

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged: Statement of Facts, Issues and Contentions

File Number: ACT 2 of 2021

File Title: RE APPLICATION FOR AUTHORISATION AA1000530
LODGED BY QUEENSLAND DAIRYFARMERS'
ORGANISATION (QDO) ON 25 SEPTEMBER 2020 IN RESPECT
OF A LICENSING SCHEME FOR THE USE OF THE 'FAIR GO
DAIRY' LOGO, AND THE DETERMINATION MADE BY THE
AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION (ACCC) ON 12 MARCH 2021

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



REGISTRAR

Dated: 16/08/2021 7:32 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 2 of 2021

RE: APPLICATION FOR REVIEW LODGED BY AUSTRALIAN DAIRY PRODUCTS FEDERATION INC IN RESPECT OF LICENSING SCHEME FOR THE USE OF THE 'FAIR GO DAIRY' LOGO, AND THE DETERMINATION MADE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) ON 12 MARCH 2021

APPLICANT: Australian Dairy Products Federation Inc

APPLICANT'S STATEMENT OF FACTS, ISSUES AND CONTENTIONS

PART A: BACKGROUND FACTS

The Applicant

1. The Australian Dairy Products Federation Inc (**ADPF**) is the national peak body representing commercial, post-farm gate, participants in the Australian dairy industry. Its members include processors, traders and marketers of Australian dairy products.
2. ADPF's members process approximately 90% of Australian milk volumes and provide dairy products for domestic consumption and export.
3. The ADPF has actively advocated on behalf of its members for more than 30 years with respect to improvements in the manufacturing, marketing and trading of dairy products.

The Application for Authorisation

4. This proceeding concerns an application for Authorisation submitted by the Queensland Dairyfarmers' Organisation Ltd (**QDO**) (**Authorisation Applicant**) to the ACCC, pursuant to s 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Application**).

5. The Applicant participated in the ACCC's public consultation with respect to the Application, making submissions dated 26 September 2020, 29 January 2021 and 5 February 2021.
6. The Application involved a scheme relating to the licence by the QDO, and use by dairy processors, of a trade mark registered by the QDO in conjunction with the promotion and sale of various dairy products by the dairy processors (**Scheme**).
7. The trade mark in question (being the mark registered by IP Australia under the number 2039381) is a logo containing the words "Fair Go Dairy", in the form below:



(Trade Mark)

8. Broadly, the QDO proposes to grant processors a licence to use the Trade Mark in connection with the sale of various dairy products as part of each licensee processor's business (**Licence**).¹
9. Pursuant to the terms of the Licence, each licensee is obliged to comply with, among other things, the Scheme Rules, which are set out at Annexure A to the Licence.²
10. By operation of the Scheme Rules, it is intended that a Licence be available to qualifying approved dairy products, including:
 - a. Dairy milk: fresh, UHT/long-life milk, powdered milk (including infant formula) and flavoured/enhanced milk;

¹ See cl 3.1 of the proposed Licence Agreement, set out as Attachment A to the Application.

² Also identified as Attachment C to the Application.

- b. Dairy cream: fresh, UHT/long-life milk and flavoured/enhanced milk;
- c. Dairy desserts: mousses, ice cream, custards and yoghurts; and
- d. Cheese/cream cheese and variants

(together, **Products**).

11. Relevantly, cl 13 of the Scheme Rules sets out qualifying requirements that must be satisfied in order for a processor to be eligible for a grant of a licence for one or more Products (**Requirements**).

12. According to the Requirements, approval for the use the Trade Mark pursuant to the Licence will only be permitted where:

- a. no less than 80% of the milk used in the manufacturing of the Products, the subject of an application, must be sourced from a farmer where:
 - I. the farmer's farm is located within Queensland;
 - 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 Sustainable and Fair Farmgate Price (**SFFP**); and
- b. no milk used in the Products is sourced from outside Australia.³

13. The SFFP is defined as a farmgate price for milk calculated in accordance with clause 12 of the Scheme Rules.⁴

14. Clause 12 of the Scheme Rules, which incorporates the Reference Schedule attached to the Scheme Rules, defined the SFFP as the product of the following formula:

$$\text{Cost of production (COP) + (COP x CPI Adjustment Rate)}$$

³ See sub-clauses 13(a) and (b) of the Scheme Rules, together with cl 7 of the Scheme Rules.

