



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Application for revocation and substitution of an authorisation**

**lodged by**

**Premium Milk Ltd**

**in respect of**

**collective negotiations of farm-gate milk prices and milk quality standards  
with Parmalat Australia Limited**

**Date: 18 August 2010**

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Dimasi  
Walker  
Willett

**Authorisation no.:** A91236

**Public Register no.:** C2010/589

## Summary

The ACCC proposes to revoke authorisation A90972 and grant authorisation A91236 in substitution. The substitute authorisation enables Premium Milk Ltd to continue collectively negotiating farm-gate prices and milk standards on behalf of its current and future dairy producer members with Parmalat Australia Ltd.

The ACCC proposes to grant authorisation for ten years.

On 22 June 2010, Premium Milk Ltd (Premium) lodged an application for re-authorisation (revocation and substitution) to collectively negotiate farm-gate prices and milk standards on behalf of its current and future dairy producer members with Parmalat Australia Ltd.

Premium's dairy producer members have been operating under an authorisation to collectively negotiate with Parmalat since 2001. Historically, Premium's Constitution has limited its membership to dairy producers located in south-east Queensland. Premium has proposed amendments to its Constitution to allow dairy producers in northern New South Wales to join the bargaining group.

The ACCC considers that the collective bargaining arrangements, even with Premium's expanded membership base, are likely to continue to result in public benefits through transaction cost savings and providing the opportunity for increased producer input into contracts.

The ACCC considers that the collective bargaining arrangements are unlikely to result in significant anti-competitive detriment. Participating in the collective negotiations is voluntary for both Premium's members and Parmalat. Collectively negotiated contracts will only be agreed and implemented where both dairy producers and Parmalat consider it is in their commercial best interest to do so.

On balance, the ACCC considers that the likely benefits that will result from the arrangements will outweigh any public detriments and the ACCC proposes to grant authorisation for ten years.

The ACCC is now seeking further submissions in relation to this draft determination prior to making its final decision. Premium and/or any interested parties may also request that a conference be held to make oral submissions on the draft determination.

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# **1. The application for revocation and substitution**

- 1.1. On 22 June 2010, Premium Milk Ltd (Premium) lodged an application under section 91C(1) of the Trade Practices Act 1974 (the Act) for the revocation of authorisation A90972 and the substitution of authorisation A91236 for the one revoked.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the Act. The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A.
- 1.4. The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution for the one revoked (re-authorisation). In order for the ACCC to re-authorise conduct, the ACCC must consider the application for re-authorisation in the same manner as it would consider an application for initial authorisation under section 88 of the Act.
- 1.5. Authorisation A90972 was granted in 2005 in substitution for A90745 which was originally granted in 2001. Relevantly, the initial authorisation A90745 was made under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.<sup>1</sup>
- 1.6. A chronology of the significant dates in the ACCC's consideration of this application is contained in Attachment B.
- 1.7. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

## **The applicant**

- 1.8. Premium is a not-for-profit organisation that was formed to assist and represent its dairy producer members in dealings with Parmalat Australia Ltd (Parmalat), a dairy processor.
- 1.9. Premium's current constitution enables it to represent dairy producers located in south-east Queensland. Currently Premium has 260 members located in south-east Queensland.

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<sup>1</sup> Amendments to the Act in 2009 introduced new provisions prohibiting cartel conduct, establishing both civil and criminal penalties. Authorisations that were in effect at the time when the cartel provisions commenced will also provide immunity from the cartel provisions of the Act.

- 1.10. Premium proposes to amend its constitution so as to expressly allow it to also represent dairy producers operating in northern New South Wales. There are currently 12 potential members in northern New South Wales.

### **The arrangements**

- 1.11. Premium seeks authorisation:

- to make and give effect to an agreement between Premium and its members as contained in Premium's Constitution, subject to a number of amendments (see paragraph 1.10), pursuant to which its current and future members can engage in collective bargaining of milk supply arrangements (through Premium) with Parmalat
- to give effect to the Milk Supply Agreement between Premium and Parmalat entered into on 30 January 2002 (pursuant to a 2001 authorisation from the ACCC) for the balance of its term, which is due to expire on 30 January 2012 (Existing Agreement)
- to make and give effect to a new Milk Supply Agreement between Premium and Parmalat which will replace the Existing Agreement (New Agreement).

