



Australian
Competition &
Consumer
Commission

Draft Determination

**Application for revocation of authorisation A90745
and its substitution by authorisation A90972**

lodged by

Premium Milk Ltd

in relation to:

*collective negotiations of farm-gate milk prices and milk quality standards
with Parmalat Australia Limited*

Date: 5 October 2005

Commissioners:

Samuel
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Authorisation no. A90972
Public register no. C2005/796

Executive Summary

The Application

On 12 December 2001, the Australian Competition and Consumer Commission (the ACCC) granted Premium Milk Supply authorisation A90745 to collectively negotiate dairy contracts with Pauls on behalf of consenting south-east Queensland dairy farmers. The authorisation was granted until 30 June 2005.

On 13 May 2005, Premium lodged an application for a revocation of authorisation A90745 and its substitution by authorisation A90972. Essentially, the proposed substitute authorisation (A90972) seeks to continue to allow the collective bargaining of farm-gate prices and milk standards through the representative body – Premium – in direct negotiations with Parmalat (formerly Pauls) for a further period of five years.

Assessment of benefits and detriments

Generally, the ACCC considers collective bargaining agreements which set uniform terms and conditions (including prices) are likely to lessen competition relative to a situation whereby competitors negotiate on an individual basis. However, in this instance, the ACCC considers that there are a number of industry specific factors and features of the proposed arrangements which will serve to mitigate the effect on competition of the proposed collective bargaining arrangements. These features include:

Mitigating features of the arrangements

- The arrangements are voluntary for all parties.
- The arrangements do not include boycott activity.
- The arrangements may be accessed by future parties.

Mitigating features of the industry

- The current level of competition between Premium's member dairy farmers is already low and is unlikely to be significantly affected by the arrangements.
- The size of the bargaining group is small relative to the market in which it competes.
- The pre-existing barriers to entry into the relevant market may already be high and are unlikely to be significantly affected by the arrangements.

The ACCC also considers that the nature of the downstream markets would be likely to limit the extent to which any price increases were passed on to consumers.

The ACCC considers that the collective bargaining arrangements may result in some public benefit, in particular transaction cost savings and efficiency gains from dairy farmers having greater input into contracts.

Consequently, the ACCC concludes that the public benefits likely to result from the collective bargaining arrangements are likely to outweigh the anti-competitive detriments of those arrangements.

Determination

The ACCC proposes to grant substitute authorisation (A90972) for Premium and its current and future members to engage in collective bargaining arrangements in accordance with:

- the *Consolidated constitution of Premium Milk Ltd* and
- the *Milk Supply Agreement*.

The ACCC proposes to grant the substitute authorisation for a period of five years from the time the final determination is granted.

Table of Contents

1	Introduction	1
2	Background to the application.....	2
	Authorisation A90745	2
	The current application for revocation and substitution	3
3	Australian dairy industry background	4
	The Australian dairy industry.....	4
	Related authorisations	7
4	Premium’s application and interested party submissions.....	8
	Premium’s application for revocation and substitution	8
	Interested party submissions	9
5	Statutory provisions	10
	The statutory tests	10
	The public benefit test.....	10
6	ACCC assessment – Markets and the counterfactual	12
	ACCC assessment: The relevant markets	12
	ACCC assessment: The counterfactual	15
7	ACCC assessment – Effect on competition.....	16
	ACCC assessment: The anti-competitive detriment	16
	Conclusion on anti-competitive detriments	21
8	ACCC assessment – Public benefits	22
	The ACCC’s previous assessment of the public benefits	23
	The ACCC’s current assessment of the public benefits.....	23
	Conclusion on the public benefits	26
9	Balance of the public benefits and anti-competitive detriments.....	27
10	The draft determination	28
	The application.....	28
	Statutory test	28
	Proposed authorised conduct.....	28

1 Introduction

Authorisations

- 1.1 The Australian Competition and Consumer Commission (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 conduct, thereby encouraging competition and efficiency in business, resulting in a 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’.
- 1.3 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.
- 1.4 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

Revocation and substitution of authorisations

- 1.5 Section 91C of the TPA allows a party to apply to the ACCC to have their existing authorisation revoked and to have a substitute authorisation granted in its place. Before the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation, it must assess the proposed substitute authorisation in the same manner that it would consider a new authorisation application.
- 1.6 In this instance, the ACCC must consider the proposed conduct against the relevant tests set out in sections 90(6) and 90(7) of the TPA which, in short, require the ACCC to be satisfied that the proposed arrangements would be likely to result in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
- 1.7 In making its decision, the ACCC conducts the same public consultation process as it would for a new application for authorisation, including informing interested parties about the application, inviting submissions and issuing a draft determination. The ACCC then invites further submissions prior to issuing a final determination.

2 Background to the application

Authorisation A90745

- 2.1 On 25 August 2000, Premium Milk Supply Pty Ltd¹ (Premium Milk Supply) lodged an application for authorisation (A90745) with the ACCC. The application was made under subsection 88(1) of the TPA for authorisation to make and give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the TPA.
- 2.2 The application related to a proposal by Premium Milk Supply to collectively bargain farm-gate prices and milk standards in negotiations with Pauls Ltd (Pauls).² Specifically, Premium Milk Supply proposed to negotiate supply volumes, delivery requirements, quality standards and prices that would apply for six monthly periods (or longer if agreed).
- 2.3 The 580 Queensland dairy farmers selling milk to Pauls at the time, through six co-operatives, were offered membership of Premium Milk Supply. The co-operatives were:
- Metropolitan Milk Producers Co-op Association Limited
 - Suncoast Milk Producers Co-operative Association
 - The Burnett Milk Producers Co-operative Association Limited
 - The Maryborough Co-operative Dairy Association Limited
 - Dairyfields Milk Suppliers Co-operative Limited and
 - Port Curtis Milk Suppliers Co-operative Association Limited.
- 2.4 Under the proposal, a Milk Management Committee, consisting of three Premium Milk Supply representatives and three representatives from Pauls would be established to facilitate the collective bargaining negotiations.
- 2.5 At the time, the ACCC considered that the following features of the collective bargaining arrangements and of the markets would limit any potential anti-competitive detriment:
- Pauls was not bound by any exclusivity agreement with Premium Milk Supply and could purchase milk outside the collective arrangements
 - dairy farmer members of Premium Milk Supply were able to opt out of the collective arrangements and negotiate their own supply arrangements with Pauls or any other processor and

¹ At the time of making its application 'Premium Milk Supply Pty Ltd' had not incorporated.

