generally, as discussed at paragraphs 8.15 to 8.19, the ACCC considers that absent authorisation, the level of competition between milk vendors, with respect to those matters on which they are seeking to collectively negotiate, namely contract terms and conditions, would be low. Under individual negotiation vendors have been offered standard form contracts with limited capacity to vary the terms of the agreement. To the extent that there is scope for individual vendors to vary the terms of such contracts, the proposed arrangements will not reduce the scope to do so. Processors will still enter into individual contracts with each vendor, with the capacity to negotiate variations to collectively agreed contracts, or alternatively, negotiate individual contracts outside of the proposed arrangements.
- 8.38. Consequently, the difference between the level of competition amongst vendors with or without the proposed arrangements would be small.

2. Voluntary participation

- 8.39. As noted, the proposed arrangements are voluntary. Neither the processors, nor individual vendors, would be compelled to participate in the proposed arrangements. Each would remain free to individually negotiate either variations to the collectively agreed contract or to negotiate individual stand alone contracts. To the extent that vendors could, absent of the proposed arrangements, compete to provide distribution services to processors, the voluntary nature of the proposed arrangement provides for such ongoing competition. Vendors who consider that they will be able to negotiate a more commercially attractive arrangement, either by variations to the collective agreement, or through negotiating individually, will remain free to do so. Consequently, incentives for vendors to compete on price, to innovate, or to otherwise improve their quality of services, to the extent that they exist, will not be reduced by the proposed arrangements to the extent that they that they might otherwise be.
- 8.40. In this respect, the Commission notes that collectively negotiated contracts will only be agreed and implemented where both vendors and their processor consider it in their commercial best interest to do so. That is to say, the arrangements will only be entered into where both parties to the proposed arrangement consider that they will generate sufficient efficiency gains to offset any inefficiencies which may result from any reduced flexibility in contracts entered into.

3. Coverage and composition of bargaining groups

- 8.41. Where the size of bargaining groups is restricted, the anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group. Further, where bargaining groups are limited in scope (by geography, product range or size, for example) negotiations are able to take into account the specific demand or supply characteristics of those particular businesses. This significantly reduces anti-competitive effects associated with 'one size fits all' negotiations and allows competition between groups to provide the

competitive discipline that leads to efficient resource use. However, even where bargaining groups are limited in scope, where different bargaining groups have common representation, that common representative can act as conduit between the groups and can significantly reduce the competition that might otherwise exist between those groups.

- 8.42. The MVA represents a large proportion of the milk vending industry in SA. The MVA estimates that it accounts for over 70% of milk deliveries in SA. Under the proposed arrangements, the MVA would represent all SA vendors who wish to be involved in collective negotiations, in negotiations with both processors. The extent of industry covered by the proposed arrangements is therefore of some concern to the ACCC.
- 8.43. The ACCC does note that under the proposed arrangements the MVA will negotiate separately with NFML and Dairy Farmers. As noted, by negotiating separately with each processor, negotiations are able to take into account the specific demand or supply characteristics of each processor, reducing the anti-competitive effects of a one size fits all approach and providing for ongoing competition between negotiating groups.
- 8.44. However, the NFML submits that the MVA's role as a single bargaining agent increases the prospect of a set of industry-wide terms and conditions, including price, in South Australia, which, it submits, would inhibit the processors' ability to compete with each other to supply their customers and to compete for the acquisition of distributors. NFML submits that the MVA would have significant bargaining power against the processors.
- 8.45. With respect to uniform contracts among vendors contracted to an individual processor, as noted, even absent of the proposed arrangements processors generally choose to employ standard form contracts. As also noted, under the proposed arrangements, the capacity to negotiation variations on standard form contracts is not restricted.
- 8.46. The ACCC considers that the likelihood of uniform contracts developing across both processors in SA as a result of the proposed collective bargaining arrangements is limited, despite the fact that the MVA could be involved in negotiations with both processors.
- 8.47. The ACCC is of the view that the processors are still likely to have a large degree of power in relation to the vendors, especially in light of the ongoing rationalisation of the milk distribution industry. To the extent that each processor wishes to tailor contracts to suit its preferred distribution arrangements, this would be expect, as is currently the case, to be reflected in the terms and conditions of contracts offered. Provided that contracts offer suitable incentives to vendors to reflect the differing terms and conditions proposed by each processor, it could be expected that such contracts would be accepted by vendors irrespective of whether a common bargaining agent was employed by vendors of both processors.
- 8.48. However, the potential for the proposed arrangements to result in a common, industry wide, set of terms and conditions, which would inhibit competition

between processors, may be further reduced by restriction on the exchange of information regarding terms and conditions between bargaining groups.

