



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Application for revocation of A90966 and substitution with A91263**

**lodged by**

**The Australian Dairy Farmers Ltd**

in respect of

**collective negotiations of contractual terms and conditions  
by dairy farmers with dairy processing companies**

**Date: 16 June 2011**

**Authorisation no.: A91263**

**Commissioners:** Samuel  
Kell  
Dimasi  
Walker  
Willett

**Public Register no.: C2011/267**

## Summary

The ACCC proposes to revoke authorisation A90966 and grant authorisation A91263 in substitution. The proposed substitute authorisation is granted to Australian Dairy Farmers Ltd to enable dairy farmers to continue to collectively bargain with dairy processors. As requested by the ADF, the ACCC proposes to grant the substitute authorisation subject to the same conditions as previously imposed.

The ACCC proposes to grant authorisation for a further ten years.

On 8 March 2011, the Australian Dairy Farmers Ltd (ADF) lodged an application for re-authorisation to enable dairy farmers to collectively bargain with dairy processors on the terms and conditions of their raw milk supply contracts. Specifically, the ADF lodged an application for revocation of authorisation A90966 and substitution of authorisation A91263 for the one revoked.

The ADF has had a collective bargaining authorisation in place since 2002, with the most recent authorisation granted in 2006.

Eighteen collective bargaining groups have been formed under the current authorisation. The ACCC considers that the collective bargaining arrangements will continue to result in public benefits through transaction cost savings and providing the opportunity for increased farmer input into contracts relative to a situation where farmers negotiate individually with the processor they supply.

The ACCC understands that the ADF collective bargaining process is supported and well understood by farmers and processors. For this reason the ADF is seeking to continue with the conditions of authorisation that currently apply. Among other things these conditions limit membership of collective bargaining groups to dairy farmers with a 'shared community interest'.

In response to comments from interested parties, the ACCC has sought to clarify the condition which prevents collective bargaining groups from using a common representative in negotiations with processors. The ACCC seeks comment on this proposed amendment.

On balance, the ACCC considers that the public benefits likely to result from the collective bargaining arrangements will outweigh any public detriments over an extended period. The ACCC proposes to grant authorisation for ten years. The ACCC notes that the collective bargaining arrangements have been in place since 2002 and that parties have confidence in the process. These arrangements are voluntary and both dairy farmers and dairy processors are able to withdraw from collective negotiations at any time.

The ACCC is now seeking further submissions in relation to this draft determination prior to making its final decision. The ADF 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 authorisation

- 1.1. On 8 March 2011, the Australian Dairy Farmers Ltd (ADF) lodged an application under section 91C(1) of the *Competition and Consumer Act 2010*<sup>1</sup> (the Act) for the revocation of authorisation A90966 and the substitution of authorisation A91263 for the one revoked.
- 1.2. Authorisation is a transparent process where the ACCC may grant protection 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. A chronology of the significant dates in the ACCC’s consideration of authorisation A91263 is contained in Attachment B.
- 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. Relevantly, the initial authorisation<sup>2</sup> 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.
- 1.6. The Australian Dairy Farmers Ltd (ADF) seeks re-authorisation for a further five years to allow dairy farmers to continue to collectively bargain the terms and conditions of their supply contacts with milk processors. The ADF seeks to continue authorisation subject to the seven conditions of authorisation as imposed by the ACCC in its previous decision. The ability to collectively boycott is not part of the collective bargaining arrangements.

## Other parties

- 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.

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<sup>1</sup> The *Trade Practices Act 1974* became the *Competition and Consumer Act 2010* on 1 January 2011.

<sup>2</sup> On 24 July 2009, amendments to the Act, contained in the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*, commenced operation. All authorisations in effect on that date, including the ADF’s authorisation, are deemed to provide statutory protection from legal action under the cartel provisions (s.88(1A)) of the Act.

- 1.8. The ADF seeks re-authorisation on behalf of current and future collective bargaining groups and current and future dairy processors.

### **Interim authorisation**

- 1.9. Authorisation A90966 is due to expire on 30 June 2011. The ACCC grants interim authorisation to enable the status quo to continue while the ACCC is considering the current application for re-authorisation. Interim authorisation is granted subject to the Conditions of the current authorisation (A90966) set out at paragraph 1.15.
- 1.10. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

### **The Australian Dairy Farmers Ltd<sup>3</sup>**

- 1.11. The ADF is a not-for-profit company representing the interests of Australian dairy farmers. The ADF's mission is to provide strong leadership and representation for the continued growth of internationally competitive, innovative and sustainable dairy farm businesses.
- 1.12. The ADF is made up of the following state dairy farmer organisations:
1. NSW Farmers' Association – Dairy Committee
  2. Queensland Dairyfarmers' Organisation
  3. South Australian Dairyfarmers' Association
  4. Tasmanian Farmers & Graziers' Association
  5. Victorian Farmers Federation – United Dairyfarmers of Victoria
  6. Western Australian Farmers' Federation – Dairy Council

### **Previous authorisations**

- 1.13. The ACCC has previously granted authorisation to the ADF and its former organisation the Australian Dairy Farmers Federation (ADFF) for collective bargaining arrangements on two occasions. In March 2002, the ACCC granted authorisation for five years (A90782) subject to conditions to address concerns about the scope of the bargaining groups and to mitigate the potential for industry wide information sharing.
- 1.14. In March 2002, National Foods Ltd applied to the Australian Competition Tribunal for a review of the ACCC's final determination. On 16 August 2002, the Tribunal issued a consent determination. Specifically, the Tribunal accepted amendments to the condition describing the formation of bargaining groups and included a mechanism for a dispute resolution process.

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<sup>3</sup> Australian Dairy Farmers Ltd, *ADF Company Information*, accessed May 2011  
<[www.australiandairyfarmers.com.au/adffv2/sitev2.nsf/\(ContentByKey\)/AboutAboutADF?open](http://www.australiandairyfarmers.com.au/adffv2/sitev2.nsf/(ContentByKey)/AboutAboutADF?open)> & Australian Dairy Farmers Ltd submission to the ACCC, March 2011.

- 1.15. On 26 April 2006, the ACCC re-authorised (A90966) dairy farmers to collectively bargain with dairy processors for a further five years. As part of this assessment the ACCC reviewed the conditions of authorisation imposed by the Tribunal. The ACCC imposed conditions which were broadly consistent with those imposed by the Tribunal. Specifically, the conditions were:

**Condition 1**

Collective bargaining groups may be represented by a member (or members) of the collective bargaining group or by (one or more) third parties. However, a collective bargaining group must not be represented by the ADF or by a third party who represents or has represented another collective bargaining group in the previous 2 years.

**Condition 2**

Collective bargaining groups can only be formed by dairy farmers who have a 'shared community interest'.

Dairy farmers will have a shared community interest where they each have a reasonable expectation of supplying the same plant of a dairy processor and are within the economic delivery zone of that plant and demonstrate one of the following:

- a. they have similar supply patterns; or
- b. they supply a specialty raw milk product.

Condition 7 requires groups to provide the ADF and the affected processor(s) with details of how this condition is satisfied.

**Condition 3**

Dairy processing companies are able to choose whether or not to negotiate with collective bargaining groups. Dairy processing companies are able to negotiate with one, or some, of the dairy farmers within a particular group based on their own commercial requirements.

