Determination

Application for authorisation
lodged by
Queensland Dairyfarmers Organisation Ltd
in respect of
the ‘Fair Go Dairy’ licensing scheme
Authorisation number: AA1000530

12 March 2021

Commissioners:
Keogh
Rickard
Brakey
Court

Summary

The ACCC has decided to grant authorisation to enable the Queensland Dairyfarmers' Organisation (QDO) to implement a proposed "Fair Go Dairy" licensing scheme (the Scheme) until 3 April 2026. Under the Scheme, QDO will grant a licence to processors of milk and dairy products for the use of a "Fair Go Dairy" logo (the Trade Mark) on dairy products made using no less than 80% unprocessed milk purchased from a farmer where:

- **the farmer's farm is located within Queensland;**
- **the milk is derived from dairy cows located within Queensland;**
- **the purchase price for the milk (per litre) is not less than the 'Sustainable and Fair Farmgate Price' (SFFP) which is set by QDO and is designed to reflect the average production cost plus a margin accounting for inflation; and**
- **no milk used in the products is sourced from outside of Australia.**

The introduction of the Scheme will be accompanied by a marketing campaign from QDO that will communicate the attributes required to qualify for products to display the Trade Mark.

The ACCC considers that the Scheme is likely to result in some public benefit through a small improvement in customer information and choice. The Trade Mark, supported by marketing from QDO, goes some way to better informing consumers who want to purchase dairy products based on the price that farmers receive. However, the extent of this benefit will depend on the extent and accuracy of publicity of the Trade Mark by QDO. The Scheme is also likely to result in a small increase in retail competition between dairy products in Queensland.

The ACCC considers that the Trade Mark is so general in nature that it is inherently unlikely to mislead consumers about the qualities of products bearing the Trade Mark, or create misleading impressions about products without it. The ACCC also considers the Scheme is unlikely to reduce competition, increase retail prices for dairy products or create inefficiency. Overall, the ACCC considers that the Scheme is unlikely to result in any significant public detriments.

On balance, the ACCC is satisfied that the Scheme is likely to result in some public benefit and that this public benefit would outweigh any likely detriment. In reaching this decision, the ACCC considers there is a reasonable basis for the SFFP calculation methodology, but does not endorse the SFFP as necessarily being 'sustainable' or 'fair' in all circumstances, as this would depend on a range of factors such as prevailing market conditions.

On 18 December 2020, the ACCC granted interim authorisation to enable QDO to negotiate with potential participants in the Scheme (e.g. dairy processors and farmers), advance preparations and marketing for the Scheme, and determine and announce the SFFP for 2021/22 in Queensland. However, interim authorisation was not granted for any dairy farmer or processor to enter into agreements in relation to the Scheme. That interim authorisation will remain in place until it is revoked or the date this determination comes into effect.

1. The application for authorisation

1.1. On 25 September 2020, the Queensland Dairyfarmers' Organisation (**QDO**) Limited lodged application for authorisation AA1000530 with the Australian Competition and Consumer Commission (the **ACCC**). QDO is seeking authorisation to give effect to the "Fair Go Dairy" product licensing scheme (**the Scheme**, described in detail at paragraphs 1.7 - 1.10) for 10 years. This application for authorisation AA1000530 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

1.2. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition laws but are not harmful to competition and/or are likely to result in overall public benefits.

1.3. QDO also requested interim authorisation to enable it to advance its preparations to give effect to the Scheme, commence marketing of the Scheme, and to negotiate, enter into, and give effect to licence agreements with milk processors.

The Applicant

1.4. QDO has sought authorisation for and on behalf of:

(a) itself, as owner and licensor of the "Fair Go Dairy" logo,

(b) processors who are licensees of the "Fair Go Dairy" logo, and

(c) any farmer from whom a processor purchases milk in accordance with the Fair Go Dairy licensing scheme.

1.5. QDO is an advocacy organisation representing the interests of dairy farmers across Queensland. QDO is a not-for-profit organisation with voluntary dairy farmer membership.

1.6. QDO's stated purpose is to guide Queensland's dairy industry and develop new opportunities to assist farmers. The organisation works regularly with governments and other stakeholders to ensure Queensland farmers are well represented. QDO also manages a range of programs and projects for the industry.

The Proposed Conduct

1.7. QDO registered the following 'Fair Go Dairy' logo with IP Australia on 1 October 2019 - registered trade mark number 2039381 (the **Trade Mark**):

The Trade Mark

1.8. QDO is seeking authorisation to license its Trade Mark to processors[1] for use on dairy milk, dairy cream, dairy desserts and cheese variants (collectively, **the Products**) which are made using unprocessed milk (within the meaning of the *Dairy Produce Act 1986 (Cth)*):

a) where no less than 80% of the milk used in the manufacturing of the Products the subject of an application, must be purchased by the processor, from a farmer where:

(i) the farmer's farm is located within Queensland;

(ii) the milk is derived from dairy cows located within Queensland;

(iii) the purchase price for the milk (per litre) is not less than the 'Sustainable and Fair Farmgate Price' (**SFFP**); and

b) no milk used in the Products may be sourced from outside of Australia.

(the **Proposed Conduct**)

1.9. On 25 January 2021 QDO advised the ACCC that it proposes to alter its method of calculating the SFFP from that originally described by using a two-year average price (rather than basing SFFP on the cost of production in the preceding year multiplied by CPI, as was initially proposed) in order to smooth fluctuations in the SFFP following large changes in CPI or cost of production. QDO also proposes to change the data source used to calculate cost of production to exclude capital purchase and principal repayment expenses.[2] Under QDO's revised SFFP calculation method, the SFFP will be equal to the two year rolling average cost of production (most recently available) adjusted for inflation. For example, the FY2021/22 will be the average of the FY2018/19 COP (adjusted for inflation) and the FY2019/20 COP (adjusted for inflation) as these will be the most recently available COP data from QDAS at the commencement of FY2021/22. Further details about the SFFP calculation are included in Attachment A.