4. Boycott activity

- 8.49. It is not proposed that any collective boycott activity occur. While there are circumstances in which the ability to boycott may in itself generate a net public benefit, more generally, collective boycotts can significantly increase any anti-competitive effects of collective bargaining arrangements. For example, the ability to collectively boycott reduces the voluntary nature of collective bargaining arrangements. In addition, collective boycotts may generate direct inefficiencies through the disruption to the business or businesses of the target of the boycott and upstream and downstream suppliers. In this instance, the ACCC notes that authorisation has not been sought for collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.
- 8.50. In light of the above four features, the ACCC considers the anti-competitive detriment generated by lost efficiencies resulting from collusion as a consequence of the proposed arrangements is likely to be low, and where the exchange of information between bargaining groups is restricted, would be minimal.

Loss of efficiencies otherwise resulting from industry rationalisation

- 8.51. NFML submits that the proposed arrangements will interfere with milk distribution in South Australia. Specifically, NFML expresses concerns that the MVA will seek to entrench current distribution arrangements and numbers. In contrast, Dairy Farmers submits that collective bargaining by milk vendors will not halt or protect vendors from changes brought about by market forces and customer demand.
- 8.52. The ACCC understands that NFML's concerns in this respect are primarily that:
- collectively negotiated agreements containing common terms and conditions may restrict the ability for vendors to compete for customers; and
 - vendors may use any countervailing bargaining power to seek to maintain the number of vendors operating in the market at unsustainable levels.
- 8.53. With respect to the submission of NFML that it intends for future contracts offered to milk vendors to provide that vendors will be free to compete with each other for customers, the ACCC notes that the proposed collective bargaining arrangements do not in themselves limit the capacity for such competition to occur.

- 8.54. In addition, as noted, incentives for vendors who consider that they could gain a competitive advantage by negotiating terms and conditions different from those agreed collectively are not reduced by the proposed arrangements.
- 8.55. With respect to concerns that vendors may, by negotiating collectively, seek to forestall industry rationalisation by entrenching current vendor numbers, the ACCC notes that the proposed arrangements are entirely voluntary and collectively negotiated agreements will only be entered into where both vendors and processors consider it in their commercial best interest to do so. Furthermore, the ACCC is of the view that processors will remain in a strong bargaining position.
- 8.56. The ACCC also notes that the MVA has advised that authorisation is not sought to collectively negotiate on behalf of members who are not offered new contracts or for the renegotiation of existing distribution contracts or franchise agreements.
- 8.57. Consequently, under the proposed arrangements processors will ultimately decide which vendors to contract with. There is no capacity under the proposed arrangements for vendors to seek to have contracts offered to those vendors with whom a processor does not wish to enter into an agreement.

Competitive pressures in downstream markets

- 8.58. The ACCC notes that, even where vendors are able to negotiate increases in prices paid to them as a result of bargaining collectively, the capacity for such increases in price to be passed on to consumers is limited. In its study on the impact of farmgate deregulation on the Australian milk industry (the milk report), the ACCC found that a new dynamic had evolved between processors and the retail sector in which processor bargaining power and ability to influence price was relatively weak.³⁷
- 8.59. In this respect, the ACCC notes the submission of the processors that any increase in price paid to vendors would need to be passed on to consumers. However, NFML also submitted that it agreed with the position in the ACCC's milk report that the processors bargaining power and ability to influence retail prices is relatively weak.³⁸
- 8.60. Consistent with the conclusions of its milk report, the ACCC considers that even where vendors are able to negotiate increases in prices paid to them as a result of bargaining collectively, competitive pressures in retail markets limit the capacity for such increases to be reflected in prices paid by consumers

Reduced scope for new market entry

- 8.61. The capacity for new entrants to compete for the right to undertake the business of existing market participants subject to a collective agreement has

³⁷ ACCC, Impact of farmgate deregulation on the Australian milk industry: study of prices, costs and profits, April 2001, page 111

³⁸ NFML submission, 22 October 2004, paragraph 5.6, page 9

implications for how competition in a market is affected. Collective negotiations between parties resulting in agreed prices and other terms and conditions and entry into long term, common, agreements may reduce the likelihood of entry into the relevant markets.

