



For inclusion on public register

19 October 2020

Ms Danielle Staltari
Director, Adjudication Branch
Australian Competition and Consumer Commission
Canberra ACT 2601

By Email: adjudication@acc.gov.au

Dear Ms Staltari

Submission re the Queensland Dairyfarmers' Organisation Application for 'Fair Go Dairy' Queensland Licensing Scheme.

Introduction

We refer to your letter dated 2 October 2020 to Lactalis Australia Pty Ltd ("**Lactalis**") seeking a submission in relation to the application by the Queensland Dairyfarmers' Organisation ("**QDO**") seeking interim and final authorisation under the Competition and Consumer Act 2010 (Cth) ("**CCA**") from the Australian Competition and Consumer Commission ("**ACCC**") for a proposed scheme to offer eligible persons a license to use the 'Fair Go Dairy' logo ("**the Logo**") on milk and dairy produce (the "**Scheme**").

Executive Summary

At the outset Lactalis notes that it has no issue with a voluntary scheme and associated branding which supports Queensland dairy farmers and a sustainable Queensland dairy industry based on more traditional industry association arrangements that promote agricultural best practice. Specifically, Lactalis would be more comfortable with more traditional arrangements which do not involve seeking to establish a floor price for the supply of milk as we believe that approach risks stultifying industry best practice, efficiencies and innovation. Specifically, Lactalis has strong concerns that what the QDO proposed Scheme is seeking is a return to the old regulated industry price and other arrangements that were in place prior to the industry levies that supported transition to an unregulated market environment.

Lactalis believes that the proposed Scheme put forward by QDO is problematic in that it seeks to establish a minimum price at which competing dairy processors would acquire milk from farmers based on both a historical survey of prices (which survey and analysis is unclear in many respects - e.g. it would appear to take into account the sale of cattle) and also some form of future estimate of international milk solid prices (this appears to be what is intended based on the minutes of meetings lodged with the QDO application). Lactalis is concerned that this has all the hallmarks of the problems that previously arose with future forecasts by the cooperative Murray Goulburn in dealing with its farmers.

We are also very reluctant to see any involvement in the proposed Scheme and any endorsement by Australian Government institutions that could be said to involve price setting or regulatory endorsement that may raise issues in relation to dairy exports in the current trade environment.

Lactalis' strong preference is that the changed dynamics arising from the implementation of the Dairy Code of Conduct ("**Dairy Code**") should be given time to see if they address the concerns and issues raised by the QDO, rather than seeking to put in place the proposed Scheme. This is particularly the case as the proposed conduct is not consistent with the competition provisions of the CCA (it seeks exemptions from the CCA) and is light on detail such that the benefits and detriments of the proposed conduct are difficult to ascertain. However, the details that have been provided raise clear risks of contravening the cartel and information exchange provisions of the CCA and also give rise to both Constitutional and international trade issues for the Australian Dairy Industry.

In these circumstances Lactalis submits that the ACCC should not grant interim authorisation for the very unclear proposed conduct contemplated by the proposed Scheme which will allow information exchange and therefore a situation that will not be able to be returned to the status quo if authorisation were not ultimately to be granted. Further, Lactalis submits that the ACCC should not grant authorisation to the very unclear and broad terms and conditions of the proposed Scheme given the significant price coordination that would arise between competitors, as well as pressure to restrict milk acquisitions to Queensland farms, which would be to the detriment of other Australian farmers and the efficient purchasing and collection of milk from broader regions that would otherwise benefit Australian consumers.

Background

Lactalis believes that many of the relevant legal and market implications regarding the proposed Scheme put forward by QDO have been previously extensively considered and addressed by the Queensland Parliament's Agriculture and Environment Committee ("the Committee") report of April 2017 into the 'Sustainable Queensland Dairy Production (Fair Milk Price Logos) Bill 2016 (the Report)'¹. Lactalis contends that all of the problems and issues identified in the Queensland Parliamentary Report and which gave rise to their recommendation against the Bill continue to exist in relation to the QDO application to the ACCC.

