6 November 2020

Danielle Staltari
Director – Adjudication Branch
Australian Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

By email – adjudication@accc.gov.au

Dear Ms Staltari

Submission re the Queensland Dairyfarmers' Organisation Limited Application for Authorisation of 'Fair Go Dairy' Scheme (AA1000530)

We refer to the application to the Australian Competition and Consumer Commission ("**ACCC**") by the Queensland Dairyfarmers' Organisation Limited ("**QDO**") for interim and final authorisation under the *Competition and Consumer Act 2010* ("the Act") for a proposed scheme to offer eligible persons a licence to use the 'Fair Go Dairy' logo ("the **Logo**") on milk and dairy products ("the **Scheme**"). Coles Supermarkets Australia Pty Ltd ("**Coles**") thanks the ACCC for allowing additional time for it to lodge this submission.

Coles notes that the application submitted by the QDO does not specify the precise provisions of the Act for which protection is sought. Coles considers that if implemented, the Scheme will set a common farmgate price across many dairy processors in Queensland. The establishment of a common farmgate price is a price fixing arrangement or cartel provision that Coles considers is unlikely to result in a net public benefit.

Coles considers that the application for authorisation of the Scheme is not one that is appropriate for an interim authorisation. It is Coles' position that the Scheme should be subject to a full assessment by the ACCC of the potential benefits and detriments likely to arise should it be implemented.

In relation to the specific questions raised in the ACCC's letter to interested parties of 2 October 2020 Coles responds to those relevant to it as follows:

1. Any likely benefits to the public resulting from the arrangements

Coles does not consider it likely that the Scheme will bring any public benefits. Indeed, Coles considers that the Scheme could result in widespread consumer confusion in Queensland. The Scheme proposes to enable licensed dairy products in Queensland to feature the Logo which according to paragraph 3.1(h) of the QDO application purports to 'assist consumers with identifying which brands are paying farmers a SFFP, providing them with the ability to choose the brands that support Australian farmers by paying them a SFFP'.

According to Paragraph 13 of the Scheme Rules however, the Logo can only appear on dairy products where no less than 80 per cent of the milk used in manufacturing the products are purchased from a farmer where:

i. The farmer's farm is located within Queensland; and

ii. The milk is derived from dairy cows located within Queensland; and

iii. The purchase price for the milk (per litre) is not less than the SFFP

Consequently, despite the Scheme purporting to identify for consumers those manufacturers that support *Australian* farmers, Scheme eligibility is limited to dairy products made using milk sourced from within Queensland.

By way of example, the average Coles supermarket in Queensland does not range any butter products that are manufactured in Queensland, typically this would mean that the raw milk for these products is also sourced outside of Queensland. This means that the vast majority of butter products in Queensland Coles stores are unlikely to be eligible to feature the Logo, regardless of whether the farmers who produced the raw milk were paid an amount equivalent to the Queensland SFFP or even in excess of the SFFP.

According to the QDO, the appearance of the Logo indicates that the dairy farmer has been paid a 'sustainable and fair farmgate price' and is 'proof that the dairy you buy is the best and fairest'. At the same time, the QDO states in clause 11(c) that the absence of the Logo 'does not mean other Processors do not pay fair prices to the farmers from whom they purchase milk from'. Coles considers that these inconsistent positions may mislead consumers regarding the farmgate prices paid to farmers producing any dairy product that does not feature the Logo.

2. Whether the 'Fair Go Dairy' logo will assist consumers to identify which dairy products are made using milk on which farmers are paid a SFFP

The Logo will assist consumers to identify which dairy products are made using milk on which farmers are paid a SFFP – but only in the sense that it identifies which products fulfil the QDO definition of a SFFP. As set out in our response to Question 1, Coles submits that the QDO's definition risks misleading consumers as it excludes any products made with milk sourced from outside Queensland, regardless of the price paid to farmers. As defined by the QDO, the absence of the Logo would suggest to customers that the dairy products are made using milk for which farmers were paid less than a SFFP, when in fact they may have been paid as much or more than the SFFP as defined by the QDO.

