

4 April 2011

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

Dear Dr Chadwick

Re: Australian dairy Farmers Ltd application for revocation of authorisation A90966 and substitution of new authorisation A91263 – interested party consultation

The NSW Farmers' Association welcomes the opportunity to comment on the Australian Dairy Farmers Ltd (ADF) application for revocation and substitution of their collective bargaining authorization.

The collective bargaining provisions provided under the ADF authorisation have been utilised by a number of dairy farmers through seven collective bargaining groups operating in NSW since 2003. These groups provide an important function to help address the imbalance of market power associated with the monopsonistic market structure.

Since 2002, and the approval of the initial authorisation, a number of changes have occurred in the NSW industry that provide further justification for the continuance of the authorisation.

In 2008, the ACCC approved the acquisition of Australian Co-operative Foods (Dairy Farmers) by National Foods. While the divestiture conditions associated with the takeover support the introduction of another processor into the NSW market, this process has been slow and currently there still remains essentially one major processor with a number of smaller processors. In a state dominated by the fresh milk market and domestic retail sales, this monopsonistic structure has implications in terms of price setting mechanisms within the market.

Recent activities by retailers on the price of generic branded milk also provide foundations for the support of collective bargaining arrangements. 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. Processors in the retail fresh milk market are expected to lose margins through reduced proprietary brand sales. Loss of margins are expected to flow through to farmers by the way of increased pressure to lower farm gate prices. 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.

Recognising that ADF have submitted for the substitution of the previous authorisation subject to the continuance of the conditions without alteration, the Association would like to seek clarification and suggest consideration of amending some conditions.

Condition 1 of the previous authorisation read:

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.

The Dairy Section seeks clarification on whether the above condition prevents a collective bargaining group from engaging any third party to provide information or assistance of a general nature (e.g. negotiating skill training or general information about how contracts are made). This sort of training and 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). In this regard, the number of cooperatives has fallen since the last authorisation process (which changes the nature of the negotiation process itself). Further, based on submissions of processors themselves during the recent Senate Economics Committee inquiry

into the impacts of Supermarket price decisions on the dairy industry, the potential for third party players (e.g. retailers) to impact the farm gate price is substantial. In this volatile environment, the importance of efficient and informed contractual negotiations to protect the interests of farmers and the steady supply of milk to consumers is paramount.

We submit that onerous restrictions on representative Associations such as NSW Farmers' Association, as would conceivably prevent the Association from holding information seminars of a general nature for the benefit of its members, could seriously impinge the ability of farmers to negotiate effectively with processors.

The Association would also like some clarification about the meaning of 'representation' in the context of Condition 1. For example, would a law firm that does a lot of work representing farmers be prevented from accepting instructions from more than one negotiating group or more than one individual client / farmer? If there is only a handful of legal advisers in a particular district, or an expert solicitor with experience in this area of law, it would seem overly restrictive if that lawyer could only act for one client / farmer by virtue of the restrictions under the authorisation – especially in circumstances in which (presumably) the same In-House Legal teams for the large processing companies will sign off and be involved in negotiations with different collective bargaining groups.

The Association contests that the involvement of a third party may, in fact, provide further benefits to the collective bargaining arrangement including the processor and the farmers.

The Association notes the clarification provided by the ACCC in the 2006 determination:

Submissions received following the draft determination have expressed concern regarding the proposed role of professionals as third party representatives in negotiations. In this respect National Foods has recommended that proposed condition 1 be amended to reflect that national and/or state-wide dairy or farm groups, such as association, are prohibited from representing a collective bargaining group. National Foods submits that this would limit the scope for cross-representation of collective bargaining groups and the formation of industry wide contracts. More generally it has been submitted that farmer representation in negotiations is a preferable outcome.

The Association contests that the ability of groups to engage third parties and/or state wide farm groups would lead to industry wide contracts and limit the scope for cross-representation. The practical reality is that contracts are connected with processors. Due to 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 in our submission, with respect, unfounded.

The Association queries whether there is a double standard in relation to cross-representation of groups when viewed in the context of a national processor such as National Foods. National Foods employs people to negotiate with any number of different bargaining groups. Those employees presumably have access to information garnered in each negotiation with each respective group. However, the restriction in Condition 1 appears confined to the primary producers with no equivalent restriction on representatives from the processors themselves. If the processor insists that common representation would lead to common prices or industry wide contracts, then respectfully one must also ask whether the processors should not let an employee involved in one set of negotiations, be part of another set of negotiations for fear that they will use the same contract and suggest the same price.

Currently the collective bargaining groups operating in NSW are doing so with minimal resources and limited skills base. They are often a collective of farmers with an appointed representative. This representative not only bears the pressure that the negotiations have on his own business but also the impact this has on his neighbours and peers, the relationships he maintains with those peers and also the administrative requirements placed upon him through the group.

National Foods stated in their submission to the 2005 authorisation review that:

....A requirement that all communications between collective bargaining groups and processors are accurately documented by collective bargaining groups.

Providing the ability for third parties to be involved in collective bargaining groups will enable opportunities for groups to engage suitable resources to support appropriate communications.

Most collective bargaining groups are not registered entities, limiting their ability to contract with third parties. The Association cites the Premium Milk Ltd collective bargaining group as a situation that demonstrates benefits to collective bargaining through accessing additional resources to support the group. However, one of the benefits of the current authorisation under the ADF is that it allows farmers to be a group with a common interest rather than going through the formalities of establishing a recognised entity. Providing the collective bargaining groups with the opportunity to access third party support through operations such as industry bodies may help provide access to some resources without the additional costs of establishing legal entities.

In the 2005 application, National Foods cited confidentiality as a concern for groups dealing with more than one processor. It is recognised that allowing collective bargaining groups to be represented by third parties may also raise suspicions about confidentiality. The Dairy Section suggest that the engagement of a professional organisation with established communication protocols would actually minimise any inter collective bargaining group discussions.

Lastly, the Association wishes to make a brief comment about current Condition 7.2 and its relationship with Condition 3. It is apparent that processors are not required to negotiate with a bargaining group. However, there is an obligation on the collective group to provide information about its membership to processors (presumably as a mechanism to ensure efficient negotiations). There is nothing that prevents a processor using that information for purposes other than collective bargaining. The Association suggests there might be a need to place tighter restrictions on processors when given information that is intended for purposes related to bargaining.

The Association looks forward to working with farmers under collective bargaining arrangements to support the best outcomes for the industry.

Yours sincerely

Adrian Drury
CHAIR DAIRY SECTION