² In August 1998, Pauls Ltd was acquired by Parmalat Australia Pty Ltd but it was not until September 2003 that Pauls Ltd changed its name to Parmalat Australia Ltd.

- competitive pressures at both the processing and retail level of the dairy industry were likely to limit the likelihood that any higher prices negotiated by Premium Milk Supply would be passed on to consumers.
- 2.6 The ACCC considered that there would be a number of public benefits from the arrangements, including efficiency gains from transaction costs savings and smoothing the transition from a regulated to a deregulated market.
- 2.7 On balance, the ACCC was satisfied that the proposed collective bargaining arrangements were likely to result in a benefit to the public, which was sufficient to outweigh any likely anti-competitive detriment.
- 2.8 Accordingly, on 12 December 2001 the ACCC granted authorisation A90745 allowing Premium Milk Ltd (Premium)³ to engage in collective negotiation with Pauls until 1 July 2005.

The current application for revocation and substitution

- 2.9 On 13 May 2005, Premium requested that, pursuant to section 91C of the TPA, the ACCC revoke authorisation A90745 and grant substitute authorisation A90972.
- 2.10 In addition to its application for substitute authorisation, Premium requested that the ACCC grant interim authorisation to allow the collective bargaining arrangements to continue while the ACCC considered Premium's substantive application.
- 2.11 On 15 June 2005, the ACCC granted Premium interim authorisation in the same terms as authorisation A90745.
- 2.12 This document is the draft determination in relation to Premium's substantive application for revocation and substitution.

³ On 30 August 2001 the ACCC was advised that 'Premium Milk Supply Pty Ltd' was incorporated as Premium Milk Ltd.

3 Australian dairy industry background

- 3.1 The ACCC notes that as the Australian dairy industry is a large, complex and diverse area of trade, there is a great deal of information, data and forecasting produced in relation to it. However, for the purposes of brevity, this section of the draft determination will only include that information which the ACCC considers to be directly relevant to the application before it.
- 3.2 The ACCC acknowledge that much of the factual information contained in this section and in other sections of the draft determination has been sourced from the following reports. Full copies of these reports can be accessed through the ACCC website or by contacting the relevant organisation directly:

ABARE: A review of the Australian Dairy Industry

Dairy 2005: Situation and Outlook Report to the Australian dairy industry

Dairy Australia: Australian Dairy Industry in Focus 2004

Australian Dairy Herd Improvement Report 2003/2004

The Australian dairy industry

- 3.3 As a consequence of the phasing out of government support and changes in international dairy markets over the past two decades, the Australian dairy industry has undergone substantial restructuring. For example, during this period, the number of dairy farms in Australia has more than halved and the processing and distribution sectors have been significantly rationalised. Whilst many smaller dairy farm and manufacturing operations have either been appropriated by larger operations or exited the industry, this restructuring appears to have created a more efficient Australian dairy industry which has become increasingly competitive in the international market.
- 3.4 More recently, factors such as the total deregulation of the Australian dairy industry (which was finalised in the year 2000), a lengthy drought in many parts of Australia, lower world milk prices and a strengthening Australian dollar, have had both positive and negative effects on the local dairy industry and the various markets in which they operate.
- 3.5 Generally, however, the dairy sector has continued to grow and to contribute significantly to Australia's economy. For example, in 2003-2004 the Australian dairy industry produced approximately 10.1 billion litres of milk with a farmgate value of \$2.8 billion and an export value (after manufacturing) of \$2.4 billion.

Milk use in Australia

- 3.6 Milk produced in Australia can be separated, by its use, into two distinct sectors, drinking and manufacturing milk. Approximately 20% of milk production is used as drinking milk with the remaining 80% used in manufacturing dairy products

such as cheese, ice cream, skim milk powder, yoghurt, butter and cream. Victoria is the largest milk production region, producing 66% of national milk production followed by New South Wales with approximately 10% and the remaining production split evenly amongst the other states.

- 3.7 While the majority of milk produced in all states is used for manufactured product, Victoria, Tasmania and South Australia farmers are more reliant on income from manufacturing milk than farmers in the other states. In addition, a greater proportion of milk in Victoria and Tasmania is used for manufactured product that is exported compared with the other states where most of the manufactured product is sold domestically.

Australian dairy farmers

- 3.8 Dairy farming occurs in all Australian states, however, it is mainly concentrated in those areas which have high average rainfall or have reliable irrigation systems. In particular, significant numbers of dairy farms may be found in: far-north and south-east Queensland; down the New South Wales coast, in much of Victoria and Tasmania, in south-eastern South Australia and in the south-west of Western Australia.
- 3.9 Further, whilst milk is produced year round in Australia, approximately two thirds of dairy farms, especially those in Tasmania and Victoria, vary their production according to the season with spring and summer (September to January) seeing the highest production. The remainder of the states' milk production is generally more evenly spread across the year.
- 3.10 As mentioned, the total number of individual Australian dairy farms has been steadily declining for a number of decades. For example, in 1975 there were in the vicinity of 30,000 dairy farms whereas in 2005 there are approximately 9,500. This consolidation of dairy farms together with exits from the industry has resulted in the growth in the size of the average dairy farm, a growth in the average herd size and significantly more efficient farming operations.
- 3.11 This is demonstrated by the fact that over approximately the same period, whilst farm numbers diminished, the total milk production increasing from 5,432 million litres (1980) to 10,075 million litres (2004).
- 3.12 Incomes for individual dairy farmers vary across the states and are dependent on many factors such as the percentage of their milk sold for manufacturing or drinking, international pricing, transport costs and the cost of feed. However, with the exception of the 2002-03 drought year, farm cash incomes and rates of return from dairying have consistently outperformed all but the cropping industry since 1989-90 and sheep in 2003-04.
- 3.13 However, even with the total number of dairy farms reducing and incomes remaining steady, the traditional family farm remains the dominant enterprise structure with approximately 61% of farms employing only family labour and only a small number of enterprises employ full time external employees.