- 1.12. Under the Milk Supply Agreement a Milk Management Committee is established which comprises three representatives from Parmalat and three representatives from Premium. Each of the six representatives have one vote. There is no second or casting vote.

- 1.13. The Milk Management Committee is required to meet not later than one month prior to the commencement of each supply period (usually a calendar year) and at such other times as the members of the Milk Management Committee agree, for the purposes of:

- determining relevant milk quality standards,
- negotiating the prices to be paid by Parmalat to producers for milk
- determining volumes of milk required from producers.

- 1.14. If the Milk Management Committee has not agreed on milk prices for a relevant supply period, then there is provision in the Milk Supply Agreement for an independent expert to determine the matter.

- 1.15. The Existing 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
- oblige Premium's members to supply Parmalat on an exclusive basis.

- 1.16. The Existing Agreement will expire on 30 January 2012 unless extended by agreement between the parties. Both Parmalat and Premium have indicated their strong support for the continuation of the Existing Agreement.

## Previous authorisations

- 1.17. On 12 December 2001, the ACCC granted authorisation A90745 for Premium Milk Supply Pty Ltd (now Premium Milk Ltd) to collectively negotiate farm-gate prices and milk standards in negotiations with Pauls Ltd (now Parmalat Australia Ltd). Authorisation was granted until 1 July 2005.
- 1.18. On 9 November 2005 the ACCC re-authorised Premium's collective bargaining arrangement for a further five years (A90972).

## 2. Background to the application

### Dairy farming

- 2.1 In 2008-09 the Australian dairy industry produced approximately 9.4 billion litres of milk with a farm gate value of \$4 billion.<sup>2</sup>
- 2.2 Dairy farming occurs in all Australian states, however it is mainly concentrated in those areas which have high average rainfall or have reliable irrigation systems. Essentially, milk production is concentrated in the south-east corner of Australia, with Victoria, Tasmania and South Australia accounting for 80% of national output.<sup>3</sup> Production in these regions is highly seasonal with a peak during October to November, tapering off in the cooler months of May to June. The production of long shelf-life manufactured products in the south-east region has enabled maximum milk utilisation within the seasonal cycle. However, production in Queensland, New South Wales and Western Australia is less seasonal with the focus on year round supply of local fresh drinking milk products. Dairy producers in these regions manage calving and feed systems to ensure more even, year round production.
- 2.3 The total number of individual Australian dairy farms has been steadily declining for a number of decades. For example, in 1980 there were 22 000 dairy farms whereas in 2006-07 there were approximately 8000.<sup>4</sup> While farm numbers have been decreasing, the average herd size has increased from 85 cows in 1980, to over 200 cows in 2008-09.<sup>5</sup> The average yield per cow has also increased from 2,850 litres a year to around 5,750 litres over the past three decades, due to improvements in herd genetics, pasture management practices and supplementary feeding regimes.<sup>6</sup> The average annual milk production per farm has increased from 247,000 litres to 1,185,000 litres over the same period.<sup>7</sup>
- 2.4 Australian dairy producers operate in a deregulated and open market. Consequently, international prices are a major factor determining the price received by producers for their milk.<sup>8</sup> In particular, farm gate prices paid to dairy producers in the south-east of Australia are heavily influenced by world dairy commodity prices.

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<sup>2</sup> Dairy Australia, *Australian Dairy Industry In Focus 2009*, Table 1.

<sup>3</sup> Ibid, p. 18.

<sup>4</sup> Ibid, p. 11.

<sup>5</sup> Ibid, p. 12.

<sup>6</sup> Ibid, p. 12.

<sup>7</sup> Ibid, p. 12.

<sup>8</sup> Ibid, p. 10

## **Dairy manufacturing and processing**

- 2.5 Processors purchase raw milk from producers (for example through farmer co-operatives, collective bargaining groups or individual producers) and process it into various dairy products for sale domestically or for export.
- 2.6 Australia's dairy manufacturing sector is diverse and includes farmer owned co-operatives and public, private and multi-national companies. Co-operatives no longer dominate the industry, but still account for approximately 40% of the milk output.<sup>9</sup>
- 2.7 The major dairy processors in Australia are Fonterra Co-operative Group Ltd, Murray Goulburn Co-operative, National Foods Limited, Parmalat and Warrnambool Cheese and Butter Factory Company Holdings Limited. Each of these is active in the acquisition of raw milk, and to varying degrees, in the production of dairy products.
- 2.8 Milk is processed into either drinking or manufacturing milk. Approximately 24% of total milk production is used as drinking milk with the remainder used in the manufacturing of dairy products such as cheese, ice cream, skim milk power, yoghurt, butter and cream.<sup>10</sup>
- 2.9 Around 60% of manufactured product is exported with the remaining 40% sold on the Australian market. This contrasts with drinking milk, where some 97% is consumed in the domestic market.<sup>11</sup>