1.10. The initial SFFP for 2020/21 in Queensland will be 71.1 cents per litre and the SFFP for 2021/22 will be 73.8 cents per litre.

1.11. For the purposes of its assessment, the ACCC has considered whether the calculation of the SFFP is sufficiently clear and transparent to enable interested parties to understand the operation of the Scheme and what the Trade Mark is denoting. The ACCC has not undertaken an assessment of whether the SFFP would be 'fair' or 'sustainable' in all circumstances, as this would depend on a range of factors such as prevailing market conditions.

2. Background

Rationale for the Scheme

2.1. QDO submits that market failures have arisen from the structure of the dairy industry and the terms of milk supply contracts offered by processors to farmers. Those failures include:

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[1] As defined in in the *Competition and Consumer (Industry Codes – Dairy) Regulations 2019 (Cth),* available at: https://www.legislation.gov.au/Details/F2019L01610#_blank

[2] Cost of production will now be calculated from information in *Appendix - Group Dairy Farm Profit Map* of the Queensland Dairy Accounting Scheme report (listed as Appendix 10.3 in 2019-20 QDAS Report).

- an imbalance in bargaining power between dairy farmers and processors;
- some standard industry practices deterring farmers from responding to market signals; and
- unfairness of some standard industry practices and unreasonable transfer of risk to farmers.

2.2. QDO considers that these imbalances manifest themselves through Australian consumers being unaware of whether a brand of milk is priced in a way that reflects whether a SFFP has been paid to the farmer who produced the milk.

2.3. The Scheme seeks to redress some of the imbalance in the Queensland dairy industry by providing greater transparency between the farmer, processor, retailer and consumer of the milk products, particularly concerning the costs associated with the Products.

2.4. QDO hopes this will encourage competition amongst processors, incentivising them to negotiate fairer contracts with farmers in order to participate in the Scheme. QDO intends to use the Trade Mark on the Products as a transparent and direct method of informing consumers by publically acknowledging the processors of milk who are paying a SFFP to farmers.

2.5. The Scheme seeks to provide consumers with the opportunity to make more informed decisions about which brand(s) of milk they should purchase, and whether they would like to support brands associated with processors who support farmers by paying them a SFFP. The Trade Mark seeks to provide a convenient and simple way to identify whether purchasing a Product will give a SFFP to the farmer who provided the milk to produce the Product.

2.6. The Scheme is intended to be voluntary and not mandatory, where only brands who would like to display the Trade Mark, denoting that they are paying farmers a SFFP, must comply with the Scheme.

3. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

Before the draft determination

3.2. The ACCC invited submissions from a range of potentially interested parties including major processors, government departments and organisations, industry groups, small retailers and supermarkets.[3]

3.3. The ACCC received 13 submissions from interested parties in relation to the application, with seven supporting the application for authorisation and six opposing.

3.4. Major processors including Bega (previously Lion Dairy and Drinks), Lactalis (formerly, Parmalat) and Norco, oppose the Scheme. They submit that the logo does not effectively convey that at least 80% of the milk must be sourced from Queensland cows and farms, which risks leading consumers to believe that milk without the logo pays a low price to farmers, whereas it may in fact just contain more milk from NSW. They also submit there is not enough milk in Queensland to supply the processors,

[3] A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

forcing some to be excluded from the Scheme, and that Queensland milk is already more expensive so further increasing the farmgate price may make the industry less sustainable. Each of the major processors submits that it will not participate in the Scheme.

3.5. Bega is concerned that the Scheme will cause further damage to the Queensland milk industry and its sustainability, given the existing price gap between some Queensland dairy regions and other states. Major processors have indicated they may seek to exit the Queensland dairy market if the Scheme creates an environment where Queensland milk is too expensive in comparison to transporting milk into Queensland from other states.

3.6. The ACCC acknowledges the existing price gap between raw milk sourced in Queensland and other states, however the Scheme will only increase Queensland's farmgate prices to the extent it is taken up by processors who would otherwise be pricing below the SFFP. If there is a large uptake of the Scheme, this would likely reflect strong demand at the retail level, providing a strong incentive not to shift to source milk from other states but reflecting that many consumers value products that meet the Fair Go logo requirements more highly than other products. The ACCC therefore considers it unlikely that the Scheme would be detrimental to the sustainability of the Queensland milk industry, and for these reasons, this issue is not addressed further by the ACCC.

3.7. Major processors also submit that the SFFP would lead to inefficiencies and remove the incentive to innovate by cementing a price calculated on average production cost plus a margin, without taking into account particular circumstances or excluding inefficient farms from the calculation of base cost of production. They submit that any sort of Scheme should be implemented Australia wide and not limited to Queensland.

3.8. Industry groups have mixed views on the Scheme.

3.9. WA Farmers Dairy Council submits the Scheme would improve competition and give consumers better visibility over what they are buying. Dairy Farmers Milk Co-Op (who supply Bega) considers it would not make the industry more sustainable and would disadvantage farms who do not have contracts with processors that could participate in the Scheme, as they would be unlikely to be paid the SFFP.

3.10. Small processors support the Scheme. They submit it may result in a small increase in retail prices, but believe it will better inform consumers about the Products they are buying.

3.11. Coles opposes the Scheme, as it considers that it will set a common farmgate price across dairy processors in Queensland and will not result in a net public benefit. Similarly to the concerns of the major processors, Coles submits the Scheme will lead consumers to believe that Products without the logo involved farmers not being paid the SFFP for their milk when this may not be the case. No other major retailers provided submissions to the ACCC.

