

Our reference
ECS/PREM10723-9070629

Waterfront Place
1 Eagle Street Brisbane QLD 4000
GPO Box 9925 QLD 4001
Tel (07) 3228 9333
Fax (07) 3228 9444
www.corrs.com.au

**CORRS
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lawyers

Sydney
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Brisbane
Perth

21 June 2010

By express post

Dr Richard Chadwick
General Manager, Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Contact
Eddie Scuderi (07) 3228 9319
Email: eddie.scuderi@corrs.com.au

Dear Sir

Premium Milk Ltd

We act for Premium Milk Ltd (**Premium**), which wishes to apply for revocation and substitution of authorisation A90972.

We **attach**:

- a completed form FC
- a supporting submission (together with confidential attachments)
- a cheque for \$2,500, the prescribed application fee.

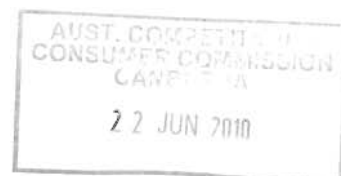
In accordance with section 89(5) of the *Trade Practices Act*, Premium requests that the confidential attachments to the supporting submission be excluded from the Commission's public registers and otherwise be kept confidential by the Commission.

Premium does not otherwise claim any confidentiality in this letter, its application for revocation and substitution of authorisation A90972, or the supporting submission.

Yours faithfully
Corrs Chambers Westgarth

P.P. J. Stark
Eddie Scuderi
Partner

attachments



Form FC

Commonwealth of Australia

Trade Practices Act 1974 — subsection 91 C (1)

**APPLICATION FOR REVOCATION OF A NON-MERGER
AUTHORISATION AND SUBSTITUTION OF A NEW
AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 91 C (1) of the *Trade Practices Act 1974* for the revocation of an authorisation and the substitution of a new authorisation for the one revoked.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of applicant:
(Refer to direction 2)

A91236

Premium Milk Ltd

- (b) Description of business carried on by applicant:
(Refer to direction 3)

Negotiation of milk prices

- (c) Address in Australia for service of documents on the applicant:

c/- Corrs Chambers Westgarth
Attn: Eddie Scuderi
GPO Box 9925
BRISBANE QLD 4001

2. Revocation of authorisation

- (a) Description of the authorisation, for which revocation is sought, including but not limited to the registration number assigned to that authorisation:

Collective negotiation of farm-gate milk prices and milk quality standards with Parmalat Australia Limited (A90972)

- (b) Provide details of the basis upon which revocation is sought:

See attached submission.

3. Substitution of authorisation

- (a) Provide a description of the contract, arrangement, understanding or conduct whether proposed or actual, for which substitution of authorisation is sought:

(Refer to direction 4)

See attached submission.

- (b) Description of the goods or services to which the contract, arrangement, understanding or conduct (whether proposed or actual) relate:

Milk.

- (c) The term for which substitute authorisation of the contract, arrangement or understanding (whether proposed or actual), or conduct, is being sought and grounds supporting this period of authorisation:

See attached submission.

4. Parties to the contract, arrangement or understanding (whether proposed or actual), or relevant conduct, for which substitution of authorisation is sought

- (a) Names, addresses and description of business carried on by those other parties to the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct:

Not applicable.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

(Refer to direction 5)

Not applicable.

- (c) Where those parties on whose behalf the application is made are not known - description of the class of business carried on by those possible parties to the contract or proposed contract, arrangement or understanding:

Not applicable.

5. Public benefit claims

- (a) Arguments in support of application for substitution of authorisation:

See attached submission.

(See Direction 6 of this Form)

- (b) Facts and evidence relied upon in support of these claims:

See attached submission.

6. Market definition

Provide a description of the market(s) in which the goods or services described at 3 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

See attached submission.

(See Direction 7 of this Form)

7. Public detriments

- (a) Detriments to the public resulting or likely to result from the substitute authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 3 (b) above and the prices of goods or services in other affected markets:

See attached submission.

(See Direction 8 of this Form)

- (b) Facts and evidence relevant to these detriments:

See attached submission.