**Condition 4**

Dairy farmer participation in collective bargaining groups is voluntary. Dairy farmers retain the right to negotiate and enter into individual contracts. Dairy farmers can leave collective groups on giving written notice to the group.

**Condition 5**

Collective bargaining groups, individual dairy farmers or dairy farmer representatives, may not attempt to prevent or restrict other farmers from supplying particular dairy processing companies.

**Condition 6**

Members or third party representatives of a collective bargaining group may not disclose, other than to members or third party representatives of the same group, information which was obtained by them in the course of collective negotiations

with a dairy processing company and which the dairy processing company has advised them is confidential.

### **Condition 7**

- 7.1 Any new collective bargaining group must, within 14 days of it first forming, provide the following information to the ADF:
- i. the names of the dairy farmers and the names and locations of the farms comprising that group
  - ii. the name and contact details of the party(s) nominated by the group to represent the group in collective negotiations
  - iii. with respect to each dairy processing company that the group intends to negotiate with, the name of the dairy processing company and the location of its relevant plant(s)
  - iv. with respect to each dairy processing company that the group intends to negotiate with, details of how each member of the group satisfies Condition 2. This could include information as to group members' histories of supplying the processor and, where group members have not previously supplied the processor, information regarding the distance between those members' farms and the relevant plant(s) of the dairy processor.
- 7.2 The collective bargaining group must, within 14 days of it first forming provide the details required by 7.1(i) to (iv) above to the processor(s) with whom they seek to negotiate. The collective bargaining group is not required to provide information which pertains to dealings between the collective bargaining group and another processor.
- 7.3 The collective bargaining group must advise the ADF of changes to the composition of the group or to the party(s) representing the group within 14 days of such change(s) being made.
- 7.4 The collective bargaining group is required to advise a processor of any changes to the composition of the group or to the party(s) representing the group within 14 days of such change(s) being made. The collective bargaining group is not required to notify a processor of changes which pertain to dealings between the collective bargaining group and another processor.
- 7.5 The ADF must keep an up-to-date register which includes this information and must, on request by a party demonstrating an appropriate interest, provide access to the register free of charge during normal business hours. Parties demonstrating an appropriate interest include processor(s) with whom the collective bargaining group seeks to negotiate, the ACCC and the Australian Competition Tribunal.

## Collective bargaining under the current authorisation

- 1.16. There are 18 collective bargaining groups operating under the current authorisation, six of which were formed since the collective bargaining arrangements were last authorised by the ACCC in 2006. The ADF submits that the 18 collective bargaining groups represent approximately 500 farming families.

Collective bargaining group	Region	Date formed
Barossa Mid-North Co-operative Dairemen	South Australia	4 May 2005
Bona Vista District	Victoria	9 August 2005
Central Dairy	New South Wales	22 July 2003
Central West	New South Wales	13 May 2010
East Coast Milk Producers	New South Wales	25 February 2011
Fleurieu Dairy Farmers	South Australia	31 May 2005
Hastings Suppliers	New South Wales	13 July 2009
King Island Dairy Farmers	Tasmania	1 September 2008
Mid Coast	New South Wales	9 August 2004
Premium Suppliers	Victoria	24 March 2005
Progressive Dairies	Queensland	21 February 2005
South West Milk Suppliers	Victoria	19 August 2005
Southern	New South Wales	10 August 2004
Sunmilk	New South Wales	2 April 2003
Sustainable Dairy Alliance	Victoria	15 May 2003
Tasmanian Suppliers	Tasmania	27 June 2006
Upper Murray Quality Milk	Victoria	24 August 2007
WA	Western Australia	12 December 2002

- 1.17. The ADF advises that the groups that have been formed under the current authorisation have been relatively small and involve dairy farmers who have common business interests and goals.

## Other collective bargaining decisions in the dairy industry

- 1.18. The ACCC has considered applications for authorisation regarding collective bargaining between dairy farmers and the dairy processors they supply. In particular:
- on 22 September 2010, the ACCC granted authorisation for ten years to Premium Milk Ltd to collectively negotiate farm-gate prices and milk standards on behalf of its members (milk producers located in south-east Queensland and Northern-NSW) with Parmalat Australia Ltd. These arrangements were originally authorised by the ACCC in December 2001.
  - on 20 February 2006, the ACCC denied authorisation to Dairy WA to establish a milk negotiating agency to collectively bargain on behalf of Western

Australian dairy farmers.<sup>4</sup> In denying authorisation, the ACCC expressed concern that the intended milk negotiating agency had the potential to result in significant public detriments and that, if authorised, the arrangements could damage competition and industry participants, including dairy farmers themselves. In its assessment, the ACCC was mindful that dairy farmers in Western Australia could continue to collectively bargain under the terms of the interim authorisation (granted to the ADF on 18 May 2005) pending the release of the ACCC's final determination of the ADF's application for re-authorisation.

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<sup>4</sup> Dairy WA originally applied to collectively boycott processors in Western Australia, however later withdrew its application for authorisation of collective boycott provisions.

## 2. Background to the application

- 2.1. This section is not intended to be a comprehensive overview of the Australian dairy industry. The Australian dairy industry is a large, complex and diverse area of trade and there is a great deal of information, data and forecasting produced in relation to it. Accordingly, this section includes information which the ACCC considers to be directly relevant to the application before it.
- 2.2. The dairy supply chain has three distinct levels:
  - the dairy farm
  - the dairy processor and
  - the retailer

### Dairy farmers and milk production

- 2.3. Dairy farming occurs in all Australian states, although, it is mainly concentrated in those areas which have high average rainfall or have reliable irrigation systems. Victoria is the highest producer, accounting for over 60% of national milk output. Other main dairying areas are found in: far-north and south-east Queensland; down the New South Wales coast, Tasmania, south-eastern South Australia and in the south-west of Western Australia.<sup>5</sup>
- 2.4. The number of dairy farms operating in Australia has decreased since deregulation of the industry in 1999/00. In mid-2010 the number of dairy farms was approximately 7500 compared with 13 000 in 1999/00. During this time there has been a move towards larger herd sizes and greater on-farm productivity.<sup>6</sup> Raw milk production in 1999/00 was approximately 11 billion litres. In 2009-10 over 9 billion litres of milk was produced, with a farmgate value of \$3.4 billion.<sup>7</sup>
- 2.5. Although milk is produced year round, approximately two thirds of dairy farms, particularly those in Tasmania and Victoria, vary their production according to the season with the months of September to January seeing the highest production. Milk production in other areas is generally more evenly spread across the year to cater for local drinking milk demand.
- 2.6. Milk production in Australia can be separated, by its use, into two sectors – drinking milk and manufacturing milk. Approximately 25% of national milk production is used for drinking or fresh milk. The remainder is used in manufacturing dairy products such as cheese, ice cream, milk powders, yoghurt, butter and cream.<sup>8</sup>
- 2.7. Currently approximately 45% of total milk production in Australia ends up in manufactured products which are exported.<sup>9</sup> The majority of this milk comes from

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<sup>5</sup> Dairy Australia, *Australian Dairy Industry in Focus 2010*, page 11

<sup>6</sup> Dairy Australia, *Australian Dairy Industry in Focus 2009*, page 9

<sup>7</sup> Dairy Australia, *Australian Dairy Industry in Focus 2010*, page 1

<sup>8</sup> Dairy Australia, *Dairy 2010 Situation and Outlook*, May 2010, page 8

<sup>9</sup> Ibid

Victoria, South Australia and Tasmania. As a result, farmgate prices in these regions (that are highly geared towards producing manufactured goods for the export market), are closely aligned to returns from exported products. These regions also account for the majority of Australia's dairy output.