3.12. Lactalis suggests that section 92 of the Australian Constitution may prohibit the ACCC from authorising the Proposed Conduct on the basis that to do so would inhibit freedom of interstate trade. The Australian Dairy Products Federation (**ADPF**) also raised this issue. In response, QDO submitted that section 92 of the Australian Constitution was not relevant to the Scheme as the Scheme will not be implemented via Commonwealth or State legislation. The legal effect of this authorisation is limited to providing legal protection for arrangements that may otherwise risk breaching the competition law but are not harmful to competition and/or are likely to result in overall public benefits in accordance with the terms of the authorisation, and the ACCC does not accept Lactalis' submission in relation to this issue.

After the draft determination

3.13. On 18 December 2020, the ACCC issued a draft determination proposing to grant authorisation for five years. A pre-decision conference was not requested following the draft determination.

3.14. On 25 January 2021, QDO wrote to the ACCC advising that it was proposing a revised method of calculating the SFFP (described at 1.9, above). The ACCC emailed interested parties advising of the revised SFFP calculation and made QDO's letter available on the public register. Submissions were received from ADPF and Norco, opposing authorisation.

3.15. Norco's submission reiterated concerns that the Scheme will have the effect of misleading consumers as to what brands and companies are supporting farmers with a sustainable milk price and farmers. Norco submits that processors that pay high farmgate prices but do not source 80% of their milk from Queensland will not qualify for the Scheme and if consumers move away from such processors this could place downward pressure on farmgate milk prices. Norco is not aware of any processor paying the revised SFFP for a full 12 month period, so would expect milk prices to rise if the Scheme is introduced.

3.16. Norco submits that the revised SFFP does not reflect benefits to farmers outside the farmgate price paid, such as the financial benefits provided to farmers in a cooperative. Norco submits that the calculation method for the SFFP is flawed and does not represent the cost of farmers operating their farms. Norco restates concerns that the use of QDAS data prevents the SFFP from keeping pace with seasonal and on-farm conditions changing and adds that QDO's proposal to move to a two year average widens the divide between the real cost of production and the SFFP.

3.17. ADPF submits that the process for setting the SFFP and milk origin criteria that must be met to qualify for the Scheme are biased[4] and the proposed use of the Trade Mark to reflect the eligibility requirements of the Scheme risks misleading consumers and disadvantaging other dairy products that may be of the same or higher quality but would not meet the Scheme's eligibility requirements. ADPF's submission also restates concerns that mark-ups in farm gate price to meet the SFFP are likely to result in increased retail prices, and having a single body determine a 'fair' milk price is problematic and this role should be left to the market. ADPF also submits that there is less need for the Scheme because new tools introduced since QDO lodged its application for authorisation, such as ADPF's Milk Value Portal, work to enhance transparency in the milk market.

3.18. In relation to the revised SFFP, ADPF submits that QDO's proposal to base the SFFP on retrospective two-year average pricing fails to recognise seasonal fluctuations and short-term impacts that occur in the industry and means that previous, harder, years can have an extended influence on price. ADPF also submits that including finance costs and land lease costs in the COP component of the SFFP is inappropriate because these are effectively personal/business investment choices and not true production costs and their inclusion will inflate the SFFP.

[4] In particular, ADPF notes that the 80% minimum Qld milk requirement is an arbitrary cutoff, QDO is not an appropriate party to determine what a fair price is and reiterates issues that were considered previously around the small pool of farms in QDAS and the risk of QDAS farm inefficiency flowing to the SFFP.

3.19. On 25 February 2021, QDO provided a response to the submissions from Norco and ADPF. QDO submits:

a) The criteria to qualify for the Scheme will be clearly communicated to consumers on the Scheme website (www.fairgodairy.com) and QDO will develop video clips which communicate the provenance attributes required for qualification to the Scheme and communicates that brands must meet both provenance and SFFP criteria to qualify – these will be circulated on free-to-air tv and social media networks.[5]

b) Several processors are expected to meet the revised SFFP and provenance requirements. Bega (previously Lion), Norco and Lactalis have not shown interest in participating in the Scheme and currently pay an average farmgate price at least 3c/L below the SFFP and are unlikely to raise their farmgate prices in order to participate.

c) From discussions held to date, most brands paying a price sufficient to meet the SFFP are likely to apply to participate in the Scheme. Most brands that do not apply for the Scheme are paying farmers a price below the SFFP and there may be a small reduction in sales for some brands not participating in the Scheme. If processors in the Scheme increase their sales, they will seek to contract more Queensland dairy farmers. They would be able to easily attract farmers given that they would be paying a higher price for milk to ensure they met that criteria for the Scheme. Thus, some Queensland farmers will be substantially better off due to the Scheme without a change in retail prices. Farmgate prices on average could increase under the Scheme and the risk of lower prices would appear to be small.

d) In relation to the SFFP:

i. All Queensland processors currently pay a farmgate price that provides stability and certainty to farmers; none pay a price that reflects costs in one year in isolation because this would lead to significant variations in prices – processors and farmers already take a multi-year approach to determining farmgate prices. QDO's change to the SFFP calculation better reflects the current situation, it does not create a disconnect.

ii. The change QDO has made to the COP base removes capital purchases and principal repayments from the SFFP in response to previous submissions. Interest repayments and land lease costs are legitimate farm expenses and recognised as costs by ABARES.

3.20. On 9 March 2021 Norco provided a further, late, submission which supports the ADPF submission (summarised at paragraph 3.17). Norco submits that the criteria to qualify for the Scheme are flawed because the 80% Queensland milk requirement may exclude some generous processors and the use of the SFFP takes the determination of pricing away from contracting parties; the SFFP is unfair and unsustainable because only smaller Queensland based processors will qualify and consumers could move away from products from processors that pay high farm gate prices but couldn't qualify for the scheme; and, QDO is likely to set the SFFP above what could be considered fair.

[5] QDO have provided the ACCC further details of their proposed marketing on a confidential basis along with access to the Scheme website, which is not yet publicly available.