8. Contracts, arrangements or understandings in similar terms

This application for substitute authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings (whether proposed or actual) that are, or will be, in similar terms to the abovementioned contract, arrangement or understanding

- (a) Is this application to be so expressed?

No.

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which substitute authorisation has been sought and those contracts, arrangements or understandings that are stated to be in similar terms:

Not applicable.

(See Direction 9 of this Form)

- (ii) Where the parties to the similar term contract, arrangement or understanding(s) are known - names, addresses and description of business carried on by those other parties:

Not applicable.

(See Direction 5 of this Form)

- (iii) Where the parties to the similar term contract, arrangement or understanding(s) are not known — description of the class of business carried on by those possible parties:

Not applicable.

9. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974)?

No.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable.

- (c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

10. Further information

- (a) Name, postal address and telephone contact details of the person authorised by the parties seeking revocation of authorisation and substitution of a replacement authorisation to provide additional information in relation to this application:

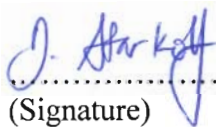
Mr Eddie Scuderi
Partner
Corrs Chambers Westgarth

GPO Box 9925
BRISBANE QLD 4001

Phone: (07) 3228 9319
Fax: (07) 3228 9444
Email: eddie.scuderi@corrs.com.au

Dated 21 June 2010

Signed on behalf of the applicant


.....
(Signature)

DAVID STARKOFF
.....
(Full Name)

CORRS CHAMBERS WESTGARTH
.....
(Organisation)

SENIOR ASSOCIATE
.....
(Position in Organisation)

DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1 (b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding, or the relevant conduct, in respect of which substitute authorisation is sought.
4. In completing this form, provide details of the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, in respect of which substitute authorisation is sought.
 - (a) to the extent that the contract, arrangement or understanding, or the relevant conduct, has been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that the contract, arrangement or understanding, or the relevant conduct, has not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing; and
 - (c) If substitute authorisation is sought for a contract, arrangement or understanding (whether proposed or actual) which may contain an exclusionary provision provide details of that provision.
5. Where substitute authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
6. Provide details of those public benefits claimed to result or to be likely to result from the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, including quantification of those benefits where possible.
7. Provide details of the market(s) likely to be affected by the contract, arrangement or understanding (whether proposed or actual), in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for substitute authorisation.
8. Provide details of the detriments to the public, including those resulting from the lessening of competition, which may result from the contract, arrangement or understanding (whether proposed or actual). Provide quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

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Premium Milk Ltd

Submission in support of revocation and substitution of authorisation

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Submission in support of in support of revocation and substitution of authorisation

1 Executive summary

- 1.1 This submission is made to the Australian Competition and Consumer Commission (ACCC) by Premium Milk Ltd (Premium).
- 1.2 Premium applies for revocation of Authorisation A90972 and its substitution by a new authorisation.
- 1.3 The application for authorisation concerns conduct that may, but for an authorisation, be regarded as conduct:
 - (a) fixing, controlling or maintaining the price for goods and the terms of supply of goods by members of Premium within the meaning of the offence and civil penalty provisions relating to cartel conduct in the *Trade Practices Act 1974* (Cth) (TPA);
 - (b) otherwise in contravention of sections 45(2)(a)(ii) and 45(2)(b)(ii) of the TPA.

2 Background

- 2.1 On 25 August 2000 Premium Milk Supply Pty Ltd¹ successfully applied for an Authorisation (A90745) to allow collective bargaining of farm-gate prices and milk standards in negotiations with Pauls Ltd.²
- 2.2 At the time of the Application for Authorisation A90745, Premium represented up to 580 Queensland dairy farmers selling milk to Pauls.
- 2.3 The conduct authorised in Authorisation A90745 involved negotiations in a Milk Management Committee consisting of three Premium representatives and three representatives from Pauls. The matters to be decided through that process included supply volumes, delivery requirements, quality standards and prices that would apply for six monthly periods or longer, if required.
- 2.4 In granting Authorisation A90745 the ACCC noted that:
 - Pauls was not bound by any exclusivity agreement with Premium and could purchase milk outside the collective arrangements;

¹ Subsequently, Premium Milk Supply Pty Ltd changed its name to Premium Milk Ltd.