### **Milk processing**

- 2.8. The Australian dairy manufacturing sector is diverse and includes farmer-owned co-operatives, public, private and multi-national companies. As in the farm sector, there has been ongoing rationalisation among dairy processors.
- 2.9. The major dairy processors are Murray-Goulburn Co-Operative; Fonterra; National Foods; Warnambool Cheese & Butter Factory; Parmalat; Tatura and United Dairy Power – together they acquire more than 90% (by volume) of milk produced.<sup>10</sup>
- 2.10. Raw milk produced in Australia is used to manufacture the following products<sup>11</sup>: cheese (34%); drinking milk (25%); skim milk powder and/or butter (24%) white milk powder (11%); casein and/or butter (3%) and other (3%).

### **Retail**

- 2.11. Manufactured dairy products and drinking milk are marketed through various channels including supermarkets, independent grocers, corner stores, service stations and fast food outlets.
- 2.12. The major manufactured dairy products are cheese, butter, butter blends and yogurt. Per capita consumption trends over the past two decades have varied quite significantly by individual product. For example, cheese consumption has stabilised with an on-going shift from cheddar to non-cheddar varieties. For butter, the introduction of vegetable oil and butter based dairy blends has helped stabilise a long-term decline<sup>12</sup>.
- 2.13. Drinking milk is sold in two formats: 'generic' milk (also known as home brand, store brand or private label) and 'branded milk'. Drinking milk consumption has been steadily shifting from regular wholemilk to modified milk with reduced/low fat content. The sale of drinking milk through the supermarket channel has also been increasing in recent years. The volume of all milk sold by supermarkets under their own private label has increased from around 25% in 1990-00 to 50% in 2009-10.<sup>13</sup>

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<sup>10</sup> Dairy Australia, *Dairy 2010 Situation and Outlook*, May 2010, page 38

<sup>11</sup> Dairy Australia, *Australian Dairy Industry in Focus 2010*, page 21

<sup>12</sup> Dairy Australia, *Australian Dairy Industry in Focus 2010*, page 24

<sup>13</sup> Dairy Australia, *Australian Dairy Industry in Focus 2010*, page 26

### 3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC 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.

#### Applicant's supporting submission

- 3.2. Broadly, the ADF submits that:
- The current authorisation has been operating successfully for almost five years with no adverse reaction from the public, dairy processors or dairy farmers. Further, the conditions of authorisation have given some key industry stakeholders confidence in the process and have assisted in changing the culture of the milk supply process.
  - Dairy farmers are at a significant disadvantage relative to dairy processors as they often have little choice of processor which leaves farmers with virtually no bargaining power and making them the ultimate price takers.
  - Collective bargaining facilitates an improved understanding between dairy farmers and dairy processors, fostering a change in the culture of the milk supply process.
  - Collective negotiations offer farmers new marketing opportunities and increases competition between processors for the acquisition of raw milk.
  - There are significant transaction cost savings (fewer meetings, financial and legal costs) for both dairy farmers and dairy processors from collective bargaining. Dairy processors no longer have to negotiate with a number of individual dairy farmers and dairy farmers negotiations are made easier and more efficient through the potential use of a member of the collective bargaining group or a third party.

#### Interested party submissions

- 3.3. The ACCC sought submissions from interested parties potentially affected by the application, including dairy farmers, collective bargaining groups, dairy processors, industry bodies and government departments. A summary of the public submissions received from interested parties follows:

##### *Processors*

- **Belgian Chocolate Mousse Company:** notes that it is cheaper for his business to buy cream from Woolworths at the retail price than it is to buy it from National Foods at the wholesale price.
- **Murray Goulburn Co-Operative Co. Limited (Murray Goulburn):** supports the re-authorisation and is generally supportive of structures or arrangements that serve to protect dairy farmers' interests and assist them to realise better prices for their milk. In Murray Goulburn's experience most

dairy farmers in the south east NSW region have multiple processors with facilities located within a distance of their farms within which milk is routinely collected. Murray Goulburn considers that the collective bargaining function performed by the ADF is only likely to be of some benefit for farmers located in areas where a co-operative does not operate.

- **National Foods:** submits that the collective bargaining process provides time savings through the ability to reach a consistent contract with members of a collective bargaining group. National Foods notes that some collective bargaining groups, particularly those which have strong farmer leadership and knowledge of the marketplace, operate more effectively than others. National Foods submits that the current conditions of authorisation are operating effectively and are well understood by the industry. In particular, National Foods considers the voluntary nature of the process, the limitations on the structure of the bargaining groups and the restrictions on information sharing to be key conditions of authorisation. National Foods considers that farmers do not necessarily need third party negotiators and that there is a risk that their presence may complicate the process and compromise the spirit of negotiations.

#### *Retailers*

- **Coles Supermarkets Australia Limited (Coles):** considers that increased transparency in farm gate pricing as well as extended opportunities for collective bargaining by dairy farmers should be facilitated to assist dairy farmers in achieving fair return and reasonable contractual terms in supply agreements with milk processors. Coles submits that it separately sets its purchase price for milk with milk processors and independently determines its price offering for milk to consumers in stores based on competition in the grocery market.

#### *Collective bargaining groups*

- **Progressive Dairies Collective Bargaining Group (Progressive Dairies):** supports the re-authorisation and notes that collective bargaining can be just as beneficial to the processor as it is to the farmer. Progressive dairies argues that while collective bargaining has been a valuable tool, in recent times voluntary collective bargaining has not been effective. Progressive Dairies submits that National Foods has recently forsaken its previous commitment to the collective bargaining process. Progressive Dairies submits that collective bargaining needs real teeth and should have recourse to arbitration.

#### *Farmer organisations*

- **Dairy Australia:** considers that the collective bargaining arrangements have worked effectively over the past five years in promoting understanding between the dairy farmers and processors. Dairy Australia is unaware of any adverse reaction from dairy farmers or dairy processors to the operation of the current authorisation
- **Queensland Dairyfarmers' Organisation Limited (Queensland Dairyfarmers):** fully supports the re-authorisation and notes that collective bargaining allows dairy farmers to discuss and negotiate outcomes with the

processor they supply which has provided dairy farmers with a more balanced 'market power' environment. Queensland Dairyfarmers submits that there are examples of collective bargaining groups who have used collective bargaining to negotiate on issues of price, improved systems to reduce costs and to better understand each other's business needs (including supply arrangements, transport, seasonal incentives, risk management). Queensland Dairyfarmers considers that with the consolidation of the processing sector the regional limitations on collective bargaining groups should be reviewed to ensure that there is a reasonable balance for farmer groups.