3.21. As noted at 1.11, the ACCC has not undertaken an assessment of whether the SFFP would necessarily be ‘fair’ or ‘sustainable’ in all circumstances, as this would depend on a range of factors such as prevailing market conditions.

3.22. Public submissions by QDO and interested parties are on the [Public Register]() for this matter.

4. ACCC assessment

4.1. The ACCC’s assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. QDO has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

Relevant areas of competition

4.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.

4.4. QDO considers the Proposed Conduct will have an impact on the:

- dairy industry, specifically, dairy processors and farmers in the dairy industry;
- wholesale milk purchasing industry (including milk processing and distribution) in which the processors operate; and
- retail industry, specifically, retailers of the Products.

4.5. In terms of the geographic reach of the Scheme, QDO submits that the Products bearing the Trade Mark may be sold throughout Australia. However, 80% of the raw milk for the Products must be purchased by a participating processor from a farmer whose farm is located within Queensland and whose milk is derived from dairy cows located within Queensland.

4.6. QDO also submits that it intends to launch the Scheme for operation in Queensland with an initial focus on fresh milk. QDO then intends to roll out the Scheme to other states and territories in Australia on a broader range of dairy products, subject to further approval by the ACCC.

4.7. The ACCC is conscious that the Scheme is intended to apply to dairy milk, dairy cream, dairy desserts and cheese, which may be sold throughout Australia. However, as a result of the Scheme Rules, which require >80% of the milk used to manufacture these Products to be sourced from Queensland farms and cows, the Scheme will primarily affect Products sold in Queensland. The ACCC understands that most Products produced in Queensland are consumed in Queensland and there is limited export of these Products to other Australian States and Territories.

4.8. The ACCC considers that the relevant areas of competition are likely to be:

- the acquisition by processors of unprocessed milk from farmers in southern Queensland/northern NSW and far north Queensland (Tablelands regions);

- the wholesale supply of dairy products by processors in Australia, but particularly in Queensland, and
- retail supply of dairy products to consumers in Australia, but particularly in Queensland.

Future with and without the Proposed Conduct

4.9. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.

Likely future with the Proposed Conduct

4.10. The ACCC considers that in the likely future with the Proposed Conduct:

- Processors who already pay a farmgate price equal to or higher than the SFFP will be more likely to participate in the Scheme.

  In this regard, QDO states that initial take up of the Scheme will likely be from smaller processors who accounted for approximately 4.5% of retail sales in Queensland in the last financial year. As such the range of dairy products bearing the Trade Mark is likely to be relatively limited when the Scheme is first introduced.

- Participation in the Scheme by major processors appears unlikely.

  Most major processors pay a farmgate price below the SFFP and a number have indicated to QDO that they are unable or unwilling to raise farmgate prices to satisfy the SFFP requirement and/or are unable to source sufficient milk from Queensland farmers to participate in the Scheme. This means that growth of the Scheme, through the Trade Mark appearing on a wider range of Products available from major processors, is uncertain.

Likely future without the Proposed Conduct

4.11. QDO notes that the number of dairy farms in Australia has contracted over the last decade and submits that in the likely future without the Proposed Conduct the trend of farmer exit will continue, leading to a contraction of supply and higher prices.

4.12. The ACCC notes that while the number of dairy farms in Australia has contracted over the last decade, national milk production during this period has been stable and average raw milk production per farm has increased.[6] Milk production volumes in Queensland have become stable in recent years[7] and the introduction of the Dairy Code provides farmers in the industry with greater confidence and certainty over contract terms.

4.13. The ACCC considers that in the likely future without the Proposed Conduct, the status quo will persist:

- Consumers will have a range of dairy products available to them, with some processors providing information about the qualities of their products (e.g. 'drought relief').
- Farmgate prices paid to the majority of Queensland farmers will be similar to current rates.

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6 ACCC, Final Report of the Dairy Inquiry; at 5.

7 ACCC, Final Report of the Dairy Inquiry; at 5 and 136-138.

Public benefits

4.14. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

> *…anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements … the achievement of the economic goals of efficiency and progress.* [8]

4.15. The ACCC has considered the following public benefits:

- Improved customer information and choice.
- Increased competition.
- More sustainable farmgate prices.

Improved customer information and choice

4.16. QDO submits that the Scheme will provide more information and choice to consumers when purchasing Products, particularly for consumers who are interested in knowing about the prices paid to farmers as part of the production of certain Products.

4.17. In support of this, QDO submits that:

- The Trade Mark will improve transparency about the Products to which it is affixed, allowing consumers to easily identify which Products meet the specified SFFP and are 'objectively paying a fair price to farmers'[9].
- The Scheme would be of a significant value to the community as a whole as it enables the consumer to be better informed about the allocation of costs behind the Products so they can better understand why certain Products cost more than their competitors.
- The Scheme may encourage retailers to stop using some dairy products as a loss-leader (i.e. selling private label milk at an unprofitable price to encourage more consumers to go into their retail outlets), on the basis that the improved pricing transparency resulting from the Scheme may lead to consumers rejecting those retailers that set prices for dairy products that are unsustainable for farmers.

4.18. Interested parties have mixed views as to whether the Scheme would be likely to improve customer information and choice.

4.19. The Queensland Farmers' Federation, WA Farmers Dairy Council, Woombye Cheese Company and Maleny Cheese suggest that it would be beneficial for retail Products to provide an indication of the amount that farmers are paid for their milk.

4.20. The Dairy Farmers Milk Co-op and some milk processors are concerned that the Trade Mark does not make reference to Queensland, does not explain what is meant by 'Fair' or what it is certifying and therefore may be confusing to consumers. Norco and ADPF echo these concerns that the logo is not clear in what it conveys, particularly as it does not reflect benefits beyond the farmgate price.

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[8] Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

[9] QDO Application for Authorisation.