² Pauls Ltd changed its name to Parmalat Australia Ltd in December 2003.

- dairy farmer members of Premium were able to opt out of the collective arrangements and negotiate their own supply arrangements with Pauls or any other processor;
 - 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 would be passed onto consumers; and
 - there would be a number of public benefits from the arrangements, including efficiency gains from transaction cost savings.
- 2.5 In 2005 Premium applied for revocation of Authorisation A90745 and its substitution by a new authorisation. That new authorisation was subsequently granted by the ACCC in November 2005 – Authorisation A90972.
- 2.6 In granting Authorisation A90972, the ACCC noted:
- the arrangements were voluntary for all parties;
 - the arrangements did not include any boycott activity;
 - the arrangements could be accessed by future parties;
 - 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 be high and are unlikely to be significantly affected by the arrangements;
 - the nature of the downstream markets would be likely to limit the extent to which any price increases were passed onto consumers.³
- 2.7 In February 2008 Premium lodged an Application for a minor variation to Authorisation A90972 to enable a small number of northern New South Wales producers to become voluntary members of Premium. On 13 March 2008 the ACCC advised that the variation was not, in its view, a minor variation. As a consequence, Premium did not accept milk producers from northern New South Wales as members and did not represent those northern New Wales producers in any negotiations with Parmalat.
- 2.8 Premium now proposes to amend its Constitution so as to expressly allow Premium to represent milk producers operating in Queensland and in northern New South Wales. There are currently 12 potential members in northern New South Wales.

³ Page 10 of Determination for Authorisation A90972.

3 Conduct for which authorisation is sought

Overview

- 3.1 Premium applies under section 91C of the TPA for revocation of Authorisation A90972 and its substitution by a new authorisation for the conduct described below.

Conduct

- 3.2 The conduct for which authorisation is sought is as follows:
- (a) To make and give effect to an agreement between Premium and its members as contained in Premium's Constitution, subject to the amendments detailed in **Confidential Attachment 1**, pursuant to which its current and future members can engage in collective bargaining of milk supply arrangements (through Premium) with Parmalat Australia Ltd (**Parmalat**).
 - (b) To give effect to the Milk Supply Agreement between Premium and Parmalat entered into on 30 January 2002 (pursuant to an earlier authorisation from the ACCC) for the balance of its term, which is due to expire on 30 January 2012 (**Existing Agreement**).
 - (c) To make and give effect to a new Milk Supply Agreement between Premium and Parmalat which will replace the Existing Agreement (**New Agreement**).

Duration

- 3.3 Authorisation is sought for **five years from 1 December 2010**.

Milk Supply Agreement

- 3.4 The Existing Agreement between Premium and Parmalat establishes a Milk Management Committee in relation to:
- milk quality and compositional standards required by Parmalat;
 - prices to be paid for the various standards of milk required; and
 - volumes of milk required by Parmalat Limited.
- 3.5 **Confidential Attachment 2** comprises the Existing Agreement.
- 3.6 The Existing Agreement will expire on 30 January 2012 unless extended by agreement. Both Parmalat and Premium have indicated their strong support for the continuation of the Existing Agreement subject to changes necessary to reflect changing payment system arrangements to take effect from 2013. **Confidential Attachment 3** comprises a list of the key principles that Parmalat proposes to be reflected in a new agreement intended to operate from 2013.
- 3.7 The Commission is also asked to note that the Existing Milk Supply Agreement does not, and the proposed new Agreement will not:

- oblige Premium to purchase milk from its members for on-supply and only envisages Premium negotiating with Parmalat on behalf of Premium's members for supply volumes, delivery requirements, quality standards and prices that will apply for milk to be supplied by members wishing to supply Parmalat;
 - bind Parmalat to exclusively negotiate with Premium or to purchase all of its requirements from Premium's members; and
 - oblige Premium's members to supply Parmalat on an exclusive basis.
- 3.8 The Commission also asked to note that principal benefits for Parmalat under the current and proposed arrangements are the ability to obtain enhanced security of supply and the ability to better match supply to demand.