## **3. Submissions received by the ACCC**

- 3.1. Premium submits that the public benefits associated with the proposed collective bargaining arrangement outweigh the minimal detriments, which are mitigated by the following factors:
- the arrangements are voluntary and do not include boycott activity
  - the arrangements may be accessed by future parties
  - the size of the bargaining group is small, relative to the market in which the group competes
  - the pre-existing barriers to entry are unlikely to be affected by the collective bargaining arrangements
  - the nature of the downstream markets acts as a restraint on price increases that might be otherwise passed on to consumers
  - the lack of any evidence to support the conclusion that the collective bargaining arrangement currently authorised (and which is proposed to be extended) has led to any public detriment.
- 3.2. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. The ACCC

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<sup>9</sup> Ibid, p. 21.

<sup>10</sup> Ibid, p. 19.

<sup>11</sup> Ibid, p. 21.

aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

- 3.3. The ACCC sought submissions from 26 interested parties potentially affected by the application, including dairy producers, milk processors, grocery retailers, industry associations and government departments. Four submissions were received.
- **Industry & Investment NSW** considers that Premium's proposed collective bargaining arrangements are to the advantage of the industry, without any public detriment or constraint on competition.
  - **Norco Co-operative Limited** (Norco) submits that it has no concerns about Premium's application for revocation and substitution.
  - **Parmalat Australia Ltd** submits that it has no objection to the application being approved and has previously advised Premium that "*it supports fully, the application for re-authorisation by Premium Milk Ltd to the ACCC*".
  - **Queensland Dairy Farmers' Organisation** (QDO) submits its full support for Premium's application for re-authorisation to enable it to continue to collectively negotiate on behalf of its members with Parmalat for a further five years. The QDO also supports Premium's proposal to amend its constitution to expressly allow Premium to represent dairy producers operating in northern New South Wales as well as Queensland.
  - **Queensland Government Department of Employment, Economic Development and Innovation** supports Premium's application for re-authorisation and has no objection to authorisation being extended to cover Premium members in northern New South Wales.
- 3.4. The views of Premium and interested parties are outlined in the ACCC's evaluation of the proposed collective bargaining arrangements in Chapter 4 of this draft determination. Copies of public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) and by following the links to this matter.

## 4. ACCC evaluation

- 4.1. Broadly, under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.
- 4.2. The ACCC's evaluation of the proposed arrangement is in accordance with test(s) found in sections:
- 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
    - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
    - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be



likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.

- 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
  - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

4.3. For more information about the statutory tests for authorisation and other relevant provisions of the Act, please see Attachment C.

## **The relevant areas of competition**

- 4.4. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant areas of competition affected by that conduct.
- 4.5. In its consideration of the original authorisation in 2001 (A90745) and the substitution authorisation in 2005 (A90972), the ACCC identified that the primary area of competition likely to be affected by the arrangements was the farm gate supply of raw milk to dairy processors in Queensland, New South Wales and possibly Victoria. The ACCC also considered that the domestic retail supply of drinking milk and the supply of manufactured dairy products (both domestically and internationally) were also likely to be affected.
- 4.6. Transportation costs and the perishability of raw milk affect the distance over which it may be feasibly transported from farm to processor. In general, processors acquire raw milk from producers within a 400 km radius of the processing facility.<sup>12</sup> For the purpose of assessing Premium's proposed collective bargaining arrangement, the ACCC considers that the relevant area of competition is the farm gate supply of raw milk to dairy processors in south-east Queensland and northern New South Wales.
- 4.7. Premium's submission in respect of the relevant areas of competition for its current application for re-authorisation is consistent with this view. Premium notes that:
- 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. In August 2000, there were approximately 580

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<sup>12</sup> ACCC, *Public Competition Assessment: National Foods Limited – proposed acquisition of Australian Co-operative Foods Limited and associated joint venture with Warrnambool Cheese and Butter Factory Company Holdings Limited*, 19 September 2008, p.8.,

dairy producers supplying Parmalat while today there are currently 272 dairy producers supplying milk to Parmalat.