4.21. Some milk processors are concerned the requirement that >80% of milk be sourced from Queensland is likely to exclude processors that pay farmgate prices above the SFFP from participating in the Scheme. Because the Trade Mark does not convey milk origin eligibility requirements consumers may draw inaccurate conclusions about the qualities of Products bearing the Trade Mark. As such, processors suggest that the Trade Mark does not reliably identify milk sourced from farms where a ‘fair’ farmgate price is being paid.

4.22. The Dairy Farmers Milk Co-Op also submits that Queensland is already saturated with labels and dairy product choices.

4.23. ADPF submits that that there is less need for the Scheme because new tools, such as ADPF’s Milk Value Portal, work to enhance transparency in the milk market.

4.24. The ACCC recognises that there are some consumers who want to support dairy brands or Products that provide the best returns for local dairy farmers and this information is often not readily available at the point of purchase. The prevalence of labels used to identify the origin of milk and other attributes, such as ‘drought relief’, suggest there is value to consumers from having access to such information when they are deciding which dairy product(s) to purchase.

4.25. The ACCC accepts that the Trade Mark aims to convey more information to consumers about the prices paid to farmers at the point of purchase. However, the ACCC considers that the extent to which it achieves this objective is limited by the lack of specificity of the expression ‘Fair Go Dairy’ and the lack of a clear reference to the Scheme’s requirement that milk originate primarily from Queensland. Consumers would need to explore QDO’s website or be exposed to QDO’s supporting marketing to understand what the Trade Mark is actually conveying. Similarly, tools such as ADPF’s Milk Value Portal provide some high level information but would not inform consumers about the farmgate prices that are associated with particular milk labels.

4.26. As noted at 3.19(a) above, QDO will provide an explanation of the Scheme on its website and through marketing that will coincide with the Scheme’s launch. Following the draft determination, the ACCC has been provided with access to the (not yet live) Scheme website and further information about the proposed marketing campaign on a confidential basis. The ACCC considers that this additional information is likely to go some way to better informing consumers who are exposed to it.

4.27. Overall, the ACCC considers that the Proposed Conduct is likely to result in some public benefit through a small improvement in customer information and choice. The Trade Mark goes some way to better informing consumers who want to purchase dairy products based on the price that farmers receive. However, the extent of this benefit will depend on how prominently and accurately QDO publicises the meaning of the Trade Mark.

Increased competition

4.28. QDO submits that improved transparency between the farmer, processor, retailer and consumer, particularly in relation to costs along the supply chain, would likely lead to increased competition between milk processors.

4.29. QDO submits that the Trade Mark will identify processors that pay a SFFP to farmers and this improved transparency will encourage processors to negotiate fairer contracts with farmers, taking into account the farmgate prices being paid by other processors participating the Scheme.

4.30. QDO also submits that the Dairy Report acknowledges that improved transparency would likely lead to:

- increased competition between processors for the acquisition of raw milk; and
- more efficient milk production decisions in the Australian dairy industry, leading to lower costs and potentially higher profits.[10]

4.31. The WA Farmers Dairy Council submits that the Scheme would improve competition in Queensland, but did not elaborate on why this would be the case. A number of milk processors suggest that the Scheme may in fact decrease competition (these concerns are addressed in paragraphs 4.49 - 4.62, below).

4.32. As discussed at paragraphs 4.25 to 4.27, the ACCC accepts that the Trade Mark goes some way to better informing consumers about the costs associated with the Products. If this information is valued by consumers, then it is feasible that there may be a shift in consumer preferences towards participating brands. In these circumstances, the ACCC considers that the Trade Mark represents an additional form of non-price competition and is likely to result in some public benefit through a small increase in retail competition between dairy products in Queensland.

4.33. It is also possible that the introduction of the Trade Mark could result in improved competition in the acquisition of raw milk in Queensland. However, in light of the likely small impact on retail competition, the ACCC considers that a significant improvement in competition for the acquisition of raw milk is possible but not likely during the proposed term of authorisation.

More sustainable farmgate prices

4.34. QDO suggests that current farmgate prices are unsustainable as a result of the present imbalance in bargaining power between farmers, processors and retailers, leading to a decrease in the number of dairy farmers and reduced milk production in Queensland each year.

4.35. By introducing a ‘Sustainable and Fair Farmgate Price’, QDO submits that the Scheme:

- may support the sustainability of farmers to ensure they can remain in the market, and
- is intended to assist in lessening price risk uncertainty, therefore allowing farmers to have greater confidence to make investments which deliver more efficiencies for their businesses.

4.36. The ACCC acknowledges the objective of the SFFP but notes that the processors who are most likely to participate in the Scheme already pay a farmgate price equal to or above the SFFP. Further, it is not certain that any other processor would raise their prices to the SFFP and in fact, some processors submit that they would not do so.

4.37. The ACCC also recognises that the SFFP could reduce price uncertainty by announcing the prices farmers could expect from participating processors before those processors would otherwise announce their minimum prices under the code. However, because of the licensing arrangements, farmers will not know whether the processors they service will participate in the Scheme when the SFFP is announced each year and therefore, it is unclear whether the Scheme will improve the position of farmers in this regard.

[10] ACCC Dairy Report, page 29.

4.38. Overall, the ACCC considers that more sustainable farmgate prices are a possible outcome from the Scheme but there is not sufficient certainty at this stage to conclude they are likely to result from the Proposed Conduct.

ACCC conclusion on public benefit

4.39. The ACCC considers that the Proposed Conduct is likely to result in some public benefits through:

- A small improvement in customer information and choice as the Trade Mark goes some way to better informing consumers who want to purchase dairy products based on the price that farmers receive. This benefit is limited by the non-specificity of the Trade Mark, meaning that the extent of benefit will depend on QDO marketing activity.
- A small increase in retail competition between dairy products in Queensland.

Public detriments

4.40. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

> *…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.*[11]

4.41. The ACCC has considered the following potential public detriments:

- Trade Mark may mislead consumers.
- Reduced competition.
- Increased retail prices for dairy products.
- Reduced incentive for QDAS farms to innovate.