⁴ See sub-clause 1(w) of the Scheme Rules

where COP was defined as the average cost of production of milk as published annually by the Queensland Dairy Accounting Scheme (**QDAS**) for the period commencing on 1 July and ending on 30 June (**QDAS Report**).⁵

15. The rationale for the Scheme is described at paragraph 3.3 of the submission accompanying the Application (**Submission**), as including:

- a. correcting an imbalance in bargaining power between dairy farmers and processors, by providing greater transparency between the farmer, processor, retailer and consumer of the Products, in particular with respect to the costs associated with such Products along the supply chain;⁶
- b. encouraging competition among processors;⁷
- c. publicly acknowledging processors who are paying a SFFP to farmers;⁸
- d. ensuring that a customer is able to determine – by reference to the Trade Mark – that the profit from the sale of the Product is objectively fair by demonstrating that such profit takes into consideration that a SFFP has been paid to the farmers;⁹
- e. that the Scheme will enable consumers to make a more informed decision about which brand of Product they should purchase, and whether they want to support brands associated with processors who also support farmers by paying them a SFFP;¹⁰ and
- f. providing the consumer with a convenient and simple way to identify whether purchasing a product will provide an SFFP to the farmer whose milk was used in the Product.¹¹

⁵ See sub-clauses 12(a)(i) and (vii)

⁶ Submission, paragraph 3.3(d)

⁷ Submission, paragraph 3.3(d)

⁸ Submission, paragraph 3.3(g) – as opposed to processors who are paying *the* SFFP

⁹ Submission, paragraph 3.3(h)

¹⁰ Submission, paragraph 3.3(i)

¹¹ Submission, paragraph 3.3(j)

The ACCC Determination

16. On 18 December 2020, the ACCC published a Draft Determination, proposing to grant authorisation and also granting Interim Authorisation for the QDO continue discussions with respect to the proposed scheme (but not permitting any arrangements to be entered into in relation to the Scheme).
17. On 25 January 2021, the QDO informed the ACCC that it proposed to change the methodology for the calculation of the SFFP. Under its revised methodology, the SFFP would reflect a rolling 2-year average of the relevant QDAS cost of production figure, multiplied by the applicable CPI rate.
18. On 12 March 2021, the ACCC published its Determination in respect of the Application, granting authorisation to enable the QDO, processors who are licensees of the Trade Mark and any farmer from whom a processor purchases milk in accordance with the Fair Go Dairy licensing scheme to implement and give effect to that scheme.¹²
19. The conduct for which authorisation was set out in the QDO's Application and relevantly described by the ACCC as the conduct involved in implementing and giving effect to that scheme, being the following:

*QDO is seeking authorisation to license its Trade Mark to processors 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 Products 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;

¹² Determination, paragraph 5.6

(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 Australia¹³

(Proposed Conduct).

The Dairy Code

20. On 27 October 2016, the then Commonwealth Treasurer issued a notice requiring the ACCC to hold an inquiry into the competitiveness of prices, trading practices and the supply chain in the Australian dairy industry.

21. The ACCC released its final report into the dairy industry on 30 April 2018 (**Final Report**), in which recommended the introduction of a mandatory code of conduct to address a range of market failures identified by it as resulting from the bargaining power imbalance and information asymmetry in farmer-processor relationships.

22. The ACCC identified various concerns with the process for setting and communicating farmgate prices to farmers,¹⁴ concluding that these could best be addressed through a mandatory code of conduct.

23. A mandatory Dairy Industry Code (**Code**) was subsequently prescribed under the *Competition and Consumer (Industry Codes— Dairy) Regulations 2019* (Cth) and commenced on 1 January 2020.

24. Among other things, the Code imposes obligations on processors with respect to the publication of standard form contracts,¹⁵ specification of minimum prices,¹⁶ the quality and quantity of milk to be supplied¹⁷ and other price related matters.

¹³ Determination, paragraph 1.8

¹⁴ Final Report https://www.accc.gov.au/system/files/1395_Dairy%20inquiry%20final%20report.pdf – see summary at pages xvi and xvii

¹⁵ Code, ss12 - 15

¹⁶ Code, s26

¹⁷ Code, s25

25. The Code – and, in particular, its mandatory nature – was designed to respond to the market failures identified by the ACCC as arising from the structure of the dairy industry and the terms of contracts offered to farmers by processors.¹⁸
26. Even though the ACCC considered that a mandatory code would address market failures and create industry certainty,¹⁹ the Code provided that the Minister for Agriculture had to undertake reviews of the Code in 2021 and 2023, in order to consider the role, impact and operation of the Code in relation to milk supply agreements entered into before 1 January 2020.²⁰
27. The public submission period for the 2021 review of the Code commenced on 5 July 2021,²¹ and a written report must be finalised and provided to the Minister responsible for the administration of s51AE of the CCA, by 31 December 2021.²²

The QDAS Report

28. QDAS was established by the Queensland Department of Agriculture and Fisheries in 1976 to improve the understanding of business principles among advisors and dairy farmers by providing farm management accounting and analysis, with the aim of helping dairy farmers make informed decisions based on business information.²³
29. The QDAS Report is compiled and published by QDAS, based on data voluntarily contributed by approximately 60 farms in Queensland. The QDAS Report for 2020 was based on data from 55 farms,²⁴ out of the approximately 327 active dairy farms in Queensland in the 2019/20 financial year.²⁵