Constitution

- 3.9 **Confidential Attachment 1** comprises Premium's existing constitution and a list of proposed amendments which are to be considered for adoption at Premium's AGM due to be held in November 2010. The Commission is asked to note that some of the proposed amendments will rescind earlier resolutions that were the subject of the unsuccessful application to the Commission for a minor variation of Authorisation A90972.

4 The relevant market

- 4.1 Premium is aware that the Commission has an established understanding of the relevant markets as a result of its work in relation to various authorisation applications and applications for merger clearances in relation to parties operating in the dairy industry in Australia. Consequently, Premium's submission proceeds on that basis and concentrates on matters of particular relevance from Premium's perspective.
- 4.2 The primary market for consideration in relation to this application is the market in Queensland and northern New South Wales for the acquisition of raw milk at the farmgate.
- 4.3 A related market for consideration is the downstream national market for the sale of drinking milk and dairy products. However, for the reasons expressed in this submission, the impact of the proposed conduct in the downstream market is considered immaterial.
- 4.4 Since the original authorisation granted to Premium in 2001 (A90745), considerable adjustment has occurred in the milk production and processing markets in Queensland and Northern New South Wales as a result of the effects of deregulation, increasing competition and rationalisation.
- 4.5 In the milk processing sector, the market in Queensland and northern New South Wales is now divided into two components: the large national processors, Parmalat and National Foods; and small specialist manufacturers such as Norco Co-op Dairy Association. In the Queensland and northern New South Wales region:

- Parmalat has processing plants in Brisbane and Nambour;
 - National Foods has a plant at Crestmead; and
 - Norco has plants at Lismore and Southport.
- 4.6 In the milk production sector, the effects of deregulation and climatic impacts have combined over the last decade to significantly reduce the number of producers operating in the Queensland and northern New South Wales region.
- 4.7 The steady decline in the number of producers operating in the Queensland and northern New South Wales region is evidenced by the following statistics:
- at the time of Premium's original application for authorisation in August 2000, there were approximately 580 milk producers supplying Pauls (now Parmalat);
 - by the time of its application for revocation and substitution of a new authorisation in May 2005, there were approximately 390 producers supplying milk to Parmalat; and
 - as at May 2010, there are 272 milk producers supplying milk to Parmalat—260 in south-east Queensland and 12 located in northern New South Wales.
- 4.8 According to a report commissioned by Dairy Australia⁴ some of the relevant factors in the dairy production and processing markets in the northern region (Queensland and northern New South Wales) were as follows:
- *"Milk production in the northern region (Qld and Nth NSW) steadily declined for about eight years. Unreliable seasonable conditions and poor farm gate prices were the major catalysts for this decline, as market conditions and signals have exposed producers to volatility in returns, gradually weakening confidence in returns from the regional supply chain."*⁵
 - *"There has been an increase in milk prices for longer term contracts and improvements in regional seasonal conditions since the fourth quarter of the 2008 calendar year which, coupled with a slowing in milk sales and processing plant demand, has created a surplus in regional milk supply for most months of the year."*⁶
 - *"The surplus has increased through 2009 and early 2010."*⁷
 - *"The uncertainty created for both processors and producers by potential changes in retailer private label supply arrangements adds a*

⁴ Northern Dairy Industry Outlook – update: June 2010.

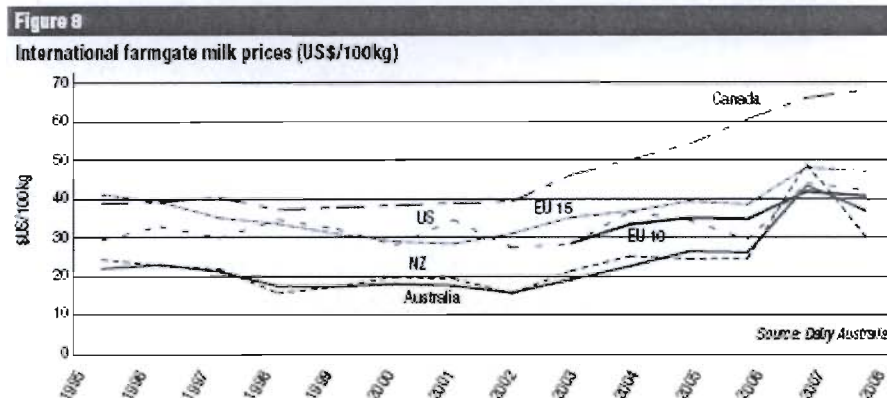
⁵ Note 4, page 9.