- 8.62. With respect to the proposed arrangements, the ACCC notes that due to the terms of vendors distribution contracts, which include listed customers and in NFML's case, defined territories, the potential for new vendors to enter the relevant markets is currently restricted to the purchase of existing rounds. However, the ACCC notes that in its new agreements NFML is proposing to remove the restriction on vendors soliciting or enticing an existing customer of another NFML vendor.³⁹
- 8.63. More generally, the application for authorisation is expressed so as to apply not just to current and future MVA members, but also to non-members. Consequently, any new vendors, or indeed any existing vendors who are not initially involved in the proposed conduct, could, provided the processor is, in the case of a contract already negotiated, agreeable to offering them a contract on the same terms, able to join the collectively agreed arrangement. In addition, as noted, any exiting vendor, or potential new entrant is, again subject to agreement being reached with the processor, able to enter into separate arrangements to those collectively negotiated.
- 8.64. Further, with respect to the markets for the distribution of milk products, the ACCC notes the proposed entry of the larger supermarket chains, at least with respect to their own distribution needs.
- 8.65. With respect to the retail supply of milk and other dairy products to customers, the ACCC notes that retail supply by milk vendors is only a small portion of this market and that collective bargaining by milk vendors would not create any barriers to new entrants seeking to enter this market.
- 8.66. The ACCC notes Parmalat's submission that being forced into collective bargaining negotiations with vendors may reduce the viability and flexibility of any processor considering establishing operations in South Australia. However, the ACCC does not consider that the proposed arrangements are likely to limit the capacity for new processors seeking to locate in South Australia to enter the market. While all vendors being tied to long term contracts may restrict the capacity for a new processor to compete to attract existing vendors, the ACCC notes that such contracts are common in the industry even absent of the proposed collective bargaining arrangements. However the ACCC does note that at present, the standard form contracts employed within the industry do not all have a common end date (although the majority of NFML vendor contracts do expire on the same date in May 2005). The proposed arrangements could, if they were to result in all vendors of a processor entering into collectively agreed contracts with a common end date, restrict a potential new entrants' capacity to compete to attract existing

³⁹ NFML submission, 22 October 2004, pages 28-29

vendors at any point in time other than the common expiration date of those contracts.

- 8.67. However, more generally the ACCC notes that barriers to entry for new vendors (aside from those created by the current distribution contract arrangements) in terms of qualifications, customer contacts and capital outlay for equipment, are relatively low. As such, the ACCC does not consider that the proposed arrangements are likely to reduce the scope for new processors to establish their own distribution networks should they choose to establish operations in South Australia.

Potential for collusive activity beyond that authorised

- 8.68. In considering collective bargaining arrangements in the past, the ACCC has noted concern that the arrangements may increase the potential for collusive anti-competitive conduct.
- 8.69. Such increased potential arises where competitors are encouraged to meet, share information and discuss pricing. The ACCC has been concerned that in this environment, there may be an increased likelihood of anti-competitive conduct (beyond that which is authorised) occurring. Indeed, as noted, the processors have raised concerns in their submissions that the conduct for which authorisation is sought is unclear and that the arrangements could facilitate the implementation of a boycott by vendors.
- 8.70. The ACCC notes that the likelihood of collusive activity beyond that authorised is reduced where participants are made aware of their obligations under the TPA, as is generally the case in the ACCC's consideration of applications for authorisation.
- 8.71. In this instance, there is no evidence to suggest that any conduct that may raise concerns under the TPA, other than that for which authorisation is sought, is intended to be discussed by the MVA and/or its members.
- 8.72. With respect to collective boycotts, as noted, authorisation has not been sought for any such activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA. Based on its discussions with them, it is the ACCC's understanding that neither the MVA nor its members have any intention of engaging in boycott activity.
- 8.73. More generally, the ACCC has clarified in chapter 10 of this draft determination the scope of the proposed arrangements.

Conclusion on anti-competitive effect of the proposed arrangements

- 8.74. For the reasons outlined above, the ACCC considers the anti-competitive detriment generated by the proposed arrangement to be low and with restrictions on the exchange of information between bargaining groups, minimal.

