

Ms Sue Philp and Mr John Rouw  
Adjudication Branch  
ACCC

9 July 2009  
Matter 81321152  
By email

[sue.philp@accg.gov.au](mailto:sue.philp@accg.gov.au)  
[john.rouw@accg.gov.au](mailto:john.rouw@accg.gov.au)

Dear Sue and John

## **TWU SA application for authorisation - A91146**

We act for National Foods. Thank you for the opportunity to comment on this authorisation application.

As you know, National Foods has had a very short time to consider this matter. The comments below are therefore preliminary in nature and National Foods reserves its right to put substantive additional material to the ACCC following the draft determination.

### **1 National Foods' initial reactions**

National Foods is concerned that the conduct for which authorisation is sought is in some respects not well defined and may extend into areas where there are no public benefit justifications (but there is the potential for significant industry disruption and detriment). National Foods' comments and concerns in this regard are set out below.

- 1 The authorisation appears to allow for a single collective bargaining unit covering all milk distributors in SA. This is not appropriate or justifiable. Presently, National Foods and the former Dairy Farmers drinking milk business (DF) have substantially different milk distribution arrangements reflecting the competitive dynamics of the industry (DF utilises a franchise system for distributors and National Foods does not). In this regard National Foods submits any collective negotiations must occur separately with each of National Foods and DF. Also, it should be made clear that the basic form of contracting in the industry will not be changed by the authorisation (ie individual contracts will continue to exist between processors and distributors, even if the terms are collectively negotiated in some respects).
- 2 To ensure a *de facto* single collective bargaining unit covering all milk distributors in SA does not arise, and to retain some prospect of competitive tension between distributor groups, the following conditions must also be imposed:
  - separate bargaining groups must have separate representation in negotiations; and
  - members of a bargaining group and its representative/s must not disclose information obtained during negotiations to persons outside of the bargaining group.
- 3 Participation in the collective bargaining process by all parties should be completely voluntary and authorisation should only be granted in relation to the

Doc 2341221.1

101 Collins Street Melbourne VIC 3000 Australia  
GPO Box 128A Melbourne VIC 3001 Australia

Sydney Melbourne Perth Brisbane Singapore

Telephone +61 3 9288 1234 Facsimile +61 3 9288 1567  
[www.freehills.com](http://www.freehills.com) DX 240 Melbourne

Correspondent offices in Hanoi Ho Chi Minh City Jakarta

collective negotiation of new distributor contracts. (We note that authorisation is not sought for collective boycotts and nor would this be justifiable). In particular:

- authorisation should not be granted for any collective negotiations on behalf of distributor/s who are not offered a new contract by National Foods (this the corollary of the voluntary participation of National Foods); and
- authorisation should not be granted for the TWU to collectively seek to renegotiate existing contracts during their term or to collectively represent distributors in disputes with National Foods. Such commercially disruptive conduct would appear to have no public benefit justification and would, in practice, be virtually indistinguishable from a collective boycott.

4 The authorisation should be limited to a period of 5 years. This is a substantial period of time for such conduct and will allow all parties to reconsider the matter in light of future industry developments.

5 As is usual practice for the ACCC, the specific conduct authorised should be set out clearly in the determination. The description of the conduct set out at paragraph (f) on page 7-8 of the authorisation application would appear to be broadly appropriate in this regard, subject to the following minor adjustments (shown in mark-up) and all of the conditions set out above:

- *The Union will write to vendors (both members and non-members of the Union) to notify them of the authorisation and to advise the vendors that they may nominate the Union to negotiate contract terms and conditions on their behalf when their existing contracts expire. The Union must inform vendors of the terms and any conditions of the ACCC authorisation.*
- *Vendors may then nominate the Union to negotiate on their behalf.*
- *The Union will then notify the relevant processor (National Foods or the future purchaser of Dairy Farmers' drinking milk business in SA) that it has been authorised to negotiate on behalf of relevant identified vendors. The Union must also notify the relevant processor of the Union representative/s who will facilitate the negotiations.*
- *The Union will then engage in negotiations on behalf of those vendors with the relevant processor.*
- *The Union will then report back to the relevant vendors.*
- *There may be further negotiations with the relevant processor.*
- *Vendors will then make individual decisions as to whether or nor to contract with the relevant processor.*

## 2 Other comments on the application

In relation to the introductory sections of the application (sections 1-5) National Foods makes the following comments:

1 National Foods does not agree with a many of the assertions made about the structure and history of the industry. National Foods will provide further information, if this is required, after reviewing the ACCC draft determination. The ACCC has previously gathered significant background information about the dairy industry and this matter should be considered in the context of a far more objective review.