Dairy manufacturing and processing

- 3.14 The structural reform which has occurred in the processing and manufacturing sectors of the industry over the past twenty years has mainly been driven by the expansion of multinational food corporations and the removal of competition restrictions such as regulated state markets and government assistance. This has resulted in Australia having a highly concentrated but highly competitive dairy manufacturing and processing sectors.
- 3.15 For example, Australia's dairy manufacturing sector, that is, the sector of the industry which produces manufactured products such as cheese, butter and milk powder, is dominated by two Victorian co-operatives, Murray Goulburn and Bonlac Supply Co, who together receive just under 50 per cent of national milk production, with a further cooperative, Dairy Farmers, receiving a further 12 per cent of the nation's milk.
- 3.16 The milk processing sector, that is the sector which produces drinking milk, is also highly concentrated in Australia with three dominant processors – National Foods Milk Ltd (now a fully owned subsidiary of San Miguel Corporation), Dairy Farmers and Parmalat Australia – reported to supply over 80 per cent of all drinking milk.
- 3.17 In addition to these large national companies, some states have smaller processors that compete more at a regional level, such as Peters and Brownes in Western Australia.
- 3.18 The perishability of raw milk has meant that, traditionally, milk manufacturers and processors have endeavoured to ensure that their milk suppliers (i.e. dairy farms) have been within close proximity to their production facilities and those production facilities have been close to final consumers. However, improvements in technology and more cost effective transport have meant that milk can be moved, and therefore sourced and supplied, over long distances for further processing.

The domestic retail market

- 3.19 Australia's broader domestic retail market for the sale of manufactured dairy products and drinking milk is dominated by the two incumbent supermarket chains, Coles and Woolworths. These supermarket chains account for around 60% of all domestic dairy sales with the food service industry (restaurants, cafes) accounting for a further 12% and the remainder being split between other outlets such as non-supermarket retailers.
- 3.20 It is significant to note that since the deregulation of the Australian dairy industry, Coles and Woolworths have adopted a strategy of selling reduced price generic milk in a bid to attract more customers. Over the past five years, this has lead to a significant increase in the sale of non-branded generic milk and reciprocal decreases in the sale of branded milk.

The export market

- 3.21 Australia's climate, which provides for efficient, low cost, high-quality milk production, has enabled Australian dairy farmers to produce milk more cheaply and in greater quantities than other major dairy producing countries. Consequently, approximately 50% of all milk produced by Australian dairy farmers is used for manufactured products which are exported and sold internationally.
- 3.22 A significant flow on effect from this reliance on exports is that the price paid for milk to Australian dairy farmers, especially those in states which are highly geared toward producing manufactured goods (Victoria, Tasmania and South Australia), is inextricably linked to international milk prices. Whilst the impact of international price fluctuations is not as pronounced for those dairy farmers who produce milk mainly for the domestic markets (Western Australia, Queensland and New South Wales), the entire dairy industry is still affected by any significant changes in the international dairy market.
- 3.23 In addition to the industry's significant export focus, Australia is an open market for the import of dairy products, which ensures returns to the dairy manufacturing sector are further linked to world market conditions.

Related authorisations

Australian Dairy Farmers – Authorisation A90782

- 3.24 In March 2002, the ACCC granted authorisation to the Australian Dairy Farmers' Federation Ltd (A90782) allowing its members to collectively negotiate contractual terms and conditions with dairy-processing companies. National Foods Ltd applied to the Australian Competition Tribunal for a review of the ACCC's determination and on 6 August 2002 the Tribunal issued a consent decision in similar terms to the ACCC's determination.
- 3.25 As their determination was due to expire on 30 July 2005, the former Australian Dairy Farmers' Federation, now known as Australian Dairy Farmers Ltd (ADF) lodged an application for the revocation of authorisation A90782 and its substitution by authorisation A90966. On 18 May 2005, the ACCC granted interim authorisation to the ADF's collective bargaining arrangements and is currently assessing the ADF's substantive application.

Dairy WA

- 3.26 On 21 March 2005, Dairy WA lodged two applications for authorisation (A90961, A90962) to allow its member dairy farmers to collectively bargain with and, under certain circumstances, to collectively boycott, milk processors in Western Australia. The ACCC is currently considering Dairy WA's application.

4 Premium's application and interested party submissions

Premium's application for revocation and substitution

Premium's application

- 4.1 As discussed in section 2 of this draft determination, on 12 December 2001, authorisation A90745 was granted under subsection 88(1) of the TPA for Premium Milk Supply to collectively negotiate dairy contracts with Pauls on behalf of consenting south-east Queensland dairy farmers.
- 4.2 Subsequently, on 13 May 2005, Premium lodged an application pursuant to section 91C of the TPA for a revocation of authorisation A90745 and its substitution by authorisation A90972. The proposed substitute authorisation (A90972) seeks to continue to allow the collective bargaining of farm-gate prices and milk standards through the representative body – Premium – in direct negotiations with Parmalat for a further period of five years.
- 4.3 Specifically, the substitute application seeks authorisation for the continuation of the collective bargaining arrangements provided for in:
- the *Consolidated constitution of Premium Milk Ltd*⁴ and
 - the *Milk Supply Agreement*⁵ between Pauls and Premium which, amongst other things, provides for the establishment of the Milk Management Committee.
- 4.4 Premium also sought interim authorisation to allow the continuation of the collective bargaining arrangements whilst the ACCC considered the merits of its substantive application.

Premium's submission in support of its application

- 4.5 Premium submits that following the granting of authorisation by the ACCC in December 2001, the Milk Management Committee was formed and has continue to convene in accordance with the agreement between Premium and Parmalat.
- 4.6 Premium submits that the Milk Management Committee has met between September and November each year and has been successful in negotiating contract terms and conditions including price, supply arrangements and quality requirements.
- 4.7 Premium submits that whilst price negotiations are a part of the Milk Management Committee's consideration, those negotiations are constrained by competition between Parmalat, National Foods and Dairy Farmers.
- 4.8 Premium submits that the public benefits accepted by the ACCC in its December 2001 determination have been achieved and will continue to be achieved.

⁴ Adopted by Premium's members on 22 June 2001.

⁵ As supplied to the ACCC on 3 September 2001.