Coles is of the view that the Scheme will create significant operational issues for Queensland based processors wishing to utilise the Logo. For example, Coles sources most of its private label milk products in Queensland from Norco, who currently source their raw milk from Queensland as well as some parts of northern New South Wales. Regardless of the source of the raw milk, it is mixed together by the processor to create the relevant dairy products. This means that processors such as Norco could never guarantee they have met the Scheme rules without incurring very significant costs to create a segregated supply chain.

3. Any impact of the scheme on dairy retail prices in Queensland

Most branded dairy products sold by Coles are supplied on a price per unit basis. Coles does not determine the wholesale list price at which a processor supplies product to it. Should a supplier of dairy products elect to participate in the Scheme and seek to apply the Logo to branded dairy products supplied to Coles, this would likely have an impact on the wholesale list price as suppliers seek to pass on the increase necessary to meet the SFFP. Coles would then need to assess whether a retail cost price increase was necessary. Given that the SFFP formula allows for an annual adjustment based on CPI, retailers are unlikely to be able to perpetually absorb an equivalent increase in the cost price of the goods meaning future increases on retail prices are more than likely.

Any increase in retail prices for products bearing the Logo will, in Coles' view, result in some consumers moving to purchase a cheaper alternative (that does not display the Logo). Ultimately Coles considers that the Scheme could make participating products less competitive in the market. In the long run, this change in consumer demand will impact Queensland dairy farmers volumes and revenue.

4. The method for how QDO proposes the SFFP will be calculated

The Scheme and the calculation of the SFFP fails to provide any incentive for farmers to work towards more innovative or efficient methods of production. The Scheme proposes that the SFFP formula will be reviewed annually and (at the least) adjusted in line with the consumer price index (CPI), ensuring that farmers are potentially rewarded with an increased SFFP regardless of whether they are engaging in inefficient business practices. Ultimately, this is likely to be to the long-term detriment of the Queensland dairy industry as there will be a greater incentive for processors to source milk from other states where costs of production are lower and farmers are incentivised to drive efficiencies to ensure the best outcome for their business.

Coles also notes that the SFFP has as its anchor point the average cost of production of milk as determined by the Queensland Dairy Accounting Scheme ("**QDAS**"). QDAS is based upon the voluntary participation of dairy farmers and for that reason, is unlikely to constitute a representative sample. Further, there is no current practice of auditing the data submitted by dairy farmers for input into QDAS, which means that the SFFP relies entirely upon the submission of accurate data from individual dairy farmers, who stand to benefit from any increases in the SFFP.

Coles considers that QDAS is an effective tool for achieving its documented objectives, including to provide dairy enterprises with information enabling them to make more informed business decisions. However, Coles shares the concerns articulated by the Queensland Parliament Agriculture and Environment Committee in 2017:

> *The committee notes that farmers participate in QDAS and contribute data on the costs of production and earnings voluntarily. The data reported by QDAS is not independently verified as to its accuracy or validity, and there is no minimum, statistically significant number of farmers contributing data in each region. The data appears adequate for fulfilling the scheme's stated objectives as a business development tool. However, the committee is concerned that the same data is not sufficiently statistically valid to serve as the basis for determinations by the Minister of sustainable prices for each dairy region, as proposed in the Bill.*[1]

Despite the change in model from a SFFP determined by government in 2017 to the current 2020 model of the SFFP determined by the QDO, the use of the QDAS data as the anchor point remains a significant concern.

5. Any harm or improvements to competition which may result from the arrangements this may include competition at the farmgate, wholesale or retail levels of the supply chain

The QDO is proposing the Scheme as a mechanism to address market failures and to bring transparency to dairy pricing and improved information upon which consumers can base their purchasing decisions. For the reasons detailed above Coles considers that the Logo will discriminate against Australian dairy products that are not made from milk sourced from Queensland. Such products are simply ineligible to participate and this is not at all clear from the Logo, which to customers will appear to be focused on simply ensuring 'fairness', without making clear the geography-based definition the QDO seeks to apply to the concept.

The main outcome of the Scheme will be to increase the cost of raw milk in Queensland for processors that elect to participate. Whilst participation is voluntary, QDO's proposed marketing of the Scheme, including highlighting support from the Queensland Government[2], may render it uncommercial for dairy product producers not to feature the Logo on their products if consumers consider the Logo as the only reliable evidence that a fair price has been paid to the farmer. Widespread adoption of the Scheme by dairy processors in Queensland has the potential to make raw milk unavailable to processors who do not wish to licence the Logo or who are ineligible under Scheme rules.