Public benefit

- 8.75. In order to grant authorisation, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.
- 8.76. The MVA submitted that the following public benefits will arise as a result of the proposed collective bargaining arrangements:
- fairness in the bargaining process;
 - compliance with statutory requirements;
 - improved efficiency of operations;
 - continued viability of the independent distribution sector;
 - reduction in transaction costs;
 - better information for vendors; and
 - improvement in health and safety.
- 8.77. The ACCC is of the view that the MVA has not satisfactorily demonstrated that greater compliance with statutory requirements, improved efficiency of operations, better information for vendors or an improvement in health and safety are likely to occur as a result of the proposed arrangements.
- 8.78. The remaining three public benefit claims – fairness in the bargaining process, reduction in transaction costs and continued viability of the independent distribution sector – are discussed as follows.

Improved vendor input into contract terms and conditions

- 8.79. The MVA submits that the proposed arrangements would lead to greater fairness in the negotiating process. It submits that currently, due to the relative bargaining strength of the processors, vendors are obliged to accept whatever terms are offered. The MVA has submitted that the proposed arrangements will help to provide vendors with some competitive parity in contract negotiations with processors, resulting in greater vendor input into contract terms.
- 8.80. In the past, the ACCC has not found that a mere change in the amount of bargaining power is, in itself, a public benefit. Rather, the ACCC has focused on the likely outcomes resulting from the change in bargaining position flowing from the proposed arrangement for which authorisation is sought. It is these likely outcomes which are essential to the net public benefit test.
- 8.81. The ACCC recognises that there are a combination of factors which, in some circumstances, result in smaller businesses having very little bargaining power compared with larger businesses, particularly in a monopsony or oligopsony market.

- 8.82. In respect of the proposed arrangements, the MVA has submitted that vendors, as individuals, are always in a weak bargaining position relative to large companies such as the processors and that vendors do not have the skills required to deal with well resourced processors experienced in the negotiation process.
- 8.83. As discussed at paragraphs 8.14 to 8.19 (the counterfactual), the ACCC considers that individual vendors are in a comparatively weak bargaining position in comparison to processors. As noted, the consequence of such a bargaining power imbalance is the offering of standard form contracts on a 'take it or leave it' basis with limited scope for variation of terms and conditions to be negotiated or for effective input by vendors into the contractual terms and conditions.
- 8.84. It is generally accepted that competition between buyers and sellers on terms and conditions of supply, through the process of arbitrage is likely to lead to an efficient outcome. Where either buyers or sellers are restricted in their ability to provide effective input into those terms and conditions, the most efficient outcome may not be achieved. There can therefore be a public benefit in collective bargaining arrangements that increase the effective input of the weaker party to the bargain.
- 8.85. In the current circumstances, the ACCC accepts that there is an imbalance in bargaining power between South Australian vendors and processors, which would, if vendors continue to be required to negotiate individually, limit their capacity to have effective input into contract terms and conditions.
- 8.86. The ACCC considers that the proposed collective bargaining arrangements will improve growers bargaining position in negotiations with processors and provide a greater opportunity for vendors, with the assistance of the MVA, to have more effective input into contract terms and conditions, which the ACCC considers does generate a public benefit.

Transaction cost savings

- 8.87. The MVA argues that the proposed arrangements would lead to a reduction in transaction costs. The MVA submits that it is reasonable to estimate legal, accounting and business advice at approximately \$5,000 per vendor per contract. However, the MVA subsequently submitted that few vendors actually seek such advice. The MVA submits that processors may incur transaction costs of \$2,000 per vendor per contract. It is submitted that under collective negotiation, the total vendor transaction costs would be in the region of \$10,000-\$20,000 or \$45-\$90 per vendor.
- 8.88. In considering previous applications for authorisation, the ACCC has noted that negotiation costs are likely to be lower in implementing a collective bargaining agreement involving a single, or small number, of negotiating processes than where the acquire or supplier must negotiate and implement agreements with every business with which it deals. Where these savings are likely to be passed on in the form of lower prices to consumers, the ACCC has accepted that this would constitute a public benefit.