- 4.9 Premium submits that the success of its collective bargaining arrangements is clearly demonstrated by both the continued support of Parmalat and the individual dairy farmers, and the reduction in farmer owned co-operatives. In particular Premium submits that of the six co-operatives identified in its original application (see paragraph 2.3 of this draft determination), only one, Dairyfields Milk Suppliers Cooperative Ltd, still operates.

Interested party submissions

- 4.10 The ACCC sought submissions from a wide range of interested parties. The ACCC received submissions from the Queensland Dairyfarmers' Organisation Ltd, the Queensland Farmers Federation Ltd, Coles Myer Ltd and the Queensland Department of Primary Industries and Fisheries.
- 4.11 In general, no concerns were raised and those expressing a view supported Premium's application for revocation and substitution.
- 4.12 Complete copies of all submissions along with Premium's application for revocation and substitution are available on the ACCC's public register.

5 Statutory provisions

- 5.1 Under section 91C of the TPA, the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation at the request of the party to whom the authorisation has been granted, or another person on behalf of such a party.
- 5.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.

The statutory tests

- 5.3 In assessing an application made under section 91C of the TPA, the relevant tests Premium must satisfy for the substitute authorisation to be granted are outlined in sections 90(6) and 90(7) of the TPA.
- 5.4 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 result, or be likely to result, in a benefit to the public and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made and the provision concerned were given effect to.
- 5.5 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 has resulted, or is likely to result, in a benefit to the public and
 - that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

The public benefit test

- 5.6 In deciding whether it should grant authorisation, the ACCC must examine the detriments of the arrangements or conduct, particularly those arising from any lessening of competition, and the public benefits arising from the arrangements or conduct and weighing the two to determine which is greater. This is referred to as the ‘public benefit test’.

- 5.7 Should the public benefits or expected public benefits outweigh the detriments, the ACCC may grant authorisation. If this is not the case, the ACCC may refuse authorisation or, alternatively, the ACCC may grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the detriment.
- 5.8 Public benefit is not defined by the TPA. However, the Australian Competition Tribunal (the Tribunal) has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁶
- 5.9 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁷
- 5.10 The ACCC also applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and any detriment generated by arrangements for which authorisation has been sought.
- 5.11 Under this test, the ACCC compares the public benefit and detriments generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

Other relevant provisions

- 5.12 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.
- 5.13 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.

⁶ *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677. The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005.

⁷ *Re 7-Eleven Stores* at 42683.

6 ACCC assessment – Markets and the counterfactual

ACCC assessment: The relevant markets

- 6.1 The first step in assessing the public benefits and detriments of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 6.2 The ACCC is of the view that whilst it is not necessary to definitively identify all of the relevant markets, it is important for the ACCC's assessment of the application to define general market parameters in order for it to assess the public benefits and detriments, particularly the anti-competitive effects, of the collective bargaining arrangements.
- 6.3 In this instance the ACCC considers that, for the purposes of considering Premium's current application for revocation and substitution, the *primary* area of competition likely to be affected by the collective bargaining arrangements is the farmgate supply of raw milk to dairy processors in much of eastern Australia. The ACCC considers that there are a number of downstream areas of competition which may be relevant to the ACCC's considerations, in particular, the domestic retail market for drinking milk and the domestic and international markets for the supply and acquisition of dairy products.

The farmgate supply of raw milk to dairy processors

- 6.4 The ACCC considers that as Premium's collective bargaining arrangements relate to the supply by dairy farmers of raw milk to a dairy processor, Parmalat, and there is no obvious substitute for that product, the primary product relevant to the ACCC's consideration is likely to be the supply of raw milk from the dairy 'farmgate'.
- 6.5 The ACCC considers, however, that whilst the product dimension of the market maybe clear, the geographic dimension of the market, that is the geographic area in which milk may be supplied or acquired, may not be so apparent.
- 6.6 The ACCC notes that state regulation and product perishability have meant that, historically, the Australian dairy industry could be separated into state or smaller regionally based markets. However, the ACCC considers that deregulation and improved transport technology have combined to change this market delineation.
- 6.7 The ACCC considers that the removal of state government restrictions on milk market arrangements has allowed the industry to operate and compete on a national basis and has had a significant impact on the traditional geographic market boundaries. Additionally, the ACCC considers that, as outlined in the following extract from ABARE's review of the dairy industry released in January 2005, improvements in transport have also impacted on these boundaries:

More cost effective transport and concentration of industry processing capacity has meant that milk is moved over longer distances for further processing. For instance, Dairy Farmers is understood to use 'B Double' trucks to move milk from South Australia to Sydney to produce manufactured dairy products while Murray

Goulburn transports milk produced in the south east region of South Australia to its factory near Warnambool in Victoria.

While it is important that factories processing market milk have a supply of milk within close proximity because milk quality deteriorates with time, improvements in bulk milk transport have again allowed milk for processing to be sourced from greater distances.⁸

- 6.8 The ACCC also understands that a number of dairy farmers in South Australia have utilised the ADF's collective bargaining authorisation to negotiate to sell their raw milk beyond their traditional regional and state boundaries, to a milk processor located in Victoria.⁹
- 6.9 The ACCC considers, therefore, that whilst it is likely to be more cost effective for dairy farmers and milk processors to transport milk short distances, it is feasible, given the appropriate price incentives, for dairy farmers to supply their milk beyond regional boundaries or for milk processors to acquire milk from outside these boundaries.
- 6.10 Consequently, the ACCC considers that for the purposes of considering Premium's current application for revocation and substitution, the geographic dimension of the relevant milk market is unlikely to be national but it is likely to incorporate an area which includes much of Queensland, New South and perhaps Victoria.

The downstream markets for drinking milk and dairy products

- 6.11 Whilst, the ACCC considers that the primary area of competition occurs between dairy farmers and the dairy processors who currently supply or acquire, or could potentially supply or acquire, milk from one another, the ACCC is of the view that there are a number further areas of competition which may be relevant to its consideration of Premium's application.
- 6.12 In particular, the ACCC considers that any detriment resulting from a reduction in competition in the primary market is likely to have an effect on, or be affected by, a number of downstream markets which may include the domestic retail market for drinking milk and the domestic and export markets for manufactured dairy products.
- 6.13 For example, the ACCC considers that any price increase resulting from the collective bargaining arrangements have the potential to flow into the domestic retail market for drinking milk. Similarly, the ACCC considers that any price increases are likely to flow into the domestic and export markets for manufactured dairy products. Equally, however, the ACCC considers that the large, highly competitive industry participants in these markets are likely to influence the ability of the collective bargaining group to negotiate significant price increases.
- 6.14 Therefore, the ACCC considers that the downstream markets for drinking milk and dairy products are likely to be relevant to the application insofar as they effect, or are affected by, the collective bargaining arrangements.