Trade Mark may mislead consumers

4.42. Coles and some milk processors submit that the logo does not convey the origin of milk in participating Products which could lead consumers to draw erroneous conclusions about the qualities of Products bearing the logo. This creates a risk that an inaccurate inference may be drawn about products that do not bear the Trade Mark in relation to what is paid to farmers. In particular:

- The 'Fair Go Dairy' logo only identifies the Products that are providing farmers with conditions that meet QDO's definition of a 'fair go' and risks misleading consumers as it excludes any Products made with milk sourced from outside Queensland, regardless of the price paid to farmers.
- The Scheme purports to support the sustainability of dairy, but may in fact have adverse effects for the sustainability of the Queensland dairy industry. As discussed in detail at paragraphs 3.5 and 3.6, the ACCC does not consider that the Scheme is likely to jeopardise the sustainability of the Queensland milk industry.
- Consumers may infer that the absence of the Trade Mark from Products means that those Products are not treating their farmers fairly or have paid their farmers less than a SFFP, when in fact they may have been paid as much or more than the SFFP.

11 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

4.43. ADPF and Norco raised these concerns in their submissions pre- and post- draft determination. Norco submits that the logo fails to reflect benefits beyond farmgate price and therefore may potentially mislead consumers into believing that products without the logo provide unfair conditions to farmers. ADPF has a similar view, submitting that the Scheme is at risk of misleading consumers to believe that products with the logo may be perceived as higher quality given their production location.

4.44. The ACCC accepts that the Trade Mark does not convey the origin of milk in participating Products and that the expression 'Fair Go Dairy' does not have a specific meaning. The ACCC also notes that the Trade Mark does not convey detailed information regarding the operation of the Scheme or circumstances in which processors will and won't qualify.

4.45. These limitations mean that the Trade Mark is less informative than it purports to be. However, the ACCC is not convinced that this also means the Trade Mark is likely to mislead consumers in relation to either products with or without the logo.

4.46. For consumers who are unfamiliar with the details of the Scheme and the Trade Mark, the ACCC considers that the expression 'Fair Go Dairy' is so general in nature that the Trade Mark is unlikely to convey any misleading impression about the qualities of products bearing the logo, or indeed, create inferences about products without the logo.

4.47. The ACCC acknowledges that consumers who are familiar with the details of the Scheme and the Trade Mark are likely to infer that products without the Trade Mark do not qualify for it. However, as long as QDO's supporting marketing is factual and informative, the ACCC does not consider that these types of inferences by consumers are likely to be inaccurate or that the Trade Mark is likely to be misleading.

4.48. As noted earlier, following the draft determination, the ACCC has been provided with access to the (not yet live) Scheme website and further information about the proposed marketing campaign on a confidential basis. The ACCC considers that QDO's proposed marketing of the Scheme is likely to contribute to consumer awareness of the Scheme and reduce the likelihood of inaccurate inferences being drawn from the use (or omission) of the Trade Mark from dairy products.

Reduced competition

4.49. Some interested parties are concerned that the Scheme will reduce competition in the following ways.

Discriminating against products that are not made with sufficient quantities of milk sourced from Queensland (Coles, Norco, Bega, Australian Dairy Products Federation)

4.50. The ACCC recognises that some processors may not be able to participate in the Scheme due to an inability to access sufficient quantities of Queensland sourced milk or because they would face significant costs in segregating Queensland milk.

4.51. However, the ACCC does not consider this aspect of the Scheme is likely to lessen competition noting that:

- If it becomes commercially worthwhile for processors to increase their farmgate prices, purchase more milk from Queensland and/or segregate their Queensland sourced milk in order to participate in the Scheme, they can do so.

- There is no indication that any retailer proposes to restrict its acquisition of dairy products to processors who are participating in the Scheme
- The Scheme does not prevent processors who are ineligible for the Scheme from establishing their own framework to convey that they are treating farmers well.

4.52. The ACCC accepts that it may be expensive for some processors to comply with the scheme due to its milk origin requirements, but does not consider this requirement lessens competition.

Enabling cartel conduct by facilitating price coordination and information sharing (Lactalis)

4.53. Lactalis notes that Clause 5.2 of the proposed licence for the Scheme states:

> *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.*

4.54. QDO confirms that it is not seeking authorisation to engage in any collusion or anti-competitive conduct between participants who are seeking to or obtain a licence to use the Trade Mark.[12] It also notes that the Dairy Code now requires all processors to publish standard form MSAs before 1 June each year, which must include a minimum price. QDO submits that the Proposed Conduct seeks to complement these transparency objectives of the Dairy Code and notes that farmers in Queensland already have access to the QDAS report, from which the SFFP is calculated.

4.55. The ACCC notes that clause 5.2 of the Scheme Rules is effectively requiring processors that participate in the Scheme to facilitate the sharing of information between dairy farms and QDO regarding the production and supply of the Products to the those processors. This is not requesting the exchange of information between competitors and, as confirmed by QDO, the authorisation sought would not permit collusion or other anti-competitive conduct by participants in the Scheme.

4.56. The ACCC notes concerns that the calculation and publication of the SFFP by QDO may constitute price signalling. The ACCC notes:

- Processors already announce what their prices will be in advance of entering into milk supply contracts – this usually occurs in June for supply contracts which commence in July. In contrast, under the Scheme an announcement of the SFFP would issue before processors publish their own minimum prices.
- The SFFP is a statement of the minimum price for processors that will be participating in the Scheme– it is not an announcement of what the farmgate price offered by those processors will be.
- The ACCC's Dairy Inquiry did not find any evidence of coordination between processors with regards to farmgate prices.
- It does not appear likely that any of the major processors will participate in the Scheme in the first five years.

