

Responses to Comments from Interested Parties

to Australian Dairy Farmers Limited

Authorisation Application for Collective Bargaining

It is pleasing to note that the responses to the ADF authorization application for collective bargaining have indicated support for the Authorisation. There has been a change of attitude in the industry to collective bargaining over the past couple of years, most likely due to the professional approach taken by collective bargaining groups to their relationships with dairy companies. The ADF looks forward to this relationship further improving into the future as the opportunities that are available through collective bargaining are taken by both dairy companies and dairy farmers.

The ADF is seeking to have the current authorization reinstated for a further five year period. The comments in the application that may have led to an impression that ADF was seeking to vary the current authorization conditions were not intended to convey such a conclusion.

While the majority of submissions support the ADF authorization application, the submission from National Foods Ltd. is not supportive with the company making a significant submission regarding the ADF's application for a further authorization for collective bargaining. There are several comments from National Foods Limited comments that are addressed as follows:

1. **Executive Summary 2.4** – The concerns that there may be monopolies of dairy farmers forming in various regions throughout Australia have not been realized through the experience of the current authorization. The collective bargaining groups that have been formed have been relatively small groups of dairy farmers who have common business interests and goals. Given the relatively small numbers of farmers within the groups that have been formed under the ADF authorization, the fears of regional monopolies forming are not born out by the facts.

National Foods also express fears of higher milk prices to dairy farmers as "suppliers are able to extract monopoly rents from processors". It is important to restate that more than 50% of Australia's milk production is exported. In addition, the Australian domestic dairy market is open to free competition from other countries including New Zealand and European Countries. More than 30% of the domestic cheese market, for example, is imported cheese. The Australian farm gate market returns, therefore, are directly linked to world market prices for dairy products. Further evidence that the fears of monopoly rents being extracted from processors comes from the operations of the current authorization. Many of the groups have either not been able to negotiate with a dairy company, or when they have, they have achieved a price agreement that was consistent with the current world market prevailing prices. The latest example of this is a group in South Australia that have negotiated an agreement to supply milk to a company whose prime market is the export market. The farm gate price for milk is only a small component of the retail price of milk and dairy products. For example the farm gate price of milk is less than 25% of the retail price.

It is also relevant to comment that when there have been increases in retail and wholesale prices in the recent past, processors have made public comment to reinforce to their customers and consumers that the price rises were not related to the price for milk from their suppliers.

2. **Executive Summary 2.6** – National Foods comment that it not necessary for a further extension to the authorization to continue to assist the transition to deregulation. In its original authorization application, ADF argued that transition to deregulation was one of the reasons for the request but it was one of many issues raised.

The ADF argued strongly in the original authorization application that there was little competition for dairy farmers supply of milk. There have been no news entrants to the manufacturing/ processing market to increase competition for milk since the original application was sought.

In addition, ADF argued that collective bargaining had a significant economic value in that it had the capacity to significantly reduce transaction costs. When dairy farmers are presented with contracts for the supply of milk, they are taking on the responsibility to seek independent legal and financial advice prior to signing a contract. Collective bargaining allows dairy farmers to reduce these transaction costs by pooling their resources and seeking one piece of advice for the group. This is an important ongoing value of collective bargaining.

It is also relevant to this point that the ADF's original application provided significant and diverse argument for collective bargaining. A review of the collective bargaining elements of the Dawson Review of the Trade Practices Act demonstrates that the arguments ADF raised in its original application in 2001 were consistent with the Review's arguments for amendments to the TPA to provide for a new approach to collective bargaining for groups of small businesses in their negotiations with input suppliers and their output customers.

3. **Likely Counterfactual 4** – National Foods has made a lot of comment on an authorization application to the ACCC from Dairy Western Australia Ltd (Dairy WA). The ADF's application has nothing to do with this application and the ADF has had no connection to the Dairy WA application. The Dairy WA application should have no bearing on the ADF authorization application and vice versa. The operation of the ADF's authorization since it was granted would also provide evidence that the fears expressed regarding the Dairy WA application are not applicable to the current or future operation of the ADF application.
4. **Uncertainty as to the ADF's application for substituting authorization 5** – The ADF is seeking to have the current authorization terms and conditions reinstated – ADF is not seeking to vary the current terms and conditions.
5. **Likely anti-competitive detriment 6.3** – National Foods are expressing significant concerns that the current authorization will allow for monopoly groups of suppliers to form throughout Australia. This cannot happen under the current authorization. The current authorization forbids all dairy farmers within given regions (defined in the authorization) to form into a single collective bargaining group. Therefore, the current authorization provides the circumstances that ensure the concerns of National Foods cannot be realized. Furthermore, the current collective bargaining groups that have formed have been relatively small in membership. The current groups reflect the real world of dairy farmers where there are some dairy farmers within a region who have similar community of interest and, therefore, have an interest in forming a collective bargaining group. However, many dairy farmers want to be in control of their own destiny and do not want to work with others through collective bargaining.
6. **Likely anti-competitive detriment 6.3 (5)** – National Foods appear to be implying in this clause that fresh milk for the drinking milk market must be produced in the local regions. This does not reflect the market realities. All dairy companies in Australia transport milk (both raw milk and processed milk) across several regions on a regular basis.