⁸ ABARE: A review of the Australian Dairy industry – 2005 (Pg30)

⁹ The Fleurieu Peninsula collective bargaining group is currently registered with ADF.

Features of relevant markets

- 6.15 Having described the broad parameters of the relevant markets, the ACCC considers it useful for its assessment of the arrangements to outline some of the structural features of the industry, such as barriers to entry or the degree of market concentration, which may influence the existing, or potential, level of competition within the industry.
- 6.16 In this instance, the ACCC considers that there are a number of important features of the Australian dairy industry which may effect competition, including:

Dairy farmers

- The total number of dairy farms has declined from approximately 30,000 (1975) to under 10,000 (2004). Northern New South Wales and south-east Queensland have had the highest rates of decline.
- Total milk production has increased from 5,432 million litres (1980) to 10,075 million litres (2004).
- Dairy farms tend to be predominately family owned operations with 76% of all workers on Australian dairy farms being family members.
- Dairy farms are generally located in areas where there is high rainfall or good irrigation conditions.
- Victorian farmers are the largest milk producers in Australia accounting for approximately 66% of production with Queensland accounting for approximately 7%.

Domestic dairy processors and retailers

- Approximately 20% of milk produced is used for drinking milk and the remaining 80% used for manufacturing dairy products.
- Over 80% of drinking milk is supplied by three processors, National Foods, Dairy Farmers and Parmalat.
- Over 70% of manufactured dairy products are supplied by three processors Murray Goulburn, Bonlac Supply Company and Dairy Farmers.
- Victorian based processors account for approximately 70% of all milk used in Australia. Queensland based processors use about 7%.
- Supermarkets account for around 60% of dairy products supplied to consumers with other retail sales 27% and food service 12%.

Dairy imports and exports

- Approximately 50% of dairy products manufactured in Australia are exported, mainly from Victoria and Tasmania.
- Imports of fresh milk into Australia are negligible but imports of manufactured dairy products such as cheese, especially from New Zealand¹⁰, are significant.

¹⁰ New Zealand is the worlds second largest exporter of dairy products.

- Australia and New Zealand together account for more than half of the export trade in dairy products.

Conclusion on the relevant markets

- 6.17 The ACCC considers that whilst it is not necessary to exactly define the relevant markets, it is necessary for competition analysis to identify general market parameters.
- 6.18 In this instance, the ACCC considers that the primary area of competition which is likely to be affected by the arrangements is the farmgate supply of raw milk to dairy processors in much of eastern Australia, with other downstream markets such as the domestic retail market for drinking milk and the domestic and international market for manufactured dairy products, also likely to be affected.

ACCC assessment: The counterfactual

- 6.19 As outlined in section 5 of this draft determination, the ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and weigh the public benefit and detriment generated by arrangements for which authorisation has been sought.
- 6.20 Under this test, the ACCC compares the public benefit and detriment generated by 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 referred to as the counterfactual.
- 6.21 In this instance, the ACCC is of the view that there are two potential counterfactual situations.
- 6.22 Firstly, as mentioned in section 3 of this draft determination, the ADF has an existing authorisation (A90782) which provides its members with access to similar collective bargaining arrangements to those engaged by Premium’s members. As a result of the ADF’s existing authorisation, which covers most Australian dairy farmers including Premium’s members, the ACCC considers that a possible counterfactual situation is one in which Premium’s member dairy farmers could continue to engage in collective bargaining negotiations with Parmalat, albeit under the ADF’s collective bargaining arrangements (the ADF counterfactual).
- 6.23 Alternatively, the ACCC considers that, if the ADF authorisation were not in place, the counterfactual situation would be likely to be one in which Premium’s member dairy farmers were required to negotiate contracts with Parmalat on an individual basis (the non-ADF counterfactual).
- 6.24 Whilst the ACCC considers that the former, that is the ADF counterfactual, is the more likely situation, it has considered both alternatives in its assessment.

7 ACCC assessment – Effect on competition

- 7.1 Section 88 of the TPA allows the ACCC to grant immunity from legal action for parties to engage in certain anti-competitive conduct which may include collective bargaining.
- 7.2 As discussed in section 5 of this draft determination, the ACCC must assess the extent to which the collective bargaining arrangements may give rise to any detriments. Specifically, the ACCC must assess the detriment to the public constituted by any lessening of competition flowing from the collective bargaining arrangements.
- 7.3 In general terms, collective agreements to negotiate terms and conditions for independent businesses covered by that agreement are likely to lessen competition relative to a situation where each business individually negotiates their own terms and conditions. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

The ACCC's approach to assessing the anti-competitive detriment

- 7.4 In assessing the potential detriment of Premium's collective bargaining arrangements, the ACCC proposes to consider the following three possible anti-competitive effects which are likely to occur in the primary area of competition:
- Lost efficiencies resulting from collusion
 - Reduced scope for new market entry
 - Increased potential for collective activity beyond that authorised
- 7.5 The ACCC will then consider the potential flow-on effect of the collective bargaining arrangements into downstream markets and, alternatively, the capacity for those downstream markets to mitigate any potential anti-competitive detriment.

ACCC assessment: The anti-competitive detriment

Lost efficiencies resulting from collusion

- 7.6 A major feature of most collectively negotiated agreements is an agreement as to the price of acquiring a good or service or the price to be paid to a group.
- 7.7 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.
- 7.8 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.

- 7.9 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.¹¹
- 7.10 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.
- 7.11 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, and 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.
- 7.12 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 four 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 negotiate, is low
 - participation in the collective bargaining arrangements is voluntary
 - there are restrictions on the coverage and composition of the bargaining group and
 - there is no boycott activity.
- 7.13 With respect to these four features, as they relate to Premium's collective bargaining arrangements, the ACCC notes the following:
- Competition between dairy farmers absent of the authorisation*
- 7.14 Generally, the ACCC considers that collective bargaining arrangements of the type proposed by Premium will lessen competition relative to the usual counterfactual situation which is one where the collective bargaining arrangements do not exist (the non-ADF counterfactual). In this instance, however, the counterfactual situation, that is the situation without the authorisation, is likely to be one where Premium's member dairy farmers would still have authorisation to collectively bargain albeit under the ADF's authorisation (the ADF counterfactual).