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[12] QDO response to Interested Party Submissions and ACCC request for information, page 14, https://www.accc.gov.au/system/files/public-registers/documents/Applicant%E2%80%99s%20response%20to%20interested%20parties%20submissions%20and%20ACCC%20request%20for%20information%20-%2027.11.20%20-%20PR%20-%20AA1000530%20QDO.pdf

4.57. The ACCC considers that by announcing the SFFP in advance of processors disclosing their minimum process (as required by the Dairy Code) QDO will further increase pricing transparency for farmers, processors and retailers. The ACCC is mindful that increased transparency increases the risk of collusive activity or cartel conduct by processors. In particular, the SFFP could act as a price signal, signposting the minimum farmgate price that farmers will be paid by processors participating in the Scheme. However, the ACCC recognises that this outcome would appear to be at odds with the objectives of the Scheme and inconsistent with the reasons that a processor would choose to participate in the Scheme.

4.58. Accordingly, the ACCC considers that in circumstances where minimum pricing is already announced in advance and coordination between processors on pricing was not detected in the ACCC's Dairy Inquiry, it does not appear likely that the Proposed Conduct will lead to collusion or cartel conduct by processors.

Setting a minimum price floor for the purchase of milk by processors that may reduce the incentive for dairy farmers to innovate and pursue efficiency (Lactalis)

4.59. The ACCC considers that the SFFP is likely to be ineffective as an industry wide price floor because:

- None of the major processors have indicated an intention to participate in the Scheme and it appears highly unlikely that some of the processors acquiring milk from Queensland farms would invest in the infrastructure and/or raise their prices to the level necessary to be eligible. As long as one or more major processors continue to operate outside the Scheme paying farmgate prices below the SFFP, this is likely to undermine the effectiveness of the SFFP as a price floor.

- Unless major processors join the Scheme, participating processors are unlikely to be able to purchase all of the milk that would be offered to them at the SFFP, meaning most farmers will still supply one of the non-participating processors.

4.60. The ACCC considers that farms will continue to have an incentive to maximise their profitability by innovating to maximise their efficiency, which in turn will maximise their profitability. In this regard the ACCC does not consider the Scheme is likely to reduce the incentive for farms to operate efficiently.

Harming competition between processors of branded milk and retailers that sell private label milk (Bega)

4.61. Bega and the Dairy Farmers Milk Co-op suggest there is a possibility that one or more major retailers may increase the price of milk they pay to farmers (to meet or exceed the SFFP) and absorb these higher costs through other parts of their business. In contrast, other processors who raise the farmgate prices they pay to the SFFP would not be able to pass on these price increases to retailers and would be forced to absorb it themselves.

4.62. The ACCC is mindful of concerns that supermarkets with private label dairy products have the capacity to cross-subsidise their Products and in this way could raise the farmgate prices they pay farmers in order to qualify for the Scheme without imposing a corresponding increase in the retail prices they charge. The ACCC has seen no evidence that this is likely to occur but welcomes further submissions from interested parties on this issue.

Increased retail prices for dairy products

4.63. Some interested parties suggest that the Proposed Conduct will result in increased retail prices for Products under the Scheme because participating processors may pass their increased costs on to retailers, and possibly consumers. These concerns were reiterated in the submissions provided by Norco and ADPF.

4.64. QDO submits that:

- It is unlikely that costs for administering, affixing and marketing the Trade Mark would result in a material increase in the cost above what processors already incur.
- QDO will be undertaking marketing of the Scheme at its own cost, and that if processors wish to undertake their own marketing for the Trade Mark, there would be little to no marginal cost in adjusting their own marketing.
- Processors who have indicated a willingness to participate in the Scheme are located in Queensland and already source all their milk from Queensland farms, so there will not be any significant costs associated with those processors demonstrating the milk origin requirements.[13]
- So far it is only processors that already pay above the SFFP that have indicated a willingness to participate in the Scheme. If processors do increase their farmgate prices in order to qualify, it is unlikely that they would be able to pass on all of any of the increased farmgate prices to supermarkets due to the negotiation processes and superior bargaining position of supermarkets to processors. Farmgate prices are determined by processors, and are the same irrespective of the ultimate dairy product the milk is used for. There is no link between farmgate milk prices and final dairy product prices for this reason, and that the Scheme is unlikely to result in effects on retail prices for dairy products.[14]

4.65. The availability of other Queensland dairy products from processors who are currently opting not to participate in the Scheme will also likely provide a price constraint. The ACCC considers that any processor deciding to participate in the Scheme would need to independently assess whether the potential benefits of participation would be worthwhile in light of any potential increase in costs it would incur to participate in the Scheme (above its ordinary operating costs), and whether to pass on these costs to retailers, or whether the processor can absorb the increase in costs (which the ACCC accepts is likely to be minimal).

4.66. The ACCC considers that if the Scheme proves popular with consumers then processors and retailers may increase the price of products bearing the Trade Mark. This would be a reflection of the benefit of the Scheme to consumers (who value the Trade Mark), leading to higher prices and would not be a reflection of reduced competition or of processors pushing their increased costs to retailers. If retailers are able to raise the price of products bearing the Trade Mark, then processors may be able to recoup part or all of the increased costs that they incur by participating in the Scheme.

[13] QDO notes that that costs associated with demonstrating compliance with the sourcing requirements may be as simple as providing copies of the milk supply and volume agreements that include details of where a farmers farm is located and allowing an inspection of the facility.

[14] The ACCC notes that this point conflicts with other arguments raised by the Applicant. QDO, in its application for authorisation, submits that supermarkets will stop loss-leading because consumers don’t want to buy products if farmers have not been paid a fair price. Although if, by QDO’s own submission, retail prices have no effect on raw milk prices the only beneficiary of a reduction in loss-leading is the supermarkets – at the expense of consumers.

4.67. The ACCC acknowledges that retail prices of products bearing the Trade Mark may increase, but does not consider this is likely to occur because of a lessening of competition.