- Farm gate prices are largely determined by world dairy commodity prices.
- In Queensland and northern New South Wales, there are two large national processors (Parmalat and National Foods Limited) and small specialist manufacturers such as the Norco Coop Dairy Association (Norco). Parmalat has processing plants in Brisbane and Nambour. National Foods has a plant at Crestmead and Norco has plants at Lismore and Southport.
- The impact of the proposed conduct on the sale of drinking milk and dairy products is immaterial because the large supermarket chains effectively dictate the price paid to processors.

## The counterfactual

- 4.8. The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.<sup>13</sup>
- 4.9. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.
- 4.10. Premium submits that the counterfactual is one where, absent the legal protection afforded by authorisation, Premium’s member dairy producers will negotiate contracts with Parmalat on an individual basis.
- 4.11. Premium notes that in its previous authorisation, the ACCC identified a potential counterfactual scenario as being the ability of Premium members to form a collective bargaining group under the protection of the authorisation granted to the Australian Dairy Farmers Ltd (ADF) (A90966).<sup>14</sup> Premium submits that this is not a genuine counterfactual because no collective bargaining groups have formed in Queensland or northern New South Wales under the protection of the authorisation granted to the

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<sup>13</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

<sup>14</sup> In March 2002, the ACCC granted conditional authorisation to the Australian Dairy Farmers’ Federation Ltd (now Australian Dairy Farmers Ltd) (A90782) allowing its members to collectively negotiate contractual terms and conditions with dairy-processing companies. National Foods Ltd applied to the Australian Competition Tribunal for a review of the ACCC’s determination and on 6 August 2002 the Tribunal issued a consent decision in similar terms to the ACCC’s determination. On 26 April 2006 the ACCC re-authorised ADF’s arrangements until 30 June 2011, subject to conditions, allowing dairy producers to continue to collectively bargain with dairy processors. The conditions reduce the potential size of the collective bargaining groups; limit the potential for information sharing; and require the collective bargaining groups to be open and transparent about their membership and the basis on which the groups have formed. These conditions are similar to the conditions imposed under the 2002 authorisation.

ADF. Premium also notes that the authorisation granted to the ADF is due to expire on 30 June 2011.

- 4.12. The ACCC notes that Premium's members have operated under a collective bargaining arrangement authorised by the ACCC since 2001. As such, they have not needed to consider operating under the authorisation granted to the ADF in 2002. However, it remains an option for Premium's members to utilise the legal protection offered by the ADF's authorisation in the event that Premium's collective bargaining arrangements were not authorised.
- 4.13. Therefore, the ACCC remains of the view that there are two potential counterfactual situations:
- with the ADF authorisation in place, the counterfactual situation is likely to be one in which Premium's member dairy producers could continue to engage in collective negotiations with Parmalat, albeit under the ADF's collective bargaining arrangements (the ADF counterfactual)
  - if the ADF authorisation was not in place, the counterfactual situation is likely to be one in which Premium's member dairy farmers are required to negotiate contacts with Parmalat on an individual basis (the non-ADF counterfactual).
- 4.14. The ACCC has considered both possible counterfactual situations in its assessment of Premium's application for re-authorisation.

## **Public benefit**

- 4.15. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>15</sup>

- 4.16. Premium submits the proposed collective bargaining arrangements will deliver public benefits, including:
- transaction cost savings
  - increased input into contracts
  - investment in new technology.
- 4.17. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

## **Transaction cost savings**

- 4.18. Premium submits that a collective bargaining arrangement for its members will lead to significant transaction cost savings. In the absence of authorisation, individual producers will need to engage their own lawyers and accountants to determine the

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<sup>15</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

appropriateness of contracts being offered by Parmalat. Premium also submits that Parmalat will achieve significant cost savings by negotiating through Premium rather than by having to negotiate with over 200 individual producers.