- **WA Farmers Federation (WAFF):** submits that since deregulation dairy farmers in WA have struggled through droughts, a processor collapse and now predatory pricing tactics on the part of the major Australian retailers. The WAFF supports the collective bargaining arrangements and submits that the ADF has helped many farmers to reach more favourable agreements with processors.
- **NSW Farmers Association (NSWFA):** submits that collective bargaining groups help to address the imbalance of market power associated with the monopsonistic market structure. Further, the NSWFA submits that:
  - Decisions by retailers to sell generic branded milk at (or very close to) cost is expected to have flow through effects back to the farm gate. It is important that farmers have the ability to influence farm gate prices to reflect the real cost of production so that processors, retailers and consumers pay accurate prices for the product and efficiencies are driven through the supply chain.
  - Collective bargaining groups operating in NSW have minimal resources and skills base. The NSWFA seeks clarification on the effect of current Condition 1 because it may have the unintended effect of preventing a collective bargaining group from engaging any third party such as industry associations to provide support services (negotiation training and/or administrative support).
  - Assistance in commercial negotiation is becoming increasingly important for dairy farmers due to the consolidation of the industry (e.g. the acquisition of Dairy Farmers by National Foods).
  - There is an obligation on collective bargaining groups to provide information about their membership to processors. The NSWFA submits that there is nothing that prevents a processor using that information for purposes other than collective bargaining. The NSWFA submits that tighter restrictions should be placed on processors when given information that is intended for purposes related to collective bargaining.

#### *Government departments*

- **Department of Employment, Economic Development and Innovation QLD:** supports collective bargaining as a means of countering the obvious imbalance of market power that exists in the dairy industry. Further, the Department submits that:

- the majority of dairy producers are essentially ‘captive’ to a single processor or, at the most, have a choice between supplying two processors due to both geographic factors and historic supply patterns
- this situation has been compounded by the on-going consolidation of the processing sector and the consequent rationalisation of processing facilities
- if the collective bargaining arrangements were to break down there may be pressure for a return to a more regulated milk supply market.
- **Department of Primary Industries NSW:** submits that collective bargaining groups are still uncommon in the dairy industry and no foreseeable detrimental effects can be identified for either competition or regional economies. The Department of Primary Industries submits that collective negotiations provides some degree of equity for dairy farmers; however the fact remains that the dairy farmers will continue to be price takers and will be at a negotiating disadvantage. The Department of Primary Industries submits that anecdotal advice on the experience with collective bargaining during the term of the authorisation has indicated that the farmers involved have benefited with a marginal price advantage in their contracts in comparison to other district dairy farmers.

3.4. The views of the ADF and interested parties are outlined in the ACCC’s evaluation of the 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 conduct is in accordance with the tests 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.
  - sections 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 tests for authorisation and 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 re-authorisation is sought is to consider the relevant areas of competition affected by that conduct.
- 4.5. Identifying the relevant areas of competition assists in assessing the public benefit and public detriment arising from any lessening of competition from the conduct. Depending on the circumstances, the ACCC may not need to comprehensively

define the relevant areas of competition, as it may be apparent that a net public benefit will or will not arise regardless of the definition.

4.6. In the most recent ADF determination, the ACCC considered the areas of competition relevant to assessing the ADF collective bargaining arrangements were the:

- farmgate supply of raw milk to processors over regional areas (with some overlap in these areas acknowledged) and
- wholesale and retail supply of drinking milk and manufactured dairy products.

4.7. The ACCC considers these areas are still relevant, as discussed further below.

*Raw milk – farmgate supply to dairy processors*

4.8. The ADF collective bargaining arrangements relate to the supply of raw milk by dairy farmers to dairy processors.

4.9. There are approximately 7 500 dairy farms in Australia with raw milk production for 2010/11 expected to be more than 9 billion litres. Table 4.1 sets out the major Australian dairy processors (by volume of milk supplied).

**Table 4.1 Major dairy processors<sup>14</sup>**

Dairy processor	Milk volume direct supply 2009/10 (billion litres)
Murray Goulburn	2.9
Fonterra	1.8
National Foods	1.7
Warnambool Cheese & Butter Factory	0.8
Parmalat	0.6
Tatura	0.3
United Dairy Power	0.2

4.10. There are a number of factors which limit how and where dairy farmers can supply their raw milk, particularly:

- raw milk must be processed by a dairy company before it can be sold
- milk is a perishable product and must be collected from the farmgate within two days of production and
- farms have limited storage capacity and transportation costs to processing plants can be high.

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<sup>14</sup> Dairy Australia, *Dairy 2010 Situation and Outlook*, May 2010, p.38

- 4.11. While improvements in technology and more cost effective transport have meant that raw milk can be transported longer distances than previously, farmers are still generally restricted to selling raw milk to a processor located within their region. The ACCC has previously considered regional areas are generally defined by the distances between dairy processors' plants and the dairy farms that supply them, usually within a radius of less than 400 kilometres. The ACCC understands that processors may incur substantially higher costs if they were to acquire and transport large quantities of raw milk from farmers more than 400 kilometres from their processing plants.<sup>15</sup> In some cases farmers may only be able to supply their milk to a single processor.
- 4.12. Consistent with previous decisions, the ACCC considers the relevant geographic areas are:
- Victoria and southern New South Wales
  - central New South Wales
  - northern New South Wales and south-east Queensland
  - north Queensland
  - South Australia (including parts of western Victoria)
  - Tasmania and
  - Western Australia.<sup>16</sup>
- 4.13. There may be a degree of overlap between some of these areas. Also, given limitations on the ability to transport raw milk over significant distances, within these broader areas, competition is likely to be more intense within particular regional areas.
- 4.14. The existence of regional areas for the supply of raw milk is further evidenced by variations in farmgate prices and supply arrangements. The ADF submits that higher prices are generally paid to farmers in the northern dairy regions where there are higher costs to ensuring year-round supply of fresh drinking milk. In the southern regions farmers tend to receive a blended price which incorporates returns from both market and manufacturing milk.
- 4.15. There are no legislative controls over the price dairy processors pay farmers for their milk. Contracts are often negotiated annually, although, particularly those negotiated with cooperatives or collective bargaining groups, can range up to two to three years in duration. Contracts generally set a fixed price, or range of prices, farmers will receive for their raw milk, subject to quality and technical specifications such as butter fat and protein levels. Some contracts provide for farmgate prices to be

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<sup>15</sup> Dairy Australia, *Dairy 2010 Situation and Outlook*, May 2010, p.38

<sup>16</sup> See ACCC Statement of Issues, Murray Goulburn Co-operative Co. Limited proposed acquisition of Warrnambool Cheese and Butter Factory Company Holdings Ltd, 22 April 2010

increased during the term of the agreement in line with movements in market prices.<sup>17</sup>

- 4.16. The ADF submits there are a range of factors that contribute to the farmgate price:

*...Farmgate prices vary between processors and can also vary between individual farmers marginally as farms operate a range of incentive/penalty payments related to milk quality, productivity and out-of-season supplies. There are also volume incentives in place to encourage milk supply to particular processing plants to improve efficiencies.*

- 4.17. The ACCC also notes that farmgate prices, particularly in regions that are highly geared towards producing manufactured goods for export, such as Victoria and Tasmania, are closely aligned to returns from exported products.<sup>18</sup> These regions account for the majority of Australia's dairy output.
- 4.18. In summary, for the purposes of assessing the application for re-authorisation the ACCC proposes to consider the effect of the collective bargaining arrangements on the supply of raw milk by dairy farmers to processors according to the broad geographic boundaries identified at paragraph 4.12.

#### *Downstream supply of drinking milk and dairy products*

- 4.19. Collective bargaining by dairy farmers may also impact the downstream supply of drinking milk and manufactured dairy products.
- 4.20. The ACCC has previously<sup>19</sup> noted that price changes resulting from collective bargaining arrangements may flow into the domestic retail supply of drinking milk and the domestic and export supply of manufactured dairy products. The extent of any price change will depend on the degree of downstream competition which exists.