¹¹ Section 45A of the TPA

- 7.15 Under the ADF counterfactual, the ACCC considers that the continuance of the collective bargaining arrangements would be unlikely to affect the level of competition between dairy farmers, as even without their authorisation, Premium's member dairy farmers would still be authorised to engage in collectively negotiations with Parmalat.
- 7.16 However, the ACCC considers that even under the non-ADF counterfactual situation, that is the situation where Premium's dairy farmers have neither their own or the ADF authorisation, any reduction in competition resulting from the collective bargaining arrangements, with respect to those matters on which Premium are seeking to collectively negotiate, would still be likely to be low.
- 7.17 That is to say, the nature of the industry and the relationship between Parmalat and the dairy farmers is such that, generally speaking, if individual negotiations were to occur between the parties, competition between dairy farmers would most likely be limited.
- 7.18 Consequently, the ACCC considers that the difference between the level of competition amongst growers with or without the collective bargaining arrangements, under the non-ADF counterfactual, would be small.

Voluntary participation in the collective bargaining arrangements

- 7.19 A key aspect of Premium's original application for authorisation was that the collective bargaining arrangements were voluntary for all parties. Again, Premium's proposed substitute authorisation is entirely voluntary and places no obligation on either Parmalat or Premium's member dairy farmers to participate in the collective bargaining arrangements.
- 7.20 The ACCC is of the view that collectively negotiated outcomes will only be agreed and implemented where both Premium's members and Parmalat consider it in their commercial best interest to do so. Consequently, if any party considers that they may be able to negotiate a more commercially attractive arrangement than they could under the collective bargaining arrangements, they will be free to do so.

Coverage and composition of the bargaining group

- 7.21 The ACCC considers that where the size of bargaining groups is restricted, any 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.
- 7.22 In this instance, whilst Premium's bargaining group comprises a significant number of the dairy farmers in south-east Queensland, as discussed in section 6, the primary market in which the collective bargaining group competes is likely to encompass much of eastern Australia and therefore Premium's collective bargaining group is likely to be small, relative to the broader market.

Boycott activity

- 7.23 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. Accordingly, any such conduct, should it occur, would not be protected from legal action under the TPA.

Reduced scope for new market entry

- 7.24 The capacity for new entrants, whether they be a new dairy farmer or a new milk processor, to compete for the rights to undertake the business of existing market participants subject to a collective agreement also has implications for how competition in the market is affected.
- 7.25 In particular, the presence of collective arrangements may serve to increase the barriers to entry if parties were to enter long term contracts which, in the case of a dairy farmer, saw all their milk supplies acquired or, in the case of a milk processor, saw all their processing needs satisfied.
- 7.26 In this instance, however, the ACCC considers that the scope for new market entry is unlikely to be significantly reduced for a number of reasons.

Pre-existing barriers to entry

- 7.27 The ACCC considers that pre-existing barriers to entry for potential new dairy farmers, in terms of technical skill, access to suitable land and capital outlay for dairy cattle and equipment, may already be high. The ACCC therefore considers that any increase in the barriers to entry resulting from the collective bargaining arrangements is likely to be small in comparison to those already present.

Voluntary participation in the arrangements

- 7.28 As mentioned, participation in the arrangements will be voluntary for all parties which will allow any parties (including new entrants) freedom to negotiate rates of payment and other conditions different to those determined under collectively negotiated agreements.

Authorisation to extend to future parties

- 7.29 The application for authorisation is expressed so as to apply not just too current Premium members, but also to any future members. Consequently, any potential new dairy farmer could, provided they became a member of Premium, join or form a collective bargaining group.
- 7.30 In addition, the ACCC notes that, the number of dairy farmers across Australia, and especially within south-east Queensland, has been declining steadily over the past two decade which suggests that there is, absent of the proposed arrangements, limited scope for new entry into the market in any event.

- 7.31 The ACCC also notes that the collective bargaining arrangements may, to some extent, limit the capacity for a new dairy processor(s) to locate in Queensland. However, the ACCC has not been provided with any information to suggest that there is a significant prospect of an additional processor seeking to locate in Queensland within the five year period for which authorisation is sought.
- 7.32 The ACCC notes that were a new processor to enter the market, there would be no restriction on existing, uncontracted, dairy farmers from supplying them and no restrictions on new dairy farmers from entering the market, although the ACCC understands that a significant number of additional dairy farmers would be likely to be required to sustain an additional processor
- 7.33 Consequently, for the reasons outlined above, the ACCC considers that the collective bargaining arrangements will not significantly increase barriers to entry in any market and that any anti-competitive detriment that may arise is likely to be minimal.

Increased potential for collective activity beyond that authorised

- 7.34 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.
- 7.35 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.
- 7.36 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.
- 7.37 Generally, the ACCC considers that 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 consenting parties to the application.
- 7.38 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.

Competitive pressures in downstream markets

- 7.39 The ACCC notes that, where dairy farmers are able to negotiate increases in prices paid to them as a result of bargaining collectively, the competitive nature of the downstream markets and the size and relative bargaining power of the market

incumbents, as described in section 3, would mean that such increases are unlikely to be significant and the extent to which such increases are passed on to consumers is likely to be limited.

- 7.40 Consequently, the ACCC considers that any small increase in price that dairy farmers may be able to negotiate is unlikely to materially impact on retail prices.

Conclusion on anti-competitive detriments

- 7.41 For the reasons outlined in this section, the ACCC considers that, overall, the potential anti-competitive detriment which may arise from the collective bargaining arrangements is likely to be minimal.

- 7.42 In particular, the ACCC considers that under either counterfactual situation, the current level of competition between the dairy farmers is unlikely to be significantly affected. In addition, the ACCC is of the view that a number of features of the arrangements are likely to mitigate their potential anti-competitive effects including:

- the arrangements are voluntary for all parties
- the arrangements do not include boycott activity and
- the arrangements may be accessed by future parties.