Notwithstanding the Committees' previous concerns, a continuing issue in relation to the proposed Scheme is the reliance on Queensland Dairy Accounting Scheme ("QDAS") figures. As noted by the Committee:

"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 ... of sustainable prices for each dairy region."

Lactalis submits it would be difficult to derive a public benefit under the proposed Scheme based on data that appears to lack statistical validity.

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

Lack of detail in the QDO Application raises concerns as to breadth and scope of the price coordination and information exchange contemplated by the proposed Scheme

Leaving aside the inherent competition law risks in the proposed Scheme (that are exemplified in the minutes lodged with the application with discussions that would appear to contemplate QDO members seeking to get processors to lift their prices to farmers), the proposed "sustainable and fair" marketing material lodged with the application risks suggesting that prices being paid to farmers by processors that do not pay the QDO's set minimum price are not fair and sustainable when there is no basis for that insinuation or that processors paying different prices were not based on commercially reasonable factors such as herd size and location.

The QDO seeks to establish what is described in the letter from QDO to the ACCC of 1 October 2020 as a "sustainable and fair farmgate price" pursuant to a very vague license agreement that does not provide any guidance as to how that price is to be set as between competing processors and retailers other than it would appear, a very all-encompassing requirement to comply with non-specified "Brand Guidelines" and compliance with proposed Scheme rules.

As noted above how pricing is set under the QDAS data is not explained in any detail, not how pricing may be impacted by the future projections referred to in the QDO minutes. In the absence of such explanations an assessment of benefits and detriments from the proposed conduct is not reasonably possible.

Clause 5.2 of the proposed license that was included in the QDO authorisation highlights the broad, uncertain and highly problematic nature of the proposed Scheme. Clause 5.2 provides that:

"The Licensee must use its best endeavours to facilitate the sharing of information between its Suppliers and the Licensor regarding all aspects of the production and supply of the Products to the Licensee".

This extremely broad clause raises questions of information exchange between competitors that is incredibly broad realting to "all aspects of the production and supply" of the relevant dairy products. The QDO themselves admit in the authorisation application that the Application is put forward to deal with conduct that may otherwise constitute possible cartel conduct.

Conduct that involves possible cartel conduct needs to be very carefully set out and defined based on the relevant documents that may involve such conduct so that the authorisation is expressly for those arrangements and not broader ill defined conduct. It is important that the elements of the proposed conduct are clearly set out so that they may be critically assessed. This needs to occur for there to be a workable framework for the assessment of the proposed conduct. Lactalis does not believe that at the moment there is such a clear framework.

The proposed Scheme lacks practical operation and is inherently discriminatory

The proposed Scheme is also discriminatory. Licenses will only be granted to processors who purchase at least 80% of their milk requirements from Queensland farmers. The major suppliers of drinking milk in Queensland are Lactalis and Lion Dairy and Drinks. Norco Cooperative Limited is also a significant supplier in South East Queensland. Regardless of their desire, or otherwise, to participate in the proposed Scheme, the realities of the market for raw milk preclude these processors from being able to do so. In its April 2018 Dairy Inquiry Final Report, the ACCC specified nine distinct regions for acquisition of raw milk,² and one of those was Northern NSW/southern Queensland³. As the region the processors purchase milk for supply to Queensland consumers includes a significant number of farmers in northern New South Wales, these three processors would be unable to participate in the Scheme, as the

² Australian Competition and Consumer Commission, *Dairy Inquiry Final Report*, April 2018, page XV.

³ ACCC, page XV

Scheme fails to recognise an existing market for raw milk that is broader than Queensland. This may also apply to other smaller processors who compete in the market for the acquisition of raw milk from farmers.