### **The counterfactual**

- 4.21. 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 arrangements for which authorisation has been sought.<sup>20</sup> 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'.
- 4.22. The ACCC has considered numerous applications for authorisation where small primary producers collectively bargain with the processors to whom they supply. In

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<sup>17</sup> ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, page 231.

<sup>18</sup> Dairy Australia, *Dairy 2010 Situation and Outlook*, May 2010, page 8

<sup>19</sup> See ACCC Determination A90966, *Australian Dairy Farmers Limited*, 26 April 2006, page 32

<sup>20</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*.

these matters the ACCC has generally found that the most common situation in the absence of an authorisation to collectively bargain, or some form of industry regulation, is one where the primary producers deal individually with the processor they supply.

- 4.23. Dairy processors are generally large, well resourced businesses with significant commercial and negotiating expertise. In contrast, dairy farmers tend to be smaller producers with limited expertise and resources to engage in effective negotiation with dairy processors. Consistent with previous decisions, the ACCC considers that in a situation where dairy farmers are required to negotiate contracts with processors individually, the consequence of such an imbalance in bargaining positions would generally be the offering of ‘take it or leave it’ contracts by dairy processors with little input from the dairy farmers, or scope for them to vary the terms and conditions of such contracts.

## **Public benefit**

- 4.24. 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>21</sup>

- 4.25. Generally, competition can be relied upon to deliver the most efficient market arrangements. In circumstances where there are market failures (for example, high transactions and bargaining costs<sup>22</sup>, market power or information asymmetries<sup>23</sup>), regulation and/or restrictions on competition (such as collective bargaining arrangements) may be required to deliver efficient outcomes.
- 4.26. The Act recognises that, in certain circumstances, arrangements which restrict competition can deliver public benefits where they address a potential market failure and therefore improve economic efficiency.
- 4.27. Broadly, the ADF submits the collective bargaining arrangements will deliver public benefits, including:
- an improved understanding by both sides of the business environment (and therefore greater input into contracts)
  - significant transaction cost savings (fewer meetings, lower total financial and legal costs) for both dairy farmers and processors
  - new marketing opportunities and increased competition between processors for the acquisition of raw milk.

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<sup>21</sup> Re Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

<sup>22</sup> Bargaining costs are part of the transactions costs of contracting. If transactions costs are high, markets may not work efficiently.

<sup>23</sup> This refers to a situation where one party has more or better information than another in a transaction. This imbalance can lead to a situation where the party who knows less accepts or offers different terms than they otherwise would, leading to inefficient outcomes.

## **Greater input into contracts (increased bargaining power)**

- 4.28. Prices that are determined by the interactions of a large number of buyers and sellers acting independently (and unable to individually influence market outcomes) will promote efficiency and social welfare.
- 4.29. In the absence of collective bargaining arrangements, prices in the dairy industry will be determined through interactions between a small number of large buyers (dairy processors) and a large number of small sellers (dairy farmers). This could give rise to an imbalance in bargaining power between processors and individual dairy farmers. This may mean that individual dairy farmers would accept less favourable terms and conditions than they otherwise would be prepared to.
- 4.30. Submissions received by the ACCC have highlighted dairy farmers' reliance on local dairy processors and interested party concerns about a potential imbalance in bargaining power between individual farmers and some regional dairy processors:
- The Department of Employment, Economic Development and Innovation QLD notes that the majority of producers are essentially 'captive' to a single processor or, at the most, have a choice between supplying two processors due to both geographic factors and historic supply patterns. This situation has been compounded in recent years by the on-going consolidation of the processing sector and the consequent rationalisation of processing facilities.
  - Progressive Dairies submits that long term contracts which were forced onto suppliers a few years ago have distorted the ability of the dairy farmer to move to another processor.
  - The ADF notes that dairy farmers are at a significant disadvantage in contract negotiations as they often have little choice of processor which leaves them with virtually no bargaining power and makes them the ultimate price takers.
- 4.31. In contrast, Murray Goulburn states that in its experience most dairy farmers in its region have a choice of multiple processors with facilities located within a distance of their farms where milk can be collected on a routine basis. The ACCC notes there are instances where dairy farmers are able to supply multiple processors depending on their location, but that dairy farmers choice of processor is generally restricted by geographic and economic delivery boundaries.
- 4.32. The ACCC considers that participation in a collective bargaining group can result in benefits to the public by facilitating improvements in the level of input farmers have in contractual negotiations. Collectively, farmers may be able to negotiate more favourable outcomes compared to a situation where they negotiate individually and/or sign standard form contracts.
- 4.33. The enhanced level of input into the negotiation process results from:
- the relatively greater bargaining power of the collective (achieved through the aggregation of their influence in the negotiation)
  - improving the individual farmer's access to information and resources
  - providing a mechanism through which productive contractual discussions between farmers and the processor can take place.

- 4.34. There is some evidence that the collective bargaining arrangements have enabled dairy farmers to have greater input into contract negotiations and thus achieve more favourable outcomes than they might otherwise have been able to. For example, Queensland Dairyfarmers submit that some collective bargaining groups have used the arrangements to develop their working relationship with the processor and implement cost-reducing systems.

### **Transaction cost savings**

- 4.35. There are transactions costs associated with contract negotiations between dairy farmers and processors. For example, there are costs associated with drafting, negotiating, and safeguarding (enforcing) a contractual agreement for the ongoing supply of raw milk.
- 4.36. If transaction costs are high this can reduce the incentives to enter into an agreement, or increase the incentive to offer ‘take it or leave it’ contracts. Both situations result in markets that deliver inefficient outcomes. Actions which reduce transaction costs can increase trade opportunities and improve economic efficiency.
- 4.37. The ADF submits that collective bargaining provides significant transaction cost savings (fewer meetings, capacity to share legal costs) for both dairy farmers and processors. National Foods, agrees that collective bargaining can provide time savings through the ability to reach a negotiated contract with all members of a bargaining group through the one process.
- 4.38. As noted in the counterfactual, the ACCC accepts that absent the authorisation, dairy farmers would be required to negotiate with dairy processors individually. Individual dairy farmers and processors would be responsible for the costs associated with each negotiation, including obtaining professional/legal advice and other administration fees. Where contracts are collectively negotiated this is likely to result in fewer negotiations with consequently lower total negotiation costs for both parties. These lower costs could be shared amongst the bargaining group generating savings for individual members of the group compared with the costs that would be incurred if the individual acted alone.
- 4.39. The ACCC considers that the collective bargaining arrangements deliver a public benefit by providing opportunities for transactions cost savings for both parties and thus the potential for more efficient outcomes.

### **Information asymmetry**

- 4.40. Competitive, efficient markets are generally based on the assumption that buyers and sellers are well informed about market conditions. In situations where a buyer or seller has incomplete information (i.e. an information asymmetry<sup>24</sup>) the party who is not well informed may accept less or offer different terms (or prices) than they would if more information was available to them. As a result, market outcomes may not promote efficiency and welfare. Information asymmetries can often be addressed by improving the transparency of market information.

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<sup>24</sup> Some information may be private in nature (e.g. how much a purchaser is willing to bid at auction) or may only be available to those participants with sufficient financial resources to obtain it (e.g. legal advice or complex cost/benefit analysis provided by expert advisors).