- 4.19. 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.
- 4.20. The QDO agrees that Premium's proposed collective bargaining arrangements will assist Premium's members to reduce negotiation and transaction costs, compared to a situation where individuals are left to negotiate their individual supply arrangements with Parmalat.
- 4.21. The ACCC accepts there are generally costs associated with entering contracts (whether they are individually or collectively negotiated) in the form of legal and/or professional advice, as well as the costs associated with the time and resources expended by the contracting parties themselves. Where contracts are collectively negotiated, these costs may be shared.
- 4.22. The ACCC considers that there are transaction cost savings resulting from the collective bargaining arrangements compared to a situation where Premium's dairy producer members are required to negotiate with Parmalat on an individual basis.
- 4.23. The ACCC also considers that the proposed collective bargaining arrangements, which are tailored to Premium's members and are supported by Parmalat, will produce some transaction cost savings relative to a situation in which Premium's members collectively negotiate under the ADF authorisation, which does not take the specific circumstances of Premium's members into account.
- 4.24. To the extent that the proposed collective bargaining arrangements result in transaction cost savings, they produce a public benefit.

#### **Increased input into contracts**

- 4.25. 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. Premium considers that 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.
- 4.26. Premium also submits that the ability of its members to have greater input into their contract terms provides them with greater confidence about the security of the sales future for their production output.
- 4.27. The QDO considers that Premium's proposed collective bargaining arrangements provide both Premium's members and Parmalat with a more efficient means of communication and negotiation which provides for a better understanding of all parties' needs. This enables the development of commercial incentives which are in the interests of all parties, such as with respect to supply timing, volume, quality and milk components.

- 4.28. The ACCC considers that collective bargaining arrangements, such as the arrangements proposed by Premium, can result in benefits to the public by facilitating improvement in the level of input a party has in their contractual negotiations. This improved input provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their business, for example by addressing common contractual problems in a more streamlined and effective manner.
- 4.29. The ACCC considers that Premium's proposed collective bargaining arrangements provide greater certainty and increased flexibility for Premium's members than the ADF's more general collective bargaining arrangements. In this context, Premium's proposed collective bargaining arrangements are more likely to provide Premium's dairy producer members with a greater opportunity for more effective input into contract terms and conditions which can assist in realising efficiencies, resulting in a public benefit.

### **Investment in new technology**

- 4.30. Premium submits that dairy producers who invest in technology and best practice will receive higher prices for their milk. It notes that during the drought conditions of 2004-2007, investment by producers in technology was limited, however, improving prices and better seasonal output from early 2008 have resulted in a significant increase in on-farm investment.
- 4.31. Premium considers that the collective bargaining arrangements between it and Parmalat enhance producers' confidence and certainty about future supply arrangements which in turn creates an incentive for producers to invest in new technology.
- 4.32. The ACCC accepts that collective negotiations may provide dairy producers with increased input into contract terms and conditions. This may provide dairy producers with greater confidence and certainty regarding their ability to supply the processors in the longer term and provide a framework to assist with, for example, the adoption of new technology or improved processes.
- 4.33. However, the information provided by Premium suggests that investment in new technology is largely dependent on broader economic circumstances rather than the collective bargaining arrangement. In these circumstances, it is difficult to assign much weight to this claimed public benefit.

### **Public detriment**

- 4.34. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>16</sup>

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<sup>16</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.35. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions, which can include price, with a supplier or customer. Anti-competitive detriment may arise where collective bargaining arrangements result in an increased price to consumers or less choice or lower quality of products for consumers.
- 4.36. Premium submits that there are no material detriments likely to arise from the proposed conduct, as evidenced by the following outcomes of the collective bargaining arrangements currently authorised:
- there has been no 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.
  - there has been no 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. Consumers now have a wide choice of products from plain milk to reduced and low fat varieties, and new products such as calcium-added and lactose intolerant products, as well as an array of cheeses.
  - there has been no increase in cost to producers. Producers have experienced transaction cost savings as compared to the counterfactual 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.
  - there has been a concentration on quality through the differential pricing system that rewards higher quality product.
- 4.37. The QDO submits its agreement that the proposed collective bargaining arrangements will not result in any anti-competitive detriment or negative impact on consumers.
- 4.38. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements is likely to be more limited where the following four features are present:
- the current level of negotiations between individual members of the group and the proposed counterparty(s) on the matters to be negotiated is low
  - participation in the collective bargaining arrangement is voluntary
  - there are restrictions on the coverage and composition of the bargaining group
  - there is no boycott activity.

### **Current level of negotiations**

- 4.39. Where the current level of individual bargaining between members of the bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.
- 4.40. The ACCC considers that absent any form of collective negotiation, Premium's milk producer members would be offered largely standard form contracts under which the capacity for individual members to vary the terms of the agreement would be limited.