It is not just processors who the Scheme will discriminate against. As the major processors will be unable to participate in the Scheme, the farmers who supply them will be denied any benefits from the Scheme that may arise. As the Committee also noted:

“most of the state’s dairy farmers who supply major processors would likely miss out on any benefits from the scheme.”⁴; and

“it appears milk from the majority of Queensland dairy farmers who supply major processors will be excluded from the logos scheme..”⁵

Again, it is hard to rationally construct a public benefit from the proposed Scheme that is not only discriminatory, but also discriminates against members of the very group it is meant to support.

The QDO suggests it will propose licensing the Scheme Australia wide. Given the Scheme as it stands fails to address the issue of raw milk supply for South East Queensland being sourced from both Queensland and New South Wales, it is not clear how the QDO will apply its state based scheme to an industry where the ACCC has identified 9 milk supply regions⁶. The proposed nation-wide roll out of the Scheme also fails to address the situation of milk products where a ‘fair price’ has been paid in one state, and the product is actually manufactured in another state or region.

The proposed Scheme also fails to address products manufactured in one state and sold in another. It is quite possible there may two products from different manufacturers, each bearing the logo, and each paying a different price for raw milk, that is then used to manufacture products sold at a similar retail price. It may therefore be difficult for consumers to identify what is fair when the underlying cost price of the items they are purchasing may vary significantly.

Constitutional Law Issues

The final issue that concerns Lactalis is the possibility an authorisation of the proposed Scheme may be unconstitutional. The Committee was examining a proposed Bill that incorporated many of the items contained in the proposed Scheme. The Committee was concerned the Bill would breach section 92 of the Australian Constitution. Given the proposed Scheme contains many of the elements of the Bill rejected by the Committee, it is possible that if the ACCC grants an authorisation in relation to the proposed Scheme, it will be authorising activity that:

1. Is discriminatory in relation to intra-state and inter-state trade, particularly in relation to the supply and acquisition of raw milk and the supply into the Queensland market of milk and dairy products; and
2. Confers an advantage on raw milk supplied from Queensland, which is not available to raw milk from outside Queensland, and is therefore protectionist and an inappropriate fetter on interstate trade and commerce.

⁴ 55th Parliament Agriculture and Environment Committee, *Report No. 33, Sustainable Queensland Dairy Production (Fair Milk Price Logos) Bill*, April 2017, page 2.

⁵ Committee, page 14

⁶ ACCC, page XV.

Trade Concerns

Lactalis does not want to see any return to a suggestion of a directly or indirectly regulated milk price given trade and tariff concerns.

Conclusion

In conclusion, Lactalis is opposed to an interim authorisation being granted to the proposed Scheme because of its uncertain operation and the difficulties that would arise in relation to returning to the status quo if the interim authorisation was to involve information exchange. It would appear that QDO has already approached processors as to their willingness to participate in the proposed Scheme so the interim authorisation would appear to involve more substantive steps and Lactalis believes that it would be more appropriate for such steps to await the outcome of the ACCC's final determination in relation to the authorisation.

In relation to authorisation of the proposed Scheme more generally, Lactalis has significant concerns because the proposed Scheme:

1. Is based on QDAS data that may not be reliable and should not be used by itself or in conjunction with forward looking assumptions as to international pricing for milk solids without further consideration as to the reliability and suitability of that data;
2. Raises competition concerns in setting a minimum floor price for the purchase of milk by processors and by setting a common price may have the unintended effect of stultifying the seeking of efficiencies among dairy farmers and being to the detriment of innovation. It may also be viewed as a retrograde step in returning to the old days of "orderly" industry regulated milk pricing and relinquishing the past dairy subsidies paid to farmers for transition to a more market oriented environment
3. Is discriminatory against industry participants outside Queensland, including those dairy farmers it is meant to benefit within Queensland as they will be supplying milk to processors who cannot meet the 80% Queensland milk purchasing requirement while supplying domestic and export markets; and
4. May be unconstitutional in its restrictions on interstate trade and may also give rise to risks to Australian dairy exports by being a defacto form of price regulation.

Yours sincerely

Lactalis Australia Pty Ltd



Vince Houlihan

General Manager – Supply Chain