In the case of the three major companies producing the bulk of drinking milk consumed in Australia, they have a relatively small number of milk processing plants and certainly each company does not have a milk processing plant in each of the regions of Australia as defined in the ADF's authorization.

Processors have the opportunity now and will continue to have the opportunity in the future (irrespective of whether there are collective bargaining groups operating or not) to source their milk from several regions – there is no Australia dairy processor that, either now or in the future, could not source milk from alternative suppliers than those in a collective bargaining group.

It is important to reiterate that the current ADF authorization provides for a dairy company to choose whether it will negotiate with a collective bargaining group. Processors also have the right under the current authorization to not accept milk from one or more members of a collective bargaining group.

There are broad and significant protections in the current authorization that ensure the fears expressed by National Foods are not real and will not be realized.

7. **Likely anti-competitive detriment 6.2 and 6.3** – National Foods have made comments throughout their response to the ADF Application that there are "...anti-competitive detriments that would be likely to arise" and "...detriments arising from the lessening of competition that may arise out of the arrangements." There may be an argument for such statements to be made in the absence of prior history with collective bargaining under an ADF authorization. However, the ADF authorization has been operating since August, 2002 and there have not been any collective bargaining group outcomes documented that give cause for an accusation of anti-competitive conduct. In fact, if there was such evidence, the ADF would have thought any company would bring that evidence before the ACCC at the time it occurred and have it considered, rather than raise the issues as a hypothetical situation following the operations of the collective bargaining authorization over the past three years.
8. **Likely anti-competitive detriment 6.3 (19 – 20)** – National Foods have made accusations that ADF does not have a commitment to deregulation. Australian dairy farmers have been operating in a deregulated environment for the past 5 years. Collective bargaining is not a reregulation of the dairy industry as has been demonstrated since the ADF authorization was granted. The Trade Practices Act has provided for collective bargaining for any group of small businesses and the Dawson Review recommended strengthening the collective bargaining provisions of the TPA. It is a misrepresentation of the TPA collective bargaining provisions to suggest their use is the equivalent of regulation as that which applied to the dairy industry up until 1st July, 2000.

Furthermore, National Foods have stated that the substitute authorization should only be granted for a two year period. The authorization ADF was granted in 2002 has had time to be operative and has demonstrated that the concept of collective bargaining has not led to anti-competitive conduct by dairy farmers. However, the authorization has been used by some dairy farmers to develop relationships with a dairy company, in most cases with the same company they had previously been supplying, and in one case to develop a pro-competitive position by being able to supply a critical mass of milk to a new entrant to a particular region (although not a new entrant to the industry) that has led to benefits to both the farmer suppliers and the dairy company entering the new region. The ADF always argued that collective bargaining would not be anti-competitive and that one of the benefits of collective bargaining is that it could create pro-competitive circumstances.

The request for a further 5 years is, in part, based on an efficiency argument. There are considerable costs incurred by the ADF, ACCC and dairy companies to address issues associated with applications for reauthorization. To have to bear these costs in two years would seem unreasonably costly for all concerned.

It is also relevant here to acknowledge that the current authorization only became operative following the Australian Competition Tribunal decision on 16th August, 2002. Therefore, the current authorization was operative for less than 3 years before a new application process had to be developed. There has been no assertion, other than from National Foods, that the term of the current authorization has been an issue.

9. **Difficulties faced by National Foods 6.4** – Comments on this clause are incorporated into the comments on 6.5 where National Foods provide more comment on the difficulties they have faced.
10. **Necessary modifications and additions to conditions 6.5 (3) to (5)** – National Foods are seeking a clarification of 'shared community of interest' with regard to 'all year round supply' and have proposed a definition of an all year round supplier being a supplier who "... produces between 50% and 60% its total annual milk production between 1 July and 31 December of a financial year,..." The ADF has consistently argued in its original authorisation application and in all its public and private dealings on collective bargaining since deregulation that an "all year round" supplier is one who is prepared to produce milk throughout the year – the volume required by a company month by month throughout the year should be rightly the domain of the company and the supplier to decide under contract.

