



Australian Competition & Consumer Commission

PO Box 1199
Dickson ACT 2602
470 Northbourne Ave
Dickson ACT 2602
Australia
Ph (02) 6243 1111
Fax (02) 6243 1199

Our Ref: C2004/1241
Contact Officer: Michael Green
Contact Phone: 02 6243 1088

9 February 2005

Dear

**Milk Vendors Association (SA) application for authorisation A90927
- draft determination**

The Australian Competition and Consumer Commission (the ACCC) has issued a draft determination in respect of the application for authorisation lodged by the Milk Vendors Association (SA) (the MVA) on 3 September 2004.

The MVA is seeking authorisation to collectively bargain on behalf of its members in relation to the terms and conditions of distribution contracts with National Foods Milk Limited (NFML) and Dairy Vale Foods Limited (Dairy Farmers).

The MVA is also 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 vendors.

Summary of ACCC considerations

Having considered the application and submissions from the MVA and interested parties, the ACCC proposes to grant authorisation, subject to the condition noted below, for five years.

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. 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.

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.

Therefore, after considering all the information before it, the ACCC is of the view that the proposed arrangements give rise to a small public benefit and limited public detriment. 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.

Interim authorisation

On 6 October 2004, the ACCC granted interim authorisation to the MVA for the proposed arrangements. As requested by the MVA, interim authorisation did not extend to the proposed dispute representation system. The ACCC has now amended the interim authorisation in accordance with the proposed condition of authorisation noted. 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.

Next steps

Once the ACCC issues a draft determination, the Applicants or any interested party who may be dissatisfied with the ACCC's draft determination may request that the ACCC convene a 'pre-decision conference'. A pre-decision conference provides the opportunity for interested parties to make oral submissions in relation to the draft determination. Under the *Trade Practices Act 1974*, the ACCC must set a date within 14 days of which any pre-decision conference must be requested. Accordingly, if you wish the ACCC to hold a pre-decision conference in relation to the draft determination, you must notify the ACCC in writing within 14 days of 16 February 2005, that is, by **cob Wednesday 2 March 2005**. Conferences are conducted informally, without the participation of legal or other professional advisers. In the event of such a conference taking place it is likely that it would be held in Adelaide in late March.

Alternatively, you are also invited to make a written submission in response to the ACCC's draft determination. Written submissions should be lodged by **cob Friday 11 March 2005** at the following address:

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Submissions can also be lodged by e-mail to adjudication@acc.gov.au or by facsimile on 02 6243 1211.

Any submission you make will be placed on the ACCC's Public Register. You may request that information you provide in a submission to the ACCC be treated as confidential and not placed on the Public Register. Information excluded from the Public Register for reasons of confidentiality will still be considered by the ACCC when reaching its decision. Guidelines for seeking confidentiality are attached for your information.

The ACCC will consider any submissions it receives, including any oral submissions made should a pre-determination conference be called, and will then release a final determination in relation to these applications.

A copy of the draft determination is available on the ACCC's website at <http://www.acc.gov.au/content/index.phtml/itemId/347229/fromItemId/314462>. If you require further information or would like a copy the determination sent to you, please contact Michael Green on 02 6243 1088.

Yours sincerely

Scott Gregson
A/g General Manager
Adjudication Branch

GUIDELINES FOR CONFIDENTIALITY CLAIMS

The process whereby the Commission assesses applications for authorisation or notification is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the Commission to maintain a public register in respect of authorisation and notification applications.

Applicants and interested parties can request that a submission, or part of a submission, be excluded from the public register.

The Commission is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or process;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

However, even if a document does not meet these technical requirements, the Commission may still grant confidentiality where, in the Commission's view, it is desirable to do so.

The Commission also has the discretion, under s89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the Commission:

- (a) where the request is that a whole document be excluded, the words "**Restriction of Publication Claimed**" should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words "**Restriction of Publication of Part Claimed**" should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

Applicants, as a matter of course, should remove headers claiming "confidential communication" from all Emails and otherwise, unless they have a particular piece of information that they justify to the Commission deserves exclusion from the public register. If confidentiality is not requested but a header cannot be removed, it should be clearly stated at the beginning of the communication that confidentiality is not requested.

If the Commission denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the Commission will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the Commission will return the original material and destroy all associated copies. The Commission will not consider this material when reaching its decision.

If the Commission does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the Commission pursuant to its powers generally under the *Trade Practices Act*.