- 8.89. However, in instances where, absent of authorisation, standard form contracts, with limited capacity for individual negotiation as to variations in those standard terms, are likely to be employed, significant negotiation cost savings are unlikely to result from collective negotiations. That is to say, even where contracts are negotiated individually, in such circumstances there is likely to be little additional negotiating cost involved in doing so compared to a situation where a collective agreement is entered into.
- 8.90. However, the ACCC notes that beyond negotiating costs, there are other transaction costs involved with entering into contractual arrangements. For example, processors and vendors availing themselves of their own financial and or legal advice before entering into such contracts.
- 8.91. With respect to the proposed arrangements, the ACCC notes that although it is proposed that contracts be negotiated collectively, it is still proposed that each vendor individually decide whether to accept the terms and conditions negotiated and enter into an individual contract. The ACCC considers that individual vendors are less likely to consider it necessary to individually engage their own independent legal and/or financial advice in respect of a collectively negotiated contract than they would if offered individually contracts, even allowing for the fact that such individual contracts would most likely take a standard form.
- 8.92. Consequently, the ACCC considers that some, albeit, limited transaction cost savings are likely to result from the proposed arrangements compared to a situation where each vendor was required to negotiate contracts individually. To the extent that such savings do arise, the ACCC considers that the competitive pressures to which processors and vendors are faced from downstream retailers are likely to ensure that at least some of these cost savings are passed on to consumers. However, given the above, the ACCC does not consider the magnitude of any such savings is likely to be significant.

Continued viability of the independent distribution sector

- 8.93. The MVA submits that the proposed arrangements will lead to the continued viability of the independent distribution sector. It is submitted that the closure of vendor businesses would result in the reduction of services available to consumers and loss of employment.
- 8.94. The processors and Parmalat submit that market forces and the ability of vendors to respond to customers' needs will determine whether the current distribution system will continue.
- 8.95. The ACCC would be likely to take the view that an increase in the viability of efficient small businesses is a public benefit, if this can be satisfactorily demonstrated to the ACCC. However, there is not likely to be a public benefit in the maintenance of inefficient small businesses.
- 8.96. The ACCC requires clear evidence of the viability of efficient small businesses being jeopardised and that allowing those small businesses to

bargain collectively will go some way towards ensuring their continued viability.

- 8.97. In this case, the ACCC considers that the MVA has not demonstrated, other than as discussed above, any market failures requiring correction to protect otherwise efficient small businesses.

Conclusion on public benefits of the proposed arrangements

- 8.98. For the reasons outlined above, the ACCC considers that the proposed arrangements will result in some public benefit. In particular, the ACCC considers that in these circumstances, improving the bargaining power of vendors, thereby providing vendors with the opportunity for more effective input into contract terms and conditions, will result in some public benefit.
- 8.99. The ACCC also considers that the proposed arrangements are likely to result in some, albeit small, transaction cost savings, which, given competitive pressures within the industry, are likely, at least in part, to be passed on to consumers.

9. Balance of public benefits & anti-competitive detriments

- 9.1 The ACCC considers the anti-competitive detriment generated by the proposed arrangement to be low. The ACCC considers that, even absent of the proposed arrangements, vendor distribution contracts would be likely to continue to be subject to somewhat standard terms and conditions. The ACCC is of the view that the difference between the level of competition amongst vendors over contract terms and conditions with or without the proposed arrangements would be small.
- 9.2 To the extent that, absent authorisation, there is scope for individual vendors to vary the terms of distribution contracts, the proposed arrangements will not reduce their scope to do so. Processors will still enter into individual contracts with each vendor, with the capacity to negotiate variations to collectively agreed contracts, or alternatively, negotiate individual contracts outside of the proposed arrangements.
- 9.3 In addition, the ACCC notes that, even where vendors are able to negotiate increases in prices paid to them as a result of bargaining collectively, competitive pressures in retail markets limit the capacity for such increases to be reflected in prices paid by consumers.
- 9.4 The ACCC considers that there is some potential for the proposed arrangements, if they were to result in a set of standard, industry wide terms and conditions being adopted, to reduce competition between vendor bargaining groups and inhibit competition between processors.
- 9.5 The ACCC considers that the proposed arrangements will result in some public benefit. In particular, the ACCC considers that improving the bargaining power of vendors, thereby providing vendors with the opportunity for more effective input into contract terms and conditions, will result in some public benefit.
- 9.6 The ACCC also considers that the proposed arrangements are likely to result in some, albeit small, transaction cost savings, which, given competitive pressures within the industry, are likely, at least in part, to be passed on to consumers.
- 9.7 Accordingly, on the evidence before it and for the reasons given above, the ACCC considers that the proposed arrangements give rise to a small public benefits and low public detriment.
- 9.8 Where it is difficult to determine precisely the magnitudes of public benefit and detriment that appear to be of similar size – as is the case here – there may be some uncertainty about whether the public benefit outweighs the public detriment.
- 9.9 In these cases, the ACCC will generally not be satisfied that the public benefit generated by the application outweighs the anti-competitive detriment.