- 7.43 In addition, the ACCC considers that a number of industry features may also serve to mitigate the potential anti-competitive effects of the collective bargaining arrangements including:

- the size of the bargaining group is small relative to the market in which it competes
- the pre-existing barriers to entry into the relevant market may already be high and
- the nature of the downstream markets would be likely to limit the extent to which any price increases were passed on to consumers.

8 ACCC assessment – Public benefits

- 8.1 In order to grant authorisation to the collective bargaining arrangements, the ACCC must be satisfied that those 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.
- 8.2 Generally when considering the size of any public benefits in an authorisation context the ACCC will, as with the anti-competitive detriments, compare whether the claimed public benefits arise as a result of the collective bargaining arrangement against whether they would exist absent the authorisation.
- 8.3 In this instance, as there are two potential counterfactuals the size of the public benefits generated may vary depending on which counterfactual is accepted.
- 8.4 In the past, the ACCC has identified certain public benefits it considers may be generated where the counterfactual was considered to be a situation in which a group of rural industry participants, such as dairy farmers, negotiated individually with a large company, such as Parmalat (the non-ADF counterfactual).
- 8.5 However, whilst the ACCC considers that such a situation is one potential counterfactual in the current circumstances, the alternative is a situation in which a continuing ADF authorisation allows Premium's members to engage in collective bargaining regardless of whether their own collective bargaining arrangements are authorised (the ADF counterfactual).
- 8.6 Arguably, therefore, were the ADF counterfactual accepted, no additional public benefits would be likely to be generated from Premium's collective bargaining arrangements as Premium's member dairy farmers would have the capacity to engage in collective bargaining (and therefore generate any public benefits) in either instance. However, the ACCC considers that for a number of reasons, Premium's existing authorisation provides advantages to its members that the ADF's authorisation may not.
- 8.7 Firstly, the ACCC considers that Premium's authorisation is likely to provide its members with a degree of certainty and flexibility that they may not otherwise enjoy under the ADF authorisation. The ACCC considers that this is likely to arise from Premium and its members having more control over their own authorisation process and the manner in which it is structured.
- 8.8 In addition, the ACCC considers that as Premium's existing collective bargaining arrangements involve a consenting counterparty, namely Parmalat, the likelihood of the parties achieving the claimed public benefits and resulting efficiencies, would potentially be greater under their own authorisation than under the ADF's collective bargaining arrangements which do not provide for specific counterparties.

- 8.9 The ACCC, therefore, considers that whilst the Premium and ADF authorisations are similar, Premium's authorisation may potentially provide its members with greater certainty, flexibility and greater efficiencies than the ADF's authorisation.

The ACCC's previous assessment of the public benefits

- 8.10 As part of its assessment of Premium's original application for authorisation, the ACCC considered the following public benefits which Premium claimed would flow from the arrangements:
- *Easing the transition to a deregulated market:* The ACCC accepted, as it had done in other rural industries, that there could be a public benefit in providing a mechanism that facilitated the transition from a regulated environment to a more competitive environment.
 - *Transaction cost savings:* The ACCC accepted that there was likely to be some small public benefit arising from the arrangements in the form of transaction cost savings.
 - *Increased countervailing/bargaining power:* The ACCC was not satisfied that providing countervailing power to the dairy farmers would, in itself, result in a public benefit. However, the ACCC did consider that providing dairy farmers with greater time and opportunity to gain the experience and knowledge to negotiate supply contracts would enhance their ability to negotiate with processors efficiently and effectively although it considered that this public benefit had already been accepted under the, 'easing the transition to a deregulated market' public benefit.
 - *Investment in new technology:* The ACCC was not satisfied that it had been provided with sufficient information to demonstrate how the collective negotiations would create more certainty for member dairy farmers such that they would continue to invest in technology.
- 8.11 Premium submits that the public benefits which were recognised by the ACCC in its original determination have been achieved and will continue to be achieved. Additionally, Premium submits that the success of the collective bargaining arrangements is indicated by the on-going support of Parmalat for the arrangements.

The ACCC's current assessment of the public benefits

Easing the transition to a deregulated market

- 8.12 The ACCC has authorised various collective bargaining arrangements in industries (and in particular in rural industries) following deregulation. In assessing such arrangements the ACCC has accepted arguments that there would be a public benefit in mechanisms that facilitate the transition from a regulated to a deregulated environment. The ACCC considers that these mechanisms may help to avoid a dislocation in the functioning of a market that may otherwise be caused by too

sudden a transition. When Premium originally applied to the ACCC for authorisation to allow its members to collectively negotiate with Pauls, it claimed a public benefit of this kind would arise.

- 8.13 Specifically, Premium argued that such a public benefit would flow from minimising the adjustment costs that could result from too precipitous change from regulation to a deregulated environment. Consistent with authorisations granted in other industries that were managing similar issues, the ACCC accepted this claimed public benefit.
- 8.14 In terms of Premium's current application, the ACCC is of the view that sufficient time has passed to allow parties, and in particular dairy farmers, the opportunity to adjust to a deregulated environment. Consequently, the ACCC considers that the public benefit previously accepted from 'easing the transition to a deregulated market' no longer exists.

Transaction cost savings

- 8.15 As mentioned, in its original authorisation the ACCC accepted Premium's claim that the collective bargaining arrangements would provide a public benefit through lower transaction costs.
- 8.16 Generally, there are transaction costs associated with using the market as a mechanism for trade. However, these transaction costs are likely to be lower in negotiating a collective bargaining agreement involving a single negotiating process relative to a situation where negotiation occurs with a great many smaller businesses. Consequently, the ACCC considers that to the extent that these transaction costs savings do arise they are likely to constitute a public benefit, the more of which is passed on to consumers, the greater their weight would be.
- 8.17 In relation to Premium's current application for revocation and substitution, the ACCC considers that transaction costs savings are likely to continue to accrue from the collective bargaining arrangements, relative to either counterfactual situation.
- 8.18 That is to say, under the non-ADF counterfactual situation, individual dairy farmers would each incur transaction costs which may include fees for accountants and lawyers, costs which they would be likely to pass on in the form of higher prices. As such, the transaction costs associated with negotiating individually would be likely to be higher than the transaction costs of negotiating as a group.
- 8.19 Similarly, the ACCC considers that under the ADF counterfactual situation, individual dairy farmers would be likely to incur larger transaction costs than they would under their own collective bargaining arrangements. The ACCC considers that these costs would be incurred as a result of the uncertainty created by moving from an authorisation designed specifically for their own unique circumstances, to a more general authorisation which does not take their specific needs into account. Again, the ACCC considers that these costs may be incurred from having to seek

legal and accounting advice and from potentially having to alter their existing contracts.

