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10 June 2008

Our Ref: KXE:DA1695/22
Your Ref: C2008/850

Dr R Chadwick
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By facsimile: 6243 1199

Dear Dr Chadwick

Authorisation Application lodged by Dairy Farmers Milk Co-operative Limited (DFMC) and Australian Cooperative Foods Limited (ACF)

We refer to your letter dated 5 June 2008 in which you sought our comments addressing the reasons why interim authorisation is necessary at this time.

Conduct for which interim authorisation is sought

As noted in the submission accompanying the application for authorisation, DFMC and ACF seek authorisation for

- amendment of the Milk Supply Agreement between them dated 1 July 2004 (**MSA**) prior to completion of any sale of ACF to provide for continuation of the back to back pricing and back to back milk purchasing policies provisions, contained in clauses 4.4 and 5.6 of the MSA; and
- if required, implementation of the back to back pricing and back to back milk purchasing policies by DFMC in its dealings with farmers for the supply of milk to ACF.

Authorisation is sought for such conduct in respect of the following contracts and arrangements between DFMC and its farmer members, namely:

- (a) **existing supply contracts**, which are those currently in existence, and those entered into between the date of this application and completion of the sale of ACF (including arrangements with farmer members for the acquisition of milk for on sale to ACF which exist without the parties having entered into a written contract) (**existing supply contracts**) – for which conduct authorisation is sought until the contracts and arrangements expire; and
- (b) **future supply contracts**, which are those supply contracts to be entered into after completion of the sale of ACF, including any renewals of any existing supply contracts (and any arrangements with farmer members for the acquisition of milk for on sale to ACF which occur without the parties entering into a written contract) (**future supply contracts**) – for which conduct authorisation is sought for five years.

DFMC and ACF seek interim authorisation for the conduct described above (**Conduct**) to continue until the Commission makes a final determination in the matter.

Reasons why interim authorisation is necessary and should be granted by the ACCC

The application brought by DFMC and ACF seeks authorisation of the Conduct in circumstances where there is a proposed sale of ACF. That sale process is occurring now and is expected to be ongoing for some months. It is that sale, which will result in the loss of related party status between DFMC and ACF, which gives rise to the need to authorise the Conduct. It is the context of the sale of ACF, which may or may not be complete by the time the Commission issues its final determination, which makes interim authorisation necessary at this time.

DFMC and ACF submit that the following factors, which have been recognised by the Australian Competition Tribunal as relevant to a decision to grant interim authorisation, support the application for the grant of interim authorisation in this case:

1 *The grant of interim authorisation would preserve the status quo, pending final determination*

The arrangements between DFMC and ACF which give rise to the Conduct have been in place since 1 July 2004, without any detrimental effect upon the relevant markets or the dairy industry.

It is possible that the sale of ACF will be completed before the Commission makes its final determination. The status quo has been in place since July 2004. It would be administratively difficult if not impossible for ACF and DFMC to implement different arrangements to cover the period between the date the sale of ACF is completed and the date the Commission makes its final determination given that the arrangements involve many hundreds of farmers across four states, who are often located in remote regional areas.

Preservation of the status quo is important in the circumstances of the sale of ACF. This is because each of DFMC, its farmer members (who are the suppliers of raw milk to DFMC for resale to ACF), ACF, its members (who are largely also members of DFMC) and each of the bidders for ACF require certainty now of on going milk supply, post completion of the sale of ACF.

The reasons for requiring such certainty now differ slightly between parties but are important to all. For DFMC and its farmer members, the terms upon which they are able to supply milk to ACF in the future may affect decisions they must take now regarding, for example, production, herd size etc. For ACF and its members, there is also a need for clarity.

2 *The conduct which is the subject of the authorisation application does not give rise to any anti-competitive detriment*

For the reasons set out in the submission, DFMC and ACF submit that the Conduct has not given rise in the past to any anti-competitive detriment and authorisation of it on an interim basis now would not alter that position. Those reasons include:

- historical prices indicate that the Conduct has had a competitive effect;
- world market prices will continue to constrain the prices received by dairy farmers and paid by processors;

- regional factors will continue to ensure that the Conduct does not give rise to industry wide pricing;
- the MSA will continue to oblige ACF to pay a commercial price for milk;
- the Conduct affects only a relatively small number of farmers;
- membership of DFMC will remain voluntary;
- farmers will continue to compete amongst themselves including on quality and volume;
- subject to the terms of their individual agreements with DFMC, farmers will remain free to supply other processors; and
- supermarkets will continue to exert considerable countervailing power.

3 *There will be no harm to other parties*

The matters set out in paragraph 2 above demonstrate that authorisation of the Conduct on an interim basis (or at all) will not harm other parties.

4 *There are public benefits arising from the Conduct*

For the reasons set out in the submission, DFMC and ACF submit that the Conduct gives rise to public benefits and that authorisation of the conduct on an interim basis will ensure that those public benefits are not lost. Those benefits arise principally from the certainty for ongoing milk supply which is discussed in paragraph 1 above. They include:

- the ongoing ability for farmers to plan for matters affecting future production and growth;
- continuation of a reduction in transaction costs for farmers; and
- stability of milk supply which will in turn allow ACF to plan for matters affecting its processing business and its competitive tendering for business.

5 *The period of interim authorisation will not detrimentally impact on the relevant markets and is important in the context of the sale of ACF*

DFMC and ACF seek to obtain the Commission's final determination as soon as possible to achieve the necessary certainty for themselves, their members and bidders for ACF. In that context, the period of interim authorisation is likely to be relatively short.

DFMC and ACF would be happy to elaborate on any of the matters raised in this letter should the Commission wish.

Yours faithfully


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