¹⁸ Explanatory Statement, *Competition and Consumer Act 2010 Competition and Consumer (Industry Codes – Dairy) Regulations 2019*, pages 1 - 2

¹⁹ Final Report at paragraph 9.5.2

²⁰ Code, s6

²¹ <https://minister.awe.gov.au/littleproud/media-releases/review-dairy-code-conduct>

²² Code, s6(7) and (8)

²³ QDAS Report 2020 https://northernaustraliandairyhub.com.au/wp-content/uploads/2020/12/QDAS_2020.pdf at page (v)

²⁴ QDAS Report 2020, at page (iv)

²⁵ Dairy Australia's Infocus Report 2020 https://www.dairyaustralia.com.au/industry-statistics/industry-reports/australian-dairy-industry-in-focus#.YRB8_IgzaUk at page 6

30. The average milk production recorded in the 2020 QDAS Report for each of the 55 QDAS farms was 1,603,400 litres,²⁶ which can be contrasted with the average milk production of the top 25% of the farms reported in the QDAS Report, of 2,418,390 litres.²⁷
31. During the same period, total Queensland milk production was 311 million litres²⁸
32. Accordingly, the QDAS farms account for approximately 28% of the entire production of milk in Queensland.
33. QDAS caveats its own report with the observation that the results and trends reported in the QDAS Report need to be interpreted carefully as QDAS farms have larger herds and produce more milk per farm than the Queensland average.²⁹

The Sustainable Queensland Dairy Production (Fair Milk Price Logos) Bill 2016 (Bill)

34. The Bill was introduced into Queensland parliament in October 2016, following consultation with the QDO.³⁰
35. The primary objective of the Bill was to establish a scheme for the voluntary use of a series of fair milk price logos in labelling of fresh drinking milk (as opposed to the Products).³¹
36. The logos were intended to influence consumer behaviour by informing purchasers that the farmers who supplied the raw milk were paid a fair and sustainable price for their product, and the Bill also provided for Ministerial determination of appropriate farmgate prices for fresh milk.³²
37. The Queensland Parliament's Agriculture and Environment Committee produced a report in response to the Bill which, while expressing sympathy for the difficulties faced

²⁶ QDAS Report 2020 at page 2

²⁷ QDAS Report 2020 at page 2

²⁸ Dairy Australia's InFocus Report 2020 at page 14

²⁹ 2020 QDAS Report, page (v)

³⁰ <https://www.legislation.qld.gov.au/view/pdf/bill.first/bill-2016-072>

³¹ Bill, s3

³² Bill, s6

by the Queensland dairy industry, ultimately recommended against the passage of the Bill.³³

38. In the course of its report, the Committee made the following observation with respect to the data contained in the QDAS Report:

“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 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 by the Bill.”³⁴

Queensland demand for milk for drinking

39. According to QDAS, annual Queensland milk production for 2019/20 financial year was 311 million litres, compared to 418 million litres in the 2016/17 financial year.³⁵ This milk was processed into both drinking milk and other Products. As the tables below demonstrate, over the same period, demand for drinking milk in Queensland remained relatively stable, at approximately 578 million litres of drinking milk sales for Queensland per annum.³⁶

³³ <https://cabinet.qld.gov.au/documents/2017/Jul/PBMDairy/Attachments/Report.PDF>

³⁴ Agriculture and Environment Committee, Report No. 33 at page 12

³⁵ 2020 QDAS Report, page (iv)

³⁶ Dairy Australia Infocus Report https://www.dairyaustralia.com.au/industry-statistics/industry-reports/australian-dairy-industry-in-focus#.YRB8_IgzaUk at page 23, Table 20

Table 14 Milk production by state (million litres)

	NSW	Vic	Qld	SA	WA	Tas	Aust
2006/07	1,104	6,297	537	655	349	641	9,583
2007/08	1,048	6,102	486	606	319	661	9,223
2008/09	1,064	6,135	513	628	340	709	9,388
2009/10	1,099	5,813	530	605	359	677	9,084
2010/11	1,087	5,936	487	572	372	726	9,180
2011/12	1,136	6,246	491	575	349	792	9,589
2012/13	1,137	6,076	465	542	349	765	9,334
2013/14	1,124	6,174	446	525	342	810	9,421
2014/15	1,184	6,411	422	530	367	891	9,805
2015/16	1,198	6,249	421	538	392	883	9,681
2016/17	1,141	5,732	425	497	385	836	9,016
2017/18	1,144	5,979	399	505	385	913	9,325
2018/19 (r)	1,082	5,574	357	496	374	910	8,793
2019/20 (p)	1,044	5,619	311	488	364	950	8,776