To define the term according to the National Foods definition would almost certainly not suit all dairy companies supply requirements. In fact, to define 'all year round' under the National Foods proposal would have meant that the National Foods suppliers in Western Australia who were under contract to supply milk all year round from July 2003, would have not fitted the proposed definition. This is clear from the comments in Appendix 1 part 1 of the National Foods submission where they acknowledge they cut contracted winter volumes by 40%. National Foods were still expecting their suppliers to supply milk all year round but their WA suppliers would not have conformed to the proposed clause of an all year round supplier because of the contract offer of a "...volume reduction of 40% in winter, and 15% in summer."

The ADF firmly believes the current definition for an 'all year round' supplier is well understood in the industry and negotiations have been entered into and contracts made on the basis of an agreement on volumes on a monthly (or other agreed period) basis.

National Foods also argue that: 'Differences of opinion also arise as to what constitutes a long-term supplier of a processor.' There are many dairy farmers who would like to enter into long term contracts for supply terms and conditions with a dairy company. However, it would appear there is considerable resistance from dairy companies to do so. The vast majority of contracts offered by dairy companies, including National Foods, are for one year terms. The ADF is confident that there are opportunities for both dairy companies and dairy farmers to achieve win:win circumstances for each other from entering into longer term relationships. However, if a dairy company is not prepared to enter into contracts of no longer than one year, it is inappropriate to expect a dairy farmer to not be entitled to participate in a collective bargaining group if they are not prepared to supply the company for two years with only a one year contract, as National Foods have proposed.

11. **Confidentiality concerns 6.5 (6) to (10)** – National Foods have expressed concerns regarding confidentiality of information within a collective bargaining group. The ADF and the ACCC have, through a number of seminars they have participated in either separately or collectively have clearly identified that there is a need to maintain confidentiality of information within collective bargaining groups. Each member of a collective bargaining group signs an application form to be a member of a group and in so doing acknowledge the requirements of the ADF authorization including confidentiality. The comments made are not supported by evidence and, therefore, it is not possible to comment further on the assertions made.

However, National Foods do suggest a new condition for a reinstatement of the ADF's authorization that would read; "A supplier may not participate in a collective bargaining group of more than one processor at any given time." The ADF is opposed to this proposed new condition. There are dairy farmers who have more than one dairy farm who may wish to participate in separate negotiation groups due to different regional locations of their farms or their farms supply different dairy companies. Such a clause as that proposed by National Foods would be an unreasonable barrier to a dairy farmer to participate in a collective bargaining group.

Another element of this proposed new condition is that if this clause was operating under the current authorization, National Foods suppliers in Western Australia would have been severely disadvantaged following negotiations between the company and its suppliers in 2003. As described in Appendix 1 of their submission, National Foods reduced their contracted volumes from their Western Australian suppliers by 40% in winter and 15% in summer. The suppliers in the collective bargaining group had significant quantities of milk for which they had to immediately find a buyer. National Foods encouraged their suppliers to negotiate with the Challenge Dairy company to supply the milk National Foods no longer required. If this clause had been operating at that time, the suppliers would not have been able to negotiate collectively with Challenge even though it was the actions of National Foods to cut contracted volumes that caused the need to find an immediate alternative buyer for their milk. Therefore, National Foods have recognized the need for their suppliers in a collective bargaining group to negotiate with another company at the same time as they are negotiating with National Foods.

12. **Communications between collective bargaining groups and processors 6.5 (11) to (13)** – National Foods have proposed a lengthy new condition to force collective bargaining group negotiation committees to communicate with their members in a manner that conforms to the communications a dairy company wishes to communicate to those members. The ADF also rejects this new condition. Dairy companies do continue to have direct communication with all their suppliers whether they are part of a collective bargaining group or not. There are no barriers to a dairy company making direct representation to their suppliers who are members of a collective bargaining group. How a negotiation committee communicates with the members of its collective bargaining group should be an issue between the members of the group and the negotiation committee they elect to negotiate on their behalf. It would not be appropriate for a collective bargaining group negotiation committee to demand to have the right to approve (or not approve) a company's communications to its suppliers. Neither is it appropriate for a dairy company to demand the right to approve the form and style of communications between a negotiation committee and the members of the collective bargaining group.

The ADF looks forward to further discussions with the ACCC on the matters raised above and any further matters pertinent to the application to have the current authorization continued.