However, it may consider whether it is possible to grant authorisation subject to conditions aimed at reducing, as far as possible, any uncertainty about whether the public benefit is greater than the anti-competitive detriment. These conditions would either seek to increase the public benefit or, more typically, reduce the anti-competitive detriment sufficiently to remove any concern that authorisation was being granted inappropriately.

- 9.10 In this instance, the ACCC considers that restriction on the exchange of information regarding contract negotiations between bargaining groups will address concerns that the proposed arrangements might result in a set of standard, industry wide terms and conditions being negotiated. The ACCC considers that with such a restriction in place, the anti-competitive detriment generated by the arrangements would be minimal and that any anti-competitive detriment would be outweighed by the public benefits resulting from the arrangements.
- 9.11 Therefore, the ACCC proposes to grant authorisation subject to the following condition:
- *the MVA must put in place a mechanism to ensure that information obtained in one bargaining group is not provided to another bargaining group*
- 9.12 Under the terms of the proposed authorisation, no party may be compelled to engage in collective negotiations. Vendors and processors who do not wish to participate may continue with individual negotiations.
- 9.13 Further, the proposed authorisation does not extend to any collective boycott activity. Accordingly, any such activity, should it occur, is not protected from legal action under the TPA.

Other issues – dispute representation

- 9.14 The MVA is seeking authorisation to represent any vendor or group of vendors in any dispute which may arise between:
- any vendor or vendors and NFML or Dairy Farmers
 - any vendor or vendors and any customer, and
 - any vendor or vendors and any other vendor or vendors⁴⁰
- 9.15 The ACCC is of the view that the precise nature of the proposed representation is not clear.

⁴⁰ The MVA originally sought authorisation to exclusively provide dispute resolution services in relation to disputes between vendors and/or between vendors and their suppliers and/or between vendors and any person or entity to which the vendor delivers product. However, the MVA amended its application in its submission provided to the ACCC on 15 December 2004.

- 9.16 In addition, the ACCC notes that on many occasions, MVA representation of vendors will not raise concerns under the TPA and will be able to continue with or without authorisation.
- 9.17 The ACCC considers that the MVA has not otherwise demonstrated public benefit associated with this aspect of the application. The ACCC is not satisfied that the benefits to the public from the proposed dispute representation arrangements will outweigh any anti-competitive detriment and as such does not propose to grant authorisation to the specific dispute representation process proposed in the MVA's application.
- 9.18 More generally, the ACCC is of the view that the most effective dispute resolution process is one which is developed in consultation with all parties involved in the bargaining process and is ultimately implemented with the support of all parties. The ACCC supports the development of effective dispute resolution procedures.
- 9.19 In this respect, the ACCC notes that, under the authorisation it is proposing to grant, it is open to the parties to develop their own dispute resolution process in respect of disputes in relation to contracts entered into, taking account of what each party hopes to achieve by such a process, which could form part of any negotiated agreements.

Term of authorisation

- 9.20 The ACCC proposes to grant authorisation subject to a five year time limit. Authorising the proposed arrangements for five years does not require that contracts entered into be for the duration of the authorisation.
- 9.21 In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment.
- 9.22 It is open for the Applicant to reapply for authorisation at the expiration of an authorisation. In the event that an application for reauthorisation is received by the ACCC, whether reauthorisation should be granted would be considered based on the circumstances at that time.
- 9.23 In addition, the ACCC may review the authorisation, prior to the expiry of the authorisation, if there has been a material change of circumstance since the authorisation was granted.

10 Draft determination

The Application

- 10.1. On 3 September 2004, the Applicant lodged an application for authorisation (A90927) with the ACCC.
- 10.2. The application was made under section 88(1) for an authorisation to:
- (a) make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA; and
 - (b) give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 10.3. The MVA seeks authorisation on behalf of its members to collectively bargain on their behalf in relation to the terms and conditions of distribution contracts with the processors for whom vendors distribute, namely National Foods Milk Limited and Dairy Vale Foods Limited. Authorisation is also sought to give effect to any contracts agreed to by the MVA and the processors.
- 10.4. The MVA also seeks authorisation to represent any vendor or group of vendors in any dispute which may arise between:
- any vendor or vendors and NFML or Dairy Farmers
 - any vendor or vendors and any customer, and
 - any vendor or vendors and any other vendor or vendors
- 10.5. As well as seeking authorisation for itself and its members, the MVA has also expressed the application so as to apply in relation to future parties. Specifically, future MVA members and current and future South Australian milk vendors who are not MVA members but who choose to participate in the proposed collective bargaining arrangements.