Reduced incentive for QDAS farms to innovate

4.68. Some dairy producers are concerned that the use of QDAS data in the calculation of the SFFP may entrench inefficiency. In particular, they suggest that calculating the SFFP on the basis of an average cost of production, plus a margin, would reduce the incentive for farms participating in QDAS to lower their average cost of production (on the basis that they would then in turn receive a lower SFFP). Bega also submits that QDAS data can be skewed by the inclusion of inefficient farms in the calculation of costs.

4.69. QDO notes that the average farm included in the QDAS Report is larger and more efficient than the average Queensland farm. The effect of this is that the cost of production in the QDAS Report is likely to be *lower* than the Queensland average.

4.70. While the ACCC accepts that it is likely that the QDAS Report would include data sourced from some farms that are less efficient than average, overall, the likely effect of the use of the QDAS data would be to encourage farms who do not presently participate in the QDAS Report to improve their efficiency, as the SFFP they may receive would be dependent on the costs of production of farms who are on average larger and more efficient.

4.71. Further, because the SFFP is calculated based on the average cost of production of a large number of farms, farms participating in the QDAS Report will individually retain an incentive to be as efficient as possible, to maximise profits.

4.72. The ACCC accordingly does not accept that the use of the QDAS data will entrench inefficiency, or reduce incentives for farms to innovate or lower their costs of production.

ACCC conclusion on public detriment

4.73. The ACCC considers that, provided the associated marketing is accurate, the Trade Mark is so general in nature that it is unlikely to mislead consumers about the qualities of products bearing the Trade Mark, or create misleading impressions about products without it.

4.74. For the reasons set out above, the ACCC considers the Scheme is unlikely to reduce competition, increase retail prices for dairy products or create inefficiency.

4.75. Overall, the ACCC considers that the Proposed Conduct is unlikely to result in any significant public detriments.

Balance of public benefit and detriment

4.76. On balance, and for the reasons outlined in this determination, the ACCC is satisfied that the Proposed Conduct is likely to result in some public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

4.77. In reaching this decision, the ACCC considers there is a reasonable basis for the SFFP calculation, but does not endorse the SFFP as necessarily being ‘sustainable’ or ‘fair’ in all circumstances, as this will depend on a range of factors such as prevailing market conditions.

Length of authorisation

4.78. The Act allows the ACCC to grant authorisation for a limited period of time.[15] This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.79. In this instance, the QDO seeks authorisation for 10 years on the basis that:

- QDO considers it takes at least five years to become established in the market
- a 10 year period provides consumers time to become familiar with the logo, and
- the renewal period for a Trade Mark in Australia is 10 years. The Applicant seeks to recover the costs in being granted the Trade Mark over the 10 year period.

4.80. QDO notes the significant time and costs associated with seeking authorisation of the Scheme. QDO is a not-for-profit organisation, with funding for the Scheme being provided by the Department of Agriculture and Fisheries. However, this funding is only available until June 2021, with no further funding allocated beyond this period.

4.81. Interested parties who support the Scheme (including Woombye and Maleny) believe that authorisation should be indefinite after a 10 year review.

4.82. Interested parties who oppose the Scheme, namely the major processors, submit that if authorisation is granted, it should only be for two to three years.

4.83. The ACCC considers that there is considerable uncertainty about how significant the impact of the Scheme will be in practice. In these circumstances, the ACCC considers it appropriate to authorise the Scheme for a shorter period than QDO has been requested. As such, the ACCC has decided to grant authorisation for five years.

5. Determination

The application

5.1. On 25 September 2020 QDO lodged application AA1000530 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

5.2. QDO seeks authorisation for the Proposed Conduct defined at paragraphs 1.7 - 1.10.

The authorisation test

5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

5.4. For the reasons outlined in this determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.

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15 Subsection 91(1)

5.5. Accordingly, the ACCC has decided to grant authorisation.

Conduct which the ACCC has decided to authorise

5.6. The ACCC has decided to grant authorisation AA1000530 to enable QDO, processors who are licensees of the “Fair Go Dairy” logo and any farmer from whom a processor purchases milk in accordance with the Fair Go Dairy licensing scheme [16] to implement and give effect to the Scheme as described in paragraph 1.8 and defined as the Proposed Conduct.

5.7. Authorisation is granted in relation to Division 1 of Part IV of the Act and section 45 of the Act.

5.8. The ACCC has decided to grant authorisation AA1000530 until 3 April 2026.

6. Date authorisation comes into effect

6.1. This determination is made on 12 March 2021. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 3 April 2021.

[16] Subsection 88(2)

Attachment A: SFFP Calculation

SFFP = COP multiplied by the **CPI Rate**

COP means the cost of production (or equivalent) for milk as published by QDAS in respect of the immediately preceding financial year. Specifically, QDO will use the *Appendix - Group Dairy Farm Profit Map* of the QDAS report (listed as Appendix 10.3 in 2019-20 QDAS Report) to determine the cost of production for the SFFP.

CPI Rate means the percentage change in the CPI Index (All Groups) for the immediately preceding calendar year;

QDO will use a 2-year average price. One year CPI will be used, which would be 2019/20 and the 2020 calendar year, when calculating the SFFP for 2021/22.

By way of example:

To calculate SFFP for 2021/22:

.SFFP 2021/22: = (Year 1 price + Year 2 price) / 2

Year 1 price **= 2018/19 COP x CPI Rate**

= 2018/19 QDAS * (1 + 2019/20 CPI) * ((2020 CPI * 2) + 1)

= 70.6 * (1-0.0035) * ((0.0086*2)+1)

= 71.5

Year 2 price **= 2019/20 COP x CPI Rate**

= 2019/20 QDAS * ((2020 CPI * 2)+1)

= 74.9 * ((0.0086 * 2)+1)

= 76.2

SFFP 2021/22: = (Year 1 price + year 2 price) / 2

= (71.5 + 76.2)/2

= 73.8c/L