- 4.41. The ACCC considers that dairy processors generally have more information available to them than individual dairy farmers about market conditions such as total volumes and quality of raw milk available; and the price and market conditions for both raw and processed milk.
- 4.42. The ADF submits that the collective bargaining arrangements have meant that both parties are better informed about the business environment with significantly reduced scope for misunderstandings and increased chances of successful and satisfactory negotiations.
- 4.43. A number of submissions identified the arrangements as improving the availability of market information for bargaining group participants. For example, Queensland Dairyfarmers submits that the arrangements have been used to develop a better understanding of each others business needs which includes details on supply arrangements, transport, seasonal incentives and risk management.
- 4.44. The ACCC considers that collective bargaining improves the quality of information available to dairy farmers during negotiations (by sharing business experience and market information) and thus helps to address information asymmetries. This may result in more efficient outcomes for dairy farmers, processors and the public. The ACCC considers this is a public benefit.

### **New marketing opportunities**

- 4.45. The ADF submits that the collective bargaining arrangements allow dairy farmers to take advantage of new marketing opportunities which will increase competition between dairy processors for the acquisition of raw milk. In particular:
- ...This is possible due to the capacity for dairy farmers in a collective bargaining group to aggregate their milk supply which allows them to explore new market opportunities outside their traditional market areas or processors.*
- 4.46. The ACCC accepts that aggregating milk supply may allow dairy farmers to explore new market opportunities that would not be available to farmers acting individually. To the extent that the collective bargaining arrangements continue to provide new supply opportunities for dairy farmers and place competitive pressure on existing processors, such outcomes would be likely to constitute a public benefit by promoting dynamic efficiency.

### **Public detriment**

- 4.47. 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>25</sup>*
- 4.48. 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. Detriment may arise where collective bargaining

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<sup>25</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

arrangements result in an increased price to consumers or less choice or lower quality of products for consumers.

- 4.49. Generally, the ACCC considers that collective bargaining arrangements have the potential to result in reduced economic efficiencies through coordinated rather than competitive actions by individuals in a group.

### **Reduced economic efficiencies**

- 4.50. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. This is often referred to as allocative efficiency. Agreements between competitors to collectively negotiate terms and conditions can interfere with these price signals and accordingly lead to allocative inefficiencies and public detriment. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 4.51. Previously, the ACCC imposed conditions of authorisation (see paragraph 1.15) to mitigate the potential for the collective bargaining arrangements in the dairy industry to result in public detriment.
- 4.52. The ACCC has identified that the capacity for collective bargaining arrangements to result in inefficiencies and public detriment is likely to be limited where the following features are present:
- the current level of negotiations between individual members of the group and the proposed counterparties is low
  - there are restrictions on the coverage, composition and representation of the bargaining group
  - participation in the collective bargaining arrangement is voluntary and
  - there is no secondary boycott activity.

#### *Current level of negotiations*

- 4.53. The ACCC considers that the anti-competitive effect of collective bargaining is likely to be limited where the level of individual negotiations between members of the bargaining group and the counterparty is low.
- 4.54. In the absence of any collective negotiation, the ACCC considers that many dairy farmers are unlikely to engage in individual negotiations with dairy processors. Rather, individual dairy farmers are likely to be offered standard form contracts where they have limited ability to negotiate the terms and conditions.

#### *Coverage, composition and representation of bargaining groups*

- 4.55. The ACCC considers that where the size, composition and representation 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.

- 4.56. In general, the ACCC considers that limiting bargaining groups (for example by geography, or by counterparty) allows negotiations to better take into account the specific demand or supply characteristics of particular businesses. This significantly reduces 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.
- 4.57. Under the current authorisation bargaining groups can only be formed by dairy farmers who have a ‘shared community interest’. This limitation on the scope of the bargaining groups was imposed as a condition (Condition 2) of authorisation which provides that:
- Dairy farmers will have a shared community interest where they each have a reasonable expectation of supplying the same plant of a dairy processor and are within the economic delivery zone of that plant and demonstrate one of the following:*
- a. they have similar supply patterns; or*
  - b. they supply a specialty raw milk product.*
- 4.58. Further, to facilitate collective bargaining and ensure transparency of group composition, the ACCC also imposed Condition 7 (see paragraph 1.15) which requires new groups to register specific details with the ADF within 14 days of their formation.
- 4.59. The ADF has sought to continue the current limitation on the coverage and composition of bargaining groups and transparency requirements as part of the re-authorised conduct. The ADF submits that allowing groups with a ‘shared community interest’ to form has enabled dairy farmers with similar production systems, philosophies and outlooks to create an environment of working together, and with a processor, to achieve a mutually beneficial outcome.
- 4.60. The current condition around the formation of bargaining groups is also supported by National Foods which submits that the shared community interest allows for a focus on local conditions. The NSWFA considers that due to the geographical location of farmers and their own business interests, the suggestion that all farmers would or even could unite to seek a common contract or price with their respective processors is unfounded.
- 4.61. Queensland Dairyfarmers submits that with the consolidation of the processing sector, the regional limitations on collective bargaining groups should be reviewed to ensure that there is a reasonable balance for farmer groups.
- 4.62. The ACCC understands that the current basis for forming bargaining groups is well understood and supported by the industry. The ACCC considers that restricting the coverage and composition of the bargaining groups according to the ‘shared community interest’ criteria prevents a single, industry-wide bargaining group forming or a small number of large groups forming which may be detrimental to efficiency. Importantly, it also allows for contracts between dairy farmers and dairy processors to be tailored to suit the conditions of the local area which may provide efficiencies, and provides for a level of ongoing competition between dairy farmer

groups. As such, and as requested by the ADF, the ACCC proposes to maintain Conditions 2 and 7 as conditions of authorisation.

- 4.63. To further ensure that national or state wide bargaining groups did not form under the previous authorisations, the ACCC and the Tribunal, imposed conditions to maintain existing competition between dairy farmers through limiting the representation of groups and information sharing across groups (the inter-group level). These conditions are intended to reduce the potential for anti-competitive coordinated conduct between the groups. Specifically, Conditions 1 and 6 respectively provide:

*Collective bargaining groups may be represented by a member (or members) of the collective bargaining group or by (one or more) third parties. However, a collective bargaining group must not be represented by the ADF or by a third party who represents or has represented another collective bargaining group in the previous 2 years.*

*Members or third party representatives of a collective bargaining group may not disclose, other than to members or third party representatives of the same group, information which was obtained by them in the course of collective negotiations with a dairy processing company and which the dairy processing company has advised them is confidential.*

- 4.64. The ACCC notes that the NSWFA has raised concerns that Condition 1 might have the unintended effect of preventing collective bargaining groups from obtaining legal or other professional advice and assistance. The NSWFA submits that the ability of third parties such as industry associations to provide support services (negotiation training and/or administrative support) to collective bargaining groups could improve the functioning of these groups and provide greater benefits to the supply chain. As a consequence the NSWFA have sought clarification of Condition 1.
- 4.65. Condition 1 does not prevent relevant industry associations from providing general advice, training and assistance to dairy farmer members. Indeed, as noted by the ACCC, industry associations and third party experts can add significant value to a collective negotiation process, for example by improving the negotiation skills of dairy farmers or by providing a high level of administrative or secretariat support to the group.<sup>26</sup>
- 4.66. Further, as noted, the ACCC also considers that the ability for collective bargaining groups to share the costs of obtaining legal or other professional advice is an important way for farmers to achieve better input into contract terms and conditions and achieve greater efficiencies. The condition does not prevent collective bargaining groups from obtaining legal or other professional advice. Professionals such as legal advisors are subject to their own professional obligations (including the obligation to maintain client confidentiality) which limit the sharing of confidential information.
- 4.67. The NSWFA proposed an amendment to Condition 1 to state that ‘a collective bargaining group must not be represented by the ADF or by a national and/or state-

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<sup>26</sup> See ACCC Determination A90966, Australian Dairy Farmers Limited, 26 April 2006, paragraph 11.16

wide dairy or farm group, such as associations, who represents or has represented another collective bargaining group in the previous 2 years’.