⁶ Ibid.

⁷ Ibid.

*further dimension of instability to this outlook, which may alter market access and pricing mechanisms.*⁸

- 4.9 Farmgate prices are largely determined by world dairy commodity prices.⁹ This point is confirmed by the graph below which shows the degree of correlation between domestic raw milk prices and international raw milk prices.¹⁰



- 4.10 In the manufactured milk sales market, the large supermarket chains effectively dictate the price paid to processors. Dairy Australia estimates that approximately 60% of manufactured product (in milk equivalent terms) is exported and the remaining 40% is sold domestically. However, 97% of drinking milk is consumed in the domestic market.¹¹ The supermarket channel's share of Australian drinking milk sales was approximately 50% in 2008/09.¹² The major supermarket chains also enjoy the majority share of domestic sales of cheese and butter.
- 4.11 The combination of the impact of international farmgate milk prices on the price paid to producers in Australia, and the countervailing power of the supermarket chains on the prices paid to processors, means that individual producers have little ability to negotiate sustainable price increases or other favourable supply terms with processors.

5 Counter-factual

- 5.1 As you are aware, the Commission applies the "future with-and-without test" established by the Australian Competition Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.

⁸ Ibid.

⁹ Dairy Australia – "Australian Dairy Industry In Focus 2009" Report - page 10.

¹⁰ Dairy Australia – "Australian Dairy Industry In Focus 2009" Report – page 10.

¹¹ Dairy Australia – "Australian Dairy Industry In Focus 2009" Report – page 21.

¹² Dairy Australia – "Australian Dairy Industry In Focus 2009" Report - page 26.

- 5.2 Premium submits that given the risk that the proposed conduct would contravene the TPA, absent the immunity afforded by authorisation, Premium will not make or give effect to the proposed arrangements.
- 5.3 Premium submits that the counter-factual is therefore that Premium will not make or give effect to the Constitution or the Milk Supply Agreement. In those circumstances, Premium submits that if the authorisation is not granted, Premium's member dairy farmers will be required to negotiate contracts with Parmalat on an individual basis.
- 5.4 In its previous authorisations for Premium, the Commission has identified a potential counter-factual as being the ability of Premium members to form a collective bargaining group under the protection of the authorisation granted by the Commission to Australian Dairy Farmers Ltd (A90966).
- 5.5 Premium submits that this is not a genuine counter-factual because:
- despite the existence of the authorisations granted to Australian Dairy Farmers Ltd and its predecessor (see Authorisation A90782), no collective bargaining groups have formed in Queensland or northern New South Wales under the protection of the authorisation granted to Australian Dairy Farmers Ltd and its processor; and
 - the current authorisation for Australian Dairy Farmers Ltd is due to expire on 30 June 2011.

6 Public benefit

- 6.1 The public benefits accepted by the Commission in relation to the previous applications by Premium remain relevant in relation to the proposed arrangements for which authorisation is now sought.

Transaction cost savings

- 6.2 A collective bargaining arrangement for Premium's members will lead to significant transaction cost savings. In the absence of the authorisation, individual farmers will need to engage their own lawyers and accountants to determine the appropriateness of contracts being offered by Parmalat.
- 6.3 Similarly, Parmalat will achieve significant cost savings by negotiating through Premium rather than by having to negotiate with over 200 individual producers.
- 6.4 Whilst the Commission did not consider the magnitude of any transaction cost savings likely to be significant when it considered this issue in relation to Authorisation A90972, it accepted that there would be a public benefit in achieving the transaction cost savings. In any case, Premium submits that the transaction cost savings are of particular relevance and significance for its members who are small family businesses operating on tight and seasonal margins.