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[1] 55th Parliament Agriculture and Environment Committee, *Report No. 33*, *Sustainable Queensland Dairy Production (Fair Milk Price Logos) Bill*, 2017 at p.12

[2] Queensland Dairyfarmers' Organisation submission to the ACCC, 25 September 2020 at p.54

Coles is not currently a raw milk purchaser in Queensland, however in July 2019 Coles commenced sourcing raw milk directly from farmers in other Australian dairy regions, in Victoria and NSW initially, and more recently in SA and WA.

Coles chose to take on its new role as a direct acquirer of raw milk in order to contract directly with dairy farmers for their milk and build mutually beneficial partnerships with them. Under this direct sourcing model, Coles sets the farmgate price and importantly offers fixed price contracts which provide farmers with certainty of income for up to three years. This certainty of income enables dairy farmers to plan and invest in their farms.

Another important aspect of the Coles direct sourcing model is the Coles Sustainable Dairy Development Group ("the **CSDDG**"). The CSDDG was formed by Coles to provide a forum for supplier dairy farmers to work with Coles to address many of the challenges facing the dairy industry. Coles has invested over $3 million in the CSDDG and considers that it reflects the nature of the partnership model Coles now has with its farmer suppliers. Since 2019 the CSDDG has supported supplier dairy farmers with:

- Exceptional circumstances payments of $2.6 million for water and fodder during bushfire and drought
- The supply of defibrillators to supplier dairy farms
- Animal health care technology trials
- Deliveries of hand sanitiser and face masks to farms during COVID-19
- Extension of Coles' own Employee Assistance Program offering free and confidential counselling services through Converge International to its dairy farmer suppliers

Coles considers its new model is relevant to consideration of the Scheme, because were the Scheme to be implemented, Coles would have to choose to either:

1. Participate in the Scheme and no longer offer its farmer suppliers contracts with 3-year farm gate price certainty; or
2. Not participate in the Scheme and have its Coles Brand milk products appear in store absent the Logo that purports to indicate to customers that the dairy farmer has been paid a fair price for the milk.

Coles does not consider either of these options to be beneficial for dairy farmers or customers. Whilst Coles does not currently acquire raw milk directly in Queensland, instead supporting farmer co-operative Norco on a long-term basis, implementation of the Scheme could undermine a possible expansion of the Coles model to Queensland in future. Coles considers that the Scheme will dampen such innovation and improvements to the entire supply chain as it makes price the singular focus. Coles recognises the value a co-operative brings to its members over and above the price paid at the farmgate, this is not considered by the Scheme.

Finally, as noted, the QDO asserts that the Scheme is intended to correct a market failure, namely an imbalance of bargaining power between dairy farmers and processors. The Dairy Industry Code of Conduct ("the **Code**") which came into effect on 1 January 2020 is the regulatory response to the failures identified by the QDO and aims to improve the clarity and transparency of contractual trading relationships between dairy farmers and the purchasers of their milk. Coles notes that the effectiveness of this Code is one of the areas the ACCC is reviewing as part of its current Perishable Agricultural Goods Inquiry and that a further review mechanism is incorporated into the Code to take place on or after 1 January 2021. It is Coles' strong view that the effectiveness of the Code in addressing any identified market failures should be completed prior to the possible introduction of the Scheme.

In conclusion, Coles does not support the authorisation of the Scheme on an interim or substantive basis. Coles considers that the Scheme will stifle efficiencies in the dairy industry by guaranteeing an annually increasing farmgate price that may increase the attractiveness of milk produced outside of Queensland to processors. Coles believes that this constantly increasing farmgate price will ultimately be passed on to consumers meaning that they will pay more for dairy products. Consumers may also be misled as to what the Logo, or the absence of the Logo means, in relation to what is paid to farmers. Finally Coles is very concerned that the implementation of the Scheme, with its singular focus on farm gate price, jeopardises the real progress it has made in building transformative direct relationships with dairy farmers in which farmgate price is only one aspect of the supply partnership.

Yours sincerely

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Coles Supermarkets Australia Pty Ltd