- 4.68. In light of the clarification requested by the NSWFA, the ACCC proposes to amend Condition 1 as follows (amendments in tracked changes):

*Collective bargaining groups may be represented in negotiations with a processor by a member (or members) of the collective bargaining group or by (one or more) third parties. However, a collective bargaining group must not be represented in negotiations with a processor by ~~the ADF~~ or by a third party who represents or has represented another collective bargaining group in negotiations with a processor in the previous 2 years*

- 4.69. This restriction applies specifically to bargaining agents that ‘represent’ a bargaining group in negotiations with a processor. It does not prevent third parties or individual industry associations from providing legal advice, general advice, training or assistance to a collective bargaining group.
- 4.70. The ACCC seeks views from interested parties on whether the proposed amendments to Condition 1 (as set out at paragraph 4.68) satisfy the concerns raised.
- 4.71. In relation to information sharing between groups, the ACCC notes that it does not have any evidence to suggest that this has occurred. However, National Foods considers that Condition 6 is important as it makes clear to farmers that information sharing is prohibited and confidentiality is important. The ADF advises that farmers take the requirements to maintain confidentiality between groups seriously.
- 4.72. Subject to the proposed clarification as identified above, the ACCC proposes to maintain Conditions 1 and 6 as requested by the ADF.

*Participation in the collective bargaining groups is voluntary*

- 4.73. Collective bargaining is voluntary where members of the collective bargaining group and counterparties are free to choose not to participate in the collective negotiations if they prefer to negotiate individually. This provides an element of ongoing competition and as such lessens the potential anti-competitive impact of the arrangements. Where participation is voluntary, those businesses who consider they can negotiate a more commercially attractive arrangement individually are able to do so. Consequently incentives for businesses to compete on price, to innovate, or to improve the quality of goods or services are not reduced to the extent that they might otherwise be.
- 4.74. Importantly in this respect, the grant of authorisation does not compel any party to participate in the collective bargaining process.
- 4.75. The ACCC notes that voluntary participation in the collective bargaining arrangements for both farmers and processors are conditions (Conditions 3 and 4 respectively) of the current authorisation. In particular:

*Dairy processing companies are able to choose whether or not to negotiate with collective bargaining groups. Dairy processing companies are able to negotiate with one, or some, of the dairy farmers within a particular group based on their own commercial requirements.*

*Dairy farmer participation in collective bargaining groups is voluntary. Dairy farmers retain the right to negotiate and enter into individual contracts. Dairy farmers can leave collective groups on giving written notice to the group.*

- 4.76. The ADF has sought to continue with the voluntary nature of the collective bargaining arrangements for both dairy farmers and dairy processors. National Foods considers it important that participation in the collective bargaining arrangements remain voluntary.
- 4.77. On the other hand, Progressive Dairies considers that collective bargaining is severely limited by the voluntary nature of the process.
- 4.78. The ACCC considers that the voluntary nature of collective bargaining arrangements for both sides of the negotiations is an important feature which limits the potential for public detriment through coordinated behaviour. The ACCC notes that collectively negotiated contracts will be entered into where both the dairy farmers and processor consider it to be in their best commercial interest to do so.

*Absence of boycott activity*

- 4.79. An extension of the voluntary participation in collective bargaining process is the absence of collective boycott activity.
- 4.80. Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because a party, faced with the threat of withdrawal of supply/acquisition, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
- 4.81. In 2006, the Tribunal (in denying authorisation for collective boycott activity in the chicken meat industry) expressed concern that collective boycotts have the potential to inflict significant damage upon the target of the boycott, its employees, consumers and, also, the boycotters themselves. The Tribunal said that: the threat of a boycott – even without it ultimately being engaged in – is likely to come at a high cost to society.<sup>27</sup>
- 4.82. The ADF has not sought authorisation to engage in collective boycott activity. As such, any collective boycott activity would not be protected from legal action under the Act.
- 4.83. To further reinforce the voluntary nature of the arrangements for all parties the ADF has sought to continue with Condition 5 of the current authorisation which states that:

*Collective bargaining groups, individual dairy farmers or dairy farmer representatives, may not attempt to prevent or restrict other farmers from supplying particular dairy processing companies.*

- 4.84. The ACCC proposes to maintain Condition 5 as requested by the ADF.

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<sup>27</sup> Re VFF Chicken Meat Growers Boycott Authorisation [2006] ACompT 2 (21 April 2006).

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

- 4.85. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the collective bargaining arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.86. For the reasons outlined in this chapter, the ACCC considers that the collective bargaining arrangements are likely to result in public benefits by providing dairy farmers with greater opportunity to have effective input into the terms and conditions of their supply contracts. This improved input provides a mechanism through which farmers may be able to negotiate more efficient outcomes compared to a situation where they negotiate individually and/or sign standard form contracts. As a result, dairy farmers may achieve greater efficiencies in their business, for example, by addressing common contractual problems in a more streamlined and effective manner. Further, collective negotiations have the potential to reduce information asymmetries that exist between dairy farmers and processors, which also enhance the potential for efficient outcomes to be achieved.
- 4.87. The ACCC is satisfied that the public benefits that have resulted from the collective bargaining arrangements during the term of the authorisation are likely to continue.
- 4.88. The ACCC notes that the previous conditions of authorisation were imposed to mitigate any potential anti-competitive detriment that may arise from coordinated rather than competitive conduct by dairy farmers. In particular, the current conditions of authorisation: restrict membership of collective bargaining groups to dairy farmers with a 'shared community interest'; prohibit collective bargaining groups from being represented by a party that has represented another group within 2 years; require that participation in the collective bargaining arrangements be voluntary; and prohibit the sharing of confidential information between collective bargaining groups.
- 4.89. The ADF submits that the conditions of authorisation have given some key industry stakeholders confidence in the process and have assisted in changing the culture of the milk supply process. The ACCC proposes to grant authorisation to the seven conditions of authorisation as set out at paragraph 5.7.
- 4.90. The ACCC considers that there is likely to be minimal public detriment as a result of the collective bargaining arrangements. It is unlikely that the collective bargaining arrangements will allow dairy farmers to raise prices for raw milk above efficient levels. Participation in the collective bargaining arrangements is voluntary for both dairy farmers and dairy processors and collective arrangements will only be reached where all parties consider it to be in their commercial interest.
- 4.91. Subject to the proposed conditions, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment, including the detriment from any lessening of competition that would result. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7) and 90(5A) and 90(5B) are met.