Statutory test

- 10.6. For the reasons outlined in this draft determination, and subject to the condition set out below and the exclusion of the dispute representation arrangements, the ACCC is satisfied that in all the circumstances the making of the contracts and the giving effect to the provisions of the arrangements for which authorisation is sought under subsection 88 (1) of the Act:
- (a) would be likely to result in a benefit to the public; and

- (b) that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.

Draft determination

- 10.7. The ACCC therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation to application A90927, except in respect of the proposed dispute resolution procedures, for a period of five years.

Conduct for which the ACCC proposes to grant authorisation

- 10.8. The authorisation the ACCC is proposing to grant is for the MVA to negotiate separately with NFML and Dairy Farmers on behalf of its members⁴¹ in relation to the terms and conditions of distribution contracts for the processors' products, according to the following arrangements:
- a) The MVA will write to vendors (both members and non members of the Association) to notify them of the authorisation and to advise the vendors that they may nominate the MVA to negotiate contract terms and conditions on their behalf.
 - b) Vendors may then nominate the MVA to negotiate on their behalf.
 - c) The MVA will then notify the relevant processor (NFML or Dairy Farmers) that it has been authorised to negotiate on behalf of the relevant vendors.
 - d) The MVA will then engage in negotiations on behalf of those vendors with the relevant processor.
 - e) The MVA will then report back to the relevant vendors.
 - f) There may then be further negotiations with the relevant processor.
 - g) Vendors will make individual decisions as to whether or not to contract with the relevant processor.
- 10.9. The MVA will not contract with processors. Each vendor will determine whether or not to agree to accept the terms and conditions of the individual contract offered by the respective processor as a result of negotiations.
- 10.10. Under the terms of the proposed authorisation, no party may be compelled to engage in collective negotiations. Vendors and processors who do not wish to participate may continue with individual negotiations.
- 10.11. The proposed collective negotiating arrangements are only in respect of the negotiation of new contracts. That is, contracts the collective negotiation of which under the proposed arrangements commenced after 6 October 2004.

⁴¹ As noted, the MVA's application is expressed so that any authorisation granted also applies to future MVA members and current and future South Australian milk vendors who are not MVA members.

This may include new contracts the individual negotiation of which commenced prior to 6 October 2004, where those negotiations have not been finalised and new contracts entered into, if the parties elect to discontinue individual negotiation in favour of collective negotiations.

- 10.12. Authorisation has not been sought, nor is it proposed to be granted, in respect of the MVA negotiating collectively on behalf of vendors who are not offered new contracts, renegotiation of existing contracts or franchise agreements by NFML or Dairy Farmers.
- 10.13. The ACCC does not propose to grant authorisation to the MVA to represent vendors in disputes with processors, customers or among themselves. The MVA may collectively represent members in disputes arising out of agreements collectively negotiated under the proposed arrangements, provided provision for such representation forms part of the agreement entered into.
- 10.14. The proposed authorisation does not extend to any collective boycott activity. Accordingly, any such activity, should it occur, is not protected from legal action under the TPA.

Conditions

- 10.15. The ACCC proposes to grant authorisation subject to the following condition:
 - *the MVA must put in place a mechanism to ensure that information obtained in one bargaining group is not provided to another bargaining group*

Interim authorisation

- 10.16. At the time of lodging the application, the MVA requested interim authorisation for the proposed arrangements. On 6 October 2004, the ACCC granted interim authorisation.
- 10.17. The terms of the proposed authorisation differ to the interim authorisation granted to the MVA on 6 October 2004. The ACCC considers it appropriate to amend the interim authorisation in accordance with the proposed conditions as stated at paragraph 10.15.
- 10.18. Interim authorisation will continue to protect the proposed arrangements from action under the TPA until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

- 10.19. The ACCC will now seek further submissions from interested parties. In addition, the Applicant or any interested party may request that the Commission hold a pre-determination conference pursuant to section 90A of the TPA.