Source: Dairy manufacturers

Table 20 Drinking milk sales by state (million litres)

	NSW	Vic	Qld	SA	WA	Tas	Aust
1979/80	531	437	249	127	119	41	1,504
1989/90	582	449	316	150	164	47	1,730
1999/00	597	440	383	185	190	48	1,933
2009/10	708	545	499	213	247	57	2,269
2010/11	715	566	502	213	262	58	2,316
2011/12	721	582	531	221	274	58	2,387
2012/13	719	600	563	222	280	61	2,445
2013/14	711	612	584	221	279	59	2,466
2014/15	715	625	581	222	285	61	2,489
2015/16	732	637	583	222	285	61	2,520
2016/17	722	635	579	227	284	60	2,507
2017/18 (r)	719	627	583	223	281	60	2,493
2018/19 (r)	709	637	578	218	276	58	2,476
2019/20 (p)	690	654	578	215	285	55	2,477

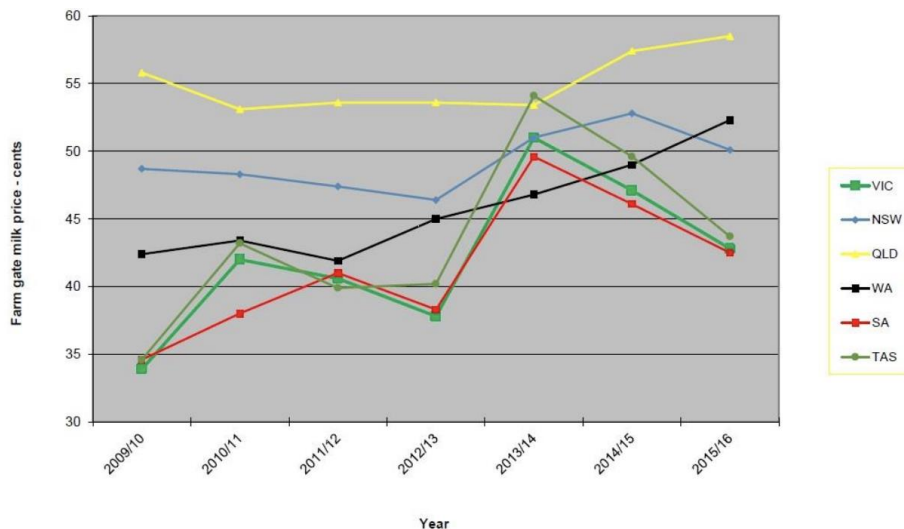
State figures exclude interstate traded milk prior to 2001, NSW includes ACT after June 2000.
(Dairy Australia estimates that this collection covers over 95% of milk sales)

Source: Milk processors and State Milk Authorities

40. At 311 million litres, Queensland milk production accounts for approximately 4% of Australia's total annual milk production of approximately 9 billion litres.³⁷

41. Even assuming that total Queensland milk production was available for drinking milk (which is not the case), Queensland suffers from a production deficit of milk for use as drinking milk of around 267 million litres per annum that can only be fulfilled through the sourcing of fresh milk (by way of delivery in bulk tankers) from other states. In light of the demand for fresh milk for the production of other Products, this deficit is exacerbated.

42. Since deregulation of the Australian dairy industry in 2000, Queensland has consistently experienced the highest and most stable farmgate prices in the country.³⁸



Source: Department of Agriculture and Fisheries, 2017

43. There are three large processors and a range of medium to small processors who acquire raw milk from dairy farmers in order to process it and supply drinking milk and other dairy products in Queensland.

44. The major processors are Lactalis (with factories in Brisbane and Nambour), Bega (with factories in Logan and the Atherton Tablelands) and Norco (with a factory in Labrador).

³⁷ Dairy Australia Infocus Report at page 14

³⁸ Agriculture and Environment Committee, Report No. 33 at page 4

45. The smaller processors include Schroter (with a factory on the Sunshine Coast), Maleny (with a factory in Maleny), Kenilworth (with a factory in Kenilworth) and 4RealMilk (with a factory in Scenic Rim). There are also some small dairy processors in Queensland who buy milk directly from other processors, rather than from farms.
46. According to the QDO, only 29% of Queensland milk production is processed by Processors who can comply with the 80% requirement, reflecting the deficit of Queensland sourced milk to the requisite demand.³⁹

PART B: ISSUES

47. The principal issue before the Tribunal is whether the Proposed Conduct satisfies the statutory criteria set out at s90(7)(b) of the CCA, in that it:
- a. would result, or be likely to result, in a benefit to the public; and
 - b. the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

PART C: CONTENTIONS

48