- 6.5 In this regard the Commission is asked to note that in its 2010 Regional Industry Outlook report for Queensland and northern New South Wales, Dairy Australia noted:¹³

"Market and margin volatility has undermined confidence for many dairy producers, particularly younger farmers with low equity. Caught by the sudden downturn in milk price, they are financially stretched and uncertain of their ability to withstand future volatility in their returns."

- 6.6 Against this background, Premium submits that any transaction cost savings will be particularly relevant. It is also submitted that the proposed conduct will enhance the ability of Premium's members to overcome some of the volatility identified by Dairy Australia's report by providing greater input into the contract terms applicable to them and security of supply rights. This in turn will help address some of the confidence factors and may assist in arresting the decline in producer numbers.

Increased input into contract

- 6.7 In granting Authorisation A90972, the Commission accepted that there was "an imbalance in bargaining power between dairy farmers and Parmalat which would limit the capacity for dairy farmers to have effective input into contract terms and conditions."¹⁴
- 6.8 The Commission also accepted that the collective bargaining arrangements were "likely to improve the bargaining position of dairy farmers and would be likely to provide a greater opportunity for them to have more effective input into contract terms and conditions and to the extent that this leads to efficiency gains, this outcome would give rise to some public benefits".¹⁵
- 6.9 Premium submits that the arrangements which have previously been authorised and for which authorisation is sought to be extended have led to its members, through Premium, having a direct input into contract terms. This is largely due to the support received from Parmalat through regular negotiation over the terms of supply in the forum of the Milk Management Committee, formed under the Milk Supply Agreement.
- 6.10 Premium canvasses the views of its members on a regular basis and feeds that into the negotiation process through Premium's members on the Milk Management Committee. Premium usually holds two Board meetings in country centres each year as well as other meetings with its members as required. This provides forums for members to participate in open discussion. Board members also contact their zone members about key issues.

¹³ Page 3 of the Report.

¹⁴ Paragraph 9.25.

¹⁵ Paragraph 9.26.

- 6.11 Premium's representatives on the Milk Management Committee are dairy farmers themselves, which of course means they are more attuned to the needs of dairy farmers when negotiating supply terms with Parmalat.
- 6.12 Premium also refers to the comments in paragraph 6.5. The benefit of direct input into contract terms is a genuine and relevant benefit for producers that might otherwise be forced to negotiate directly and have less security over the sales future for their production output.

Investment in new technology

- 6.13 In respect of Authorisation A90972, the Commission concluded that whilst allowing collective bargaining generally leads to an increase in investment and subsequent improvement in efficiencies and reduction in costs and that such outcomes would be likely to constitute a public benefit, Premium had not demonstrated that such a public benefit had actually arisen.¹⁶
- 6.14 The Milk Management Committee takes a number of factors into account when settling milk prices. Those factors include:
- the next best option pricing;
 - butter fat and protein percentage;
 - total bacteria plate counter;
 - somatic cell count;
 - iodine count;
 - freezing point;
 - security of supply; and
 - freshness of supply.
- 6.15 Each of the factors referred to above is given an experienced based rating to specify the different levels at which pricing will be applied.
- 6.16 The majority of the factors affecting price (for example, butter fat and protein percentage and total bacteria plate count) are directly impacted by farming efficiency. Farmers that invest in technology and best practice will receive higher prices for their milk.
- 6.17 Consequently, the certainty created by a collectively negotiated set of standards for milk quality and associated pricing will act as genuine incentives for investment in new technology and best practice farming techniques. During the recent severe drought conditions between 2004 and 2007, investment by producers in technology was limited. However, with improving prices and better seasonal output from early 2008, on farm investment has significantly increased.

¹⁶ Paragraphs 9.31 and 9.32.

- 6.18 It is also submitted that for there to be an incentive to invest in new technology at the producer level, there must exist a degree of justified confidence in the future demand for your product and the return to be obtained from achieving greater levels of quality through investment. The collective bargaining arrangements between Premium and Parmalat create the atmosphere in which this level of confidence and certainty can be achieved.
- 6.19 As noted by Dairy Australia, there remains uncertainty at both the producer and processor level, both of which it is submitted are significant disincentives to investment in new technology that can only be countered by creating greater certainty of the kind afforded through collective and informed negotiation.