- 4.41. Therefore, the ACCC considers that the level of competition amongst Premium's milk producer members with or without the collective negotiations would be low.

### **Voluntary participation in the collective bargaining arrangements**

- 4.42. The collective bargaining arrangements are voluntary and neither Parmalat nor Premium's dairy producer members are compelled to participate. Each remains free to individually negotiate either variations to the collectively agreed contracts or to negotiate individual stand alone contracts.

### **Size/composition of bargaining groups**

- 4.43. The ACCC considers that where the size of the bargaining group is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and to the competition provided by those suppliers outside the group.
- 4.44. In general, the ACCC considers that limiting bargaining groups (for example by geography, or by size, relative to the counterparty) allows negotiations to better take into account the specific demand or supply characteristics of particular businesses. This significantly reduces the anti-competitive effects associated with 'one size fits all' negotiations and allows competition between groups to provide the competitive discipline that leads to efficient resource use.
- 4.45. Premium's bargaining group is currently made up of 260 dairy producers located in south-east Queensland.
- 4.46. Premium proposes to amend its Constitution so that dairy producers located in northern New South Wales may also become Premium members and join the bargaining group. There are currently 12 potential members in northern New South Wales and these 12 dairy producers already supply milk to Parmalat. Over time, it is possible that the number of Premium members located in northern New South Wales will increase.
- 4.47. Premium's bargaining group comprises a significant portion of the dairy producers in south-east Queensland, and potentially northern New South Wales.

### **Boycott activity**

- 4.48. Premium has not applied for authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act.

### **Balance of public benefit and detriment**

- 4.49. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed collective bargaining arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

- 4.50. In the context of applying the net public benefit test in section 90(8)<sup>17</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>18</sup>
- 4.51. For the reasons outlined in this chapter the ACCC considers the public benefits likely to result from the collective bargaining arrangement would outweigh the public detriment.
- 4.52. The ACCC accepts that the collective bargaining arrangements are likely to continue to result in public benefits resulting from improving the level of input that dairy producer members of Premium have into contract negotiations with Parmalat. There is also likely to be some transaction cost savings and efficiencies from collective negotiations relative to a situation where each dairy producer individually negotiates and settles contracts.
- 4.53. While Premium's bargaining group comprises a significant portion of the dairy producers in south-east Queensland, and potentially northern New South Wales, the ACCC considers that the public detriment likely to result from the collective bargaining arrangements is minimal. Participation in the collective bargaining arrangements is voluntary for both dairy producers and Parmalat and a collective agreement will only be reached where all parties consider it to be in their commercial interest.
- 4.54. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met.

## **Length of authorisation**

- 4.55. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>19</sup> The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 4.56. In this instance, Premium seeks authorisation for five years from 1 December 2010.
- 4.57. No submissions were received regarding the period of authorisation.
- 4.58. In considering the term of authorisation, the ACCC notes that the proposed collective bargaining arrangements have been authorised since 2001 and have had the support of Parmalat throughout this period. The proposed collective bargaining arrangements are relatively stable and are well understood by Premium and Parmalat.
- 4.59. In these circumstances, the ACCC is minded to grant authorisation for a period longer than requested by Premium, as the ACCC is satisfied that the public benefits of the

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<sup>17</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>18</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

<sup>19</sup> Section 91(1).



conduct are likely to continue to outweigh the public detriment over an extended period.

- 4.60. Therefore the ACCC proposes to re-authorise the collective bargaining arrangements for a further ten years.
- 4.61. In the event that Premium wishes to amend its proposed arrangements during the period of authorisation, it is open to Premium to utilise the minor variation (if appropriate) or the revocation and substitution processes.
- 4.62. Additionally, the ACCC may review an authorisation if it is satisfied that:
- the authorisation was granted on evidence or information that was materially false or misleading
  - a condition of authorisation had not been complied with
  - there has been a material change of circumstances since the authorisation was granted. A material change of circumstances is one that has ‘an impact or likely impact upon public benefit and/or detriment’.<sup>20</sup>

## **5. Draft determination**

### **The application**

- 5.1. On 22 June 2010 Premium Milk Ltd (Premium) lodged an application for the revocation of authorisation A90972 and the substitution of A91236 for the one revoked. Authorisation A90972 was granted in substitution for A90745.
- 5.2. Application A91236 was made under section 91C(1) of the Act. Relevantly, the initial authorisation A90745 was made under subsection 88(1).
- 5.3. In particular, Premium seeks authorisation to collectively negotiate farm-gate prices and milk standards on behalf of its current and future members with Parmalat Australia Ltd.
- 5.4. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### **The net public benefit test**

- 5.5. For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which re-authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met.