- 8.20 Consequently, the ACCC considers that some, albeit, limited transaction cost savings are likely to result from the collective bargaining arrangements compared to either counterfactual situation. To the extent that such savings do arise, the ACCC considers that the competitive pressures which Parmalat faces are likely to ensure that at least some of these cost savings are passed on to consumers. However, the ACCC does not consider the magnitude of any such savings is likely to be significant.

Increased input into contracts

- 8.21 An increase in bargaining power, raised in the authorisation context, typically involves a group of smaller businesses attempting to improve their bargaining position relative to another, generally larger, business through a collective arrangement.
- 8.22 The ACCC does not consider a mere change in bargaining power is, in itself, a public benefit. Rather, the ACCC focuses on the likely outcomes resulting from the change in bargaining position flowing from the collective bargaining arrangement for which authorisation is sought. It is these likely outcomes which are essential to the net public benefit test.
- 8.23 The ACCC considers that such improved outcomes and efficiencies are more likely to arise if both parties to the negotiation (i.e. the buyer and the seller) have some input into the negotiation process. There can therefore exist a public benefit in collective bargaining arrangements that increase the effective input of the weaker party to the bargaining process.
- 8.24 Generally, in the context of milk supply contracts, the ACCC considers the effective input from both parties is likely to produce the most efficient outcome.
- 8.25 In the current circumstances, the ACCC accepts that there is an imbalance in bargaining power between dairy farmers and Parmalat, which would, in the non-ADF counterfactual situation, limit the capacity for dairy farmers to have effective input into contract terms and conditions.
- 8.26 The ACCC considers that, under the non-ADF counterfactual, the collective bargaining arrangements would improve the bargaining position of the dairy farmers and would be likely to provide a greater opportunity for them to have more effective input into contracts terms and conditions and to the extent that this leads to efficiency gains, this outcome would give rise to some public benefits.
- 8.27 Additionally, the ACCC considers that under the ADF counterfactual situation, for the same reasons identified previously, that is, greater certainty, increased flexibility and a supportive counterparty, the Premium collective bargaining arrangements would be more likely provide its member dairy farmers with a

greater opportunity to have more effective input into contracts terms and conditions which may also lead to increased efficiencies.

Investment in new technology

- 8.28 Generally, the ACCC considers that where providing a group with authorisation to engage in collective bargaining leads to an increase in investment and subsequent improvement in efficiencies and reduction in costs, such an outcome would be likely to constitute a public benefit.
- 8.29 However, in this instance, whilst the collective bargaining arrangements have been in place for a number of years, Premium has not provided the ACCC with sufficient information to demonstrate that such outcomes have been achieved and, as a consequence, the ACCC does not accept the claimed public benefit.

Conclusion on the public benefits

- 8.30 In order to grant authorisation to Premium's collective bargaining arrangements, the ACCC must be satisfied that the potential public benefits of the arrangements would outweigh the potential anti-competitive detriments arising from the arrangements.
- 8.31 In this instance, as there are two potential counterfactuals the size of the public benefits generated by the collective bargaining arrangements may vary depending on which counterfactual is accepted.
- 8.32 However, the ACCC considers that similar public benefits may be generated under either of the alternative counterfactuals, albeit to a differing degree.
- 8.33 In particular, the ACCC considers that some limited transaction cost savings are likely to result from the collective bargaining arrangements compared to either counterfactual situation and to the extent that these transaction costs savings do arise they are likely to constitute a public benefit, the more of which is passed on to consumers, the greater their weight would be.
- 8.34 Similarly, the ACCC considers that to the extent that the collective bargaining arrangements provide dairy farmers with greater input into contract terms and conditions and this leads to efficiency gains, such an outcome would also be likely to give rise to public benefits.

9 Balance of the public benefits and anti-competitive detriments

- 9.1 In order to grant authorisation the ACCC must be satisfied that the collective bargaining arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from those arrangements.
- 9.2 In this instance, the ACCC is satisfied that any potential anti-competitive detriment that may arise from the collective bargaining arrangements is likely to be minimal as under either counterfactual situation, the current level of competition between dairy farmers is unlikely to be significantly affected.
- 9.3 In addition, the ACCC is of the view that a number of features of the arrangements are likely to mitigate their potential anti-competitive effects including:
- the arrangements are voluntary for all parties
 - the arrangements do not include boycott activity and
 - the arrangements may be accessed by future parties.
- 9.4 The ACCC considers that a number of industry features may also serve to mitigate the potential anti-competitive effects of the collective bargaining arrangements including:
- the size of the bargaining group is small relative to the market in which it competes
 - the pre-existing barriers to entry into the relevant market may already be high and
 - the nature of the downstream markets would be likely to limit the extent to which any price increases were passed on to consumers.
- 9.5 In addition, the ACCC is satisfied that some public benefits may flow from the collective bargaining arrangements, in particular transaction cost savings and efficiency gains from dairy farmers having greater input into contracts, and to the extent that these savings do arise they are likely to constitute a public benefit.

10 The draft determination

The application

10.1 On 13 May 2005, Premium lodged an application pursuant to section 91C of the TPA for a revocation of authorisation A90745 and its substitution by authorisation A90972. The application was made pursuant to section 88(1) of the TPA for a substitute 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 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.¹²

10.2 The application sought authorisation for a period of five years.

Statutory test

10.3 For the reasons outlined in this draft determination, the ACCC is satisfied that:

- the public benefits likely to result from the collective bargaining arrangements would outweigh the potential anti-competitive detriments of those arrangements.

Proposed authorised conduct

10.4 The ACCC proposes to grant substitute authorisation A90972 pursuant to section 88 of the TPA and the Competition Code for Premium and its current and future members to engage in collective bargaining arrangements in accordance with:

- the *Consolidated constitution of Premium Milk Ltd* and
- the *Milk Supply Agreement*.

10.5 The ACCC proposes to grant authorisation for a period of five years from the time the final determination is granted.

¹² The application has also been considered as an application under the *Competition Code* of Queensland.