7 Public detriment

- 7.1 Premium submits that there are no material detriments likely to arise from the proposed conduct.
- 7.2 Premium submits that the lack of public detriment is evidenced by the following factors:
- (a) The collective bargaining arrangements currently authorised have not led to any increased price to consumers. The price for raw milk is in large part set by reference to the global price for milk and the wholesale price is largely influenced by the substantial countervailing market power of the supermarket chains which take the majority of the domestic supply of milk products.
 - (b) The collective bargaining arrangements have not led to any reduction in consumer choice. Since the collective bargaining arrangements were first authorised in 2001, there has been significant innovation in the nature and range of milk based products available to Australian consumers. As the Commission's officers would be aware, consumers now have a wide choice of milk products from plain milk to reduced and low fat varieties, new entrants such as calcium-added and lactose intolerant products, as well as an array of cheeses.
 - (c) There has been no increase in cost to producers. Indeed, as outlined above in relation to the public benefits that flow from the collective bargaining arrangements, producers have experienced transaction cost savings as compared to the counter-factual where they would need to individually negotiate terms and conditions and in which they would have limited ability to influence the terms of their contracts.
 - (d) The collective bargaining arrangements have led to a concentration on quality through the differential pricing system that rewards higher quality product.
- 7.3 The Commission is also asked to note that:
- (a) The number of producers likely to be represented by Premium has significantly reduced since the last authorisation. There are currently

only approximately 270 maximum potential members as opposed to a potential 390 in May 2005.

- (b) The amount of competition between dairy producers is low, thereby reducing any impact that the authorisation would have on competition between producers.
- (c) Participation in the collective bargaining arrangements for which authorisation is sought is voluntary.
- (d) There are no restrictions on the coverage and composition of the bargaining group for which authorisation is sought.
- (e) There is no boycott activity proposed as part of the authorised conduct.
- (f) The constitutional reforms outlined in Confidential Attachment 1 which expands coverage into northern New South Wales would only lead to a possible increase in voluntary member numbers of 12 producers.
- (g) The existence of the authorisation will not raise any barriers to entry because:
 - (i) new dairy farmers wishing to enter the market will not be adversely impacted by the collective bargaining arrangements and indeed, those producers can take advantage of them to smooth their entry into the market;
 - (ii) there is no evidence of any new processors wishing to enter the Queensland and northern New South Wales market, however, to the extent that anyone wished to do so, the collective bargaining arrangements, being voluntary, would not operate as a barrier to entry by locking up supply.

7.4 As the Commission noted in relation to Authorisation A90972, the downstream markets are highly competitive in nature and populated with incumbents that have significant bargaining power so that any price increases arising from the collective bargaining arrangements are unlikely to be significant or to be wholly passed onto consumers.¹⁷ That remains the case now and will remain the case for the foreseeable future.

7.5 It is also relevant that the downstream market is national in nature, thereby minimising any significant impact of a regional price such as that which might be negotiated by a small group of producers in one region with a single processor.

¹⁷ See paragraphs 8.35 and 8.36.

8 Conclusion

8.1 For all of the reasons set out above, Premium submits that the public benefits associated with the proposed conduct outweigh the public detriments which are minimal and mitigated by a number of factors including:

- (a) the fact that the arrangements are voluntary;
- (b) the fact that the arrangements do not include boycott activity;
- (c) the fact that the arrangements may be accessed by future parties;
- (d) the size of the bargaining group being relatively small to the market in which the group competes;
- (e) the pre-existing barriers to entry being unlikely to be affected by the collective bargaining arrangements;
- (f) the nature of the downstream markets acting as a restraint on price increases that might be otherwise passed on to consumers; and
- (g) the lack of any evidence to support the conclusion that the conduct which is currently authorised (and which is proposed to be extended) has led to any public detriment.

Corrs Chambers Westgarth

21 June 2010

Confidential Attachment 1

EXCLUDED FROM PUBLIC REGISTER

Confidential Attachment 2

EXCLUDED FROM PUBLIC REGISTER

Confidential Attachment 3

EXCLUDED FROM PUBLIC REGISTER