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<sup>20</sup> *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997), ATPR 41-593 at 44,212. See also *re 7-Eleven Stores Pty Ltd* (1998), ATPR 41-666 at 41,462.

## **Conduct for which the ACCC proposes to grant authorisation**

- 5.6. The ACCC proposes to revoke authorisation A90972 and grant authorisation A91236 in substitution.
- 5.7. The ACCC proposes to grant authorisation under section 91C(4) of the Act to Premium:
- to give effect to an agreement between Premium and its members as contained in Premium's Constitution, including the agreement as amended by the proposed amendments which include an amendment so as to expressly allow Premium to represent milk producers operating in Queensland and in northern New South Wales, pursuant to which its current and future members can engage in collective bargaining of milk supply arrangements (through Premium) with Parmalat<sup>21</sup>
  - 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)
  - to make and give effect to a new Milk Supply Agreement between Premium and Parmalat which will replace the Existing Agreement (New Agreement).
- 5.8. The ACCC proposes to grant authorisation for 10 years.
- 5.9. Further, the proposed authorisation is in respect of the collective bargaining arrangement as it stands at the time authorisation is granted. Any changes to the collective bargaining arrangement during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.10. This draft determination is made on 18 August 2010.
- 5.11. The attachments to this determination are part of the draft determination.

## **Conduct not proposed to be authorised**

- 5.12. The proposed authorisation does not extend to Premium and its members to engage in collective boycott activity. Any such conduct would not be protected from legal action under the Act.

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<sup>21</sup> Premium applied for authorisation to make and give effect to an agreement between Premium and its members as contained in Premium's Constitution. However, because Premium's Constitution is already in existence, the ACCC does not have the power to grant authorisation to Premium to make the agreement: s88(12).

## **Further submissions**

- 5.13. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

## **Attachment A — the authorisation process**

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

## **Attachment B — chronology of ACCC assessment for application A91236**

The following table provides a chronology of significant dates in the consideration of the application by Premium Milk Ltd.

<b>DATE</b>	<b>ACTION</b>
22 June 2010	Application for authorisation lodged with the ACCC.
22 July 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
27 July 2010	Further submission received from Premium.
18 August 2010	Draft determination issued.

# Attachment C — the tests for authorisation and other relevant provisions of the Act

## Trade Practices Act 1974

### Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
  - (a) make a determination in writing granting such authorization as it considers appropriate; or
  - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision would result, or be likely to result, in a benefit to the public; and
  - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
    - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
    - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
  - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
  - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;

- (b) the proposed covenant were given, and were complied with; or
  - (c) the proposed conduct were engaged in;
- as the case may be.
- (7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.
- (8) The Commission shall not:
- (a) make a determination granting:
    - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
    - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
    - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
    - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or
  - (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.
- (9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.
- (9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):
- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
    - (i) a significant increase in the real value of exports;
    - (ii) a significant substitution of domestic products for imported goods; and
  - (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

## **Variation in the language of the tests**

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.<sup>22</sup>

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>23</sup>

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

## Conditions

The Act allows the ACCC to grant authorisation subject to conditions.<sup>24</sup>

## Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future<sup>25</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>26</sup>

## Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>27</sup>. It does not apply to applications for revocation, revocation and substitution, or

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<sup>22</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>23</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>24</sup> Section 91(3).

<sup>25</sup> Section 88(10).

<sup>26</sup> Section 88(6).

<sup>27</sup> Section 90(10A)



minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

## **Minor variation**

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.<sup>28</sup> The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.<sup>29</sup>

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a ‘minor variation’ and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

## **Revocation; revocation and substitution**

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.<sup>30</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>31</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>32</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>33</sup>

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<sup>28</sup> Subsection 91A(1)

<sup>29</sup> Subsection 87ZD(1).

<sup>30</sup> Subsection 91B(1)

<sup>31</sup> Subsection 91B(3)

<sup>32</sup> Subsection 91C(1)

<sup>33</sup> Subsection 91C(3)