- 2 It is not correct to characterise the deregulation of the dairy industry as resulting in significantly increased profitability for processors. In fact, all dairy businesses have faced transition costs and challenges, as the industry moved from an inefficient regulated model to a internationally competitive deregulated sector.
- 3 National Foods rejects the assertion that it has 'overwhelming bargaining power' against its farmer suppliers and distributors. The long term viability of these businesses are essential to National Foods' existence and both groups have previously obtained authorisations that have allowed collective bargaining to occur. In reality, National Foods generally has a very constructive relationship with both these groups of suppliers. National Foods always seeks to resolve any disputes that may arise with distributors in a consultative and amicable way.
- 4 National Foods is itself heavily constrained by a highly competitive dairy retail sector, characterised by a number of very large customers with significant countervailing power (including the supermarket chains). Moves by certain customers to 'direct billing' or alternative distribution arrangements are often driven by those customers seeking to drive efficiencies in their own operations.
- 5 It is not correct to suggest that distributor contracts may have historically raised concerns under the *Trade Practices Act (TPA)* due to exclusivity. Exclusive distribution arrangements are extremely common, and in the dairy industry this is an efficient business model that has no adverse impact upon competition.
- 6 National Foods does not accept the assertion that its distributor contracts are weighted strongly in favour of the processor. The National Foods' distributor contracts have been developed with significant distributor input and have proven to be both effective and efficient. If necessary, National Foods would be pleased to discuss this further with the ACCC.
- 7 As the ACCC is aware, the milk industry structure in SA will not be materially altered as a result of the National Foods / Dairy Farmers transaction. Parmalat will shortly independently own and operate the DF business, which has also been subject to comprehensive independent management arrangements pursuant to enforceable undertakings under the TPA in the intervening period.

In relation to the assessment of public benefits and detriments (sections 6-8 of the application) National Foods makes the following preliminary remarks:

- 1 National Foods submits there are very small public benefits associated with the application. These small benefits are linked to distributor input into the terms and conditions of new contracts and small transaction cost savings that may arise.
- 2 National Foods does not believe there is any evidence of additional public benefits associated with collective bargaining arising from:
  - improved statutory compliance / distributor health and safety (which are both already covered by appropriate legislation and National Foods policies and no evidence of non-compliance has been identified); or
  - efficiency of distributor operations / viability of distributors (some parts of the application appears to suggest that collective bargaining might be used support inefficient distributors, and this clearly should not be recognised as a public benefit).
- 3 The potential detriment that may arise from the proposed conduct (which includes price fixing) is not adequately addressed in the application. A single collective bargaining unit covering all milk distributors in SA could result in a

significant shift in the industry by forcing the different distribution models of National Foods and DF into alignment and potentially creating higher and more uniform distribution prices. For this reason, negotiation must take place with one processor and participation must be voluntary to ensure parties can retain flexibility. Furthermore, elements that are likely to be highly commercially disruptive (and may potentially result in boycotts), such as collective agitation of disputes or collective attempts to renegotiate established contracts should not be permitted.

- 4 If the conduct to be authorised is appropriately delineated in the manner set out in section 1 of this letter, the public detriment from the conduct is likely to be minimised. This is of course consistent with the ACCC final determination following a comprehensive public consultation in relation to the 2005 Milk Vendors' Association (SA) application (authorisation A90927).

National Foods would be pleased to discuss this matter further with the ACCC or provide any additional information that may be required.

Yours sincerely



**Peter McDonald**  
Partner  
Freehills

+61 3 9288 1597  
+61 422 815 933  
peter.mcdonald@freehills.com