## Length of authorisation

- 4.92. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>28</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.
- 4.93. The ADF seeks re-authorisation for a further five years. The ADF notes that a period of five years will save all parties time and money through a reduced administrative and compliance burden. Further, the ADF notes that a five year period creates a secure and stable business environment for the industry.
- 4.94. No interested party submissions were received regarding the period of authorisation.
- 4.95. The ACCC proposes to grant authorisation for 10 years. In considering the term of authorisation, the ACCC notes that the collective bargaining arrangements have been authorised since 2002 and are well understood by dairy farmers and processors. The ACCC has had the opportunity to consider the collective bargaining arrangements on two previous occasions (in 2002 and 2006) and is satisfied that the public benefits from the conduct are likely to continue to outweigh the detriments for an extended period. The ACCC considers that granting authorisation for 10 years will provide the industry with greater certainty over the collective bargaining arrangements for a longer term.
- 4.96. The ACCC notes that the collective bargaining arrangements are voluntary and that both dairy farmers and dairy processors are able to withdraw from collective negotiations at any time.
- 4.97. In the event that the ADF wishes to amend the collective bargaining arrangements during the proposed period of authorisation, it is open to the ADF to utilise the minor variation (if appropriate) or the revocation and substitution processes.
- 4.98. 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>29</sup>

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<sup>28</sup> Section 91(1).

<sup>29</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.

## 5. Draft determination

### The application

- 5.1. On 8 March 2011, the ADF lodged an application for the revocation of authorisation A90966 and the substitution of authorisation A91263 for the one revoked.
- 5.2. Application A91263 was made under section 91C(1) of the Act. Relevantly, the initial authorisation was made under subsection 88(1).
- 5.3. In particular, the Australian Dairy Farmers Ltd (ADF) seeks re-authorisation to allow dairy farmers to collectively bargain the terms and conditions of their supply contacts with milk processors. The ADF seeks authorisation to continue the seven conditions of authorisation as imposed by the ACCC in its previous decision.
- 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 the 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 arrangements. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met.
- 5.6. The ACCC therefore **proposes to revoke** authorisation A90966 **and grant** authorisation A91263 in substitution.

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

- 5.7. The ACCC proposes to grant authorisation under section 91C(4) of the Act to allow dairy farmers to collectively bargain the terms and conditions of their supply contacts with milk processors. Further, the ACCC proposes to grant authorisation subject to the following conditions:

#### **Condition 1 (amended)**

Collective bargaining groups may be represented in negotiations with a processor by a member (or members) of the collective bargaining group or by (one or more) third parties. However, a collective bargaining group must not be represented in negotiations with a processor by a third party who represents or has represented another collective bargaining group in negotiations with a processor in the previous 2 years.

#### **Condition 2**

Collective bargaining groups can only be formed by dairy farmers who have a 'shared community interest'.

Dairy farmers will have a shared community interest where they each have a reasonable expectation of supplying the same plant of a dairy processor and are

within the economic delivery zone of that plant and demonstrate one of the following:

- a. they have similar supply patterns; or
- b. they supply a specialty raw milk product.

Condition 7 requires groups to provide the ADF and the affected processor(s) with details of how this condition is satisfied.

### **Condition 3**

Dairy processing companies are able to choose whether or not to negotiate with collective bargaining groups. Dairy processing companies are able to negotiate with one, or some, of the dairy farmers within a particular group based on their own commercial requirements.

### **Condition 4**

Dairy farmer participation in collective bargaining groups is voluntary. Dairy farmers retain the right to negotiate and enter into individual contracts. Dairy farmers can leave collective groups on giving written notice to the group.

### **Condition 5**

Collective bargaining groups, individual dairy farmers or dairy farmer representatives, may not attempt to prevent or restrict other farmers from supplying particular dairy processing companies.

### **Condition 6**

Members or third party representatives of a collective bargaining group may not disclose, other than to members or third party representatives of the same group, information which was obtained by them in the course of collective negotiations with a dairy processing company and which the dairy processing company has advised them is confidential.

### **Condition 7**

7.1 Any new collective bargaining group must, within 14 days of it first forming, provide the following information to the ADF:

- i. the names of the dairy farmers and the names and locations of the farms comprising that group
- ii. the name and contact details of the party(s) nominated by the group to represent the group in collective negotiations
- iii. with respect to each dairy processing company that the group intends to negotiate with, the name of the dairy processing company and the location of its relevant plant(s)
- iv. with respect to each dairy processing company that the group intends to negotiate with, details of how each member of the group satisfies Condition 2. This could include information as to group members'

histories of supplying the processor and, where group members have not previously supplied the processor, information regarding the distance between those members' farms and the relevant plant(s) of the dairy processor.

- 7.2 The collective bargaining group must, within 14 days of it first forming provide the details required by 7.1(i) to (iv) above to the processor(s) with whom they seek to negotiate. The collective bargaining group is not required to provide information which pertains to dealings between the collective bargaining group and another processor.
- 7.3 The collective bargaining group must advise the ADF of changes to the composition of the group or to the party(s) representing the group within 14 days of such change(s) being made.
- 7.4 The collective bargaining group is required to advise a processor of any changes to the composition of the group or to the party(s) representing the group within 14 days of such change(s) being made. The collective bargaining group is not required to notify a processor of changes which pertain to dealings between the collective bargaining group and another processor.
- 7.5 The ADF must keep an up-to-date register which includes this information and must, on request by a party demonstrating an appropriate interest, provide access to the register free of charge during normal business hours. Parties demonstrating an appropriate interest include processor(s) with whom the collective bargain group seeks to negotiate, the ACCC and the Australian Competition Tribunal.
- 5.8. The ACCC proposes to grant authorisation for 10 years.
- 5.9. The proposed re-authorisation is in respect of the collective bargaining arrangement as it stands at the time authorisation is granted. Any changes to the collective bargaining arrangements during the term of the proposed re-authorisation would not be covered by the proposed re-authorisation.
- 5.10. Authorisation is not granted to boycotts. Any collective boycott activity would not be protected from legal action under the Act.
- 5.11. This draft determination is made on 16 June 2011.
- 5.12. The attachments to this determination are part of the draft determination.

### **Interim authorisation**

- 5.13. Authorisation A90966 is due to expire on 30 June 2011. As such, the ACCC grants interim authorisation to enable the status quo to continue while the ACCC is considering the current application for re-authorisation. Interim authorisation is granted subject to the Conditions of the current authorisation (A90966) set out at paragraph 1.15.
- 5.14. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## **Further submissions**

- 5.15. 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 *Competition and Consumer Act 2010* (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**

The following table provides a chronology of significant dates in the consideration of the application by the ADF.

<b>DATE</b>	<b>ACTION</b>
8 March 2011	Application for revocation and substitution lodged with the ACCC
8 April 2011	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
16 June 2011	Interim authorisation granted
16 June 2011	Draft determination issued.

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

## Competition and Consumer Act 2010

### 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>30</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>31</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>32</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:

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<sup>30</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>31</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>32</sup> Section 91(3).

- persons who become party to the contract, arrangement or understanding at some time in the future<sup>33</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>34</sup>

## **Six- month time limit**

A six-month time limit applies to the ACCC’s consideration of new applications for authorisation<sup>35</sup>. It does not apply to applications for revocation, revocation and substitution, or 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>36</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>37</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 arrangements.

## **Revocation; revocation and substitution**

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.<sup>38</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>39</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>40</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>41</sup>

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<sup>33</sup> Section 88(10)

<sup>34</sup> Section 88(6)

<sup>35</sup> Section 90(10A)

<sup>36</sup> Subsection 91A(1)

<sup>37</sup> Subsection 87ZD(1)

<sup>38</sup> Subsection 91B(1)

<sup>39</sup> Subsection 91B(3)

<sup>40</sup> Subsection 91C(1)

<sup>41</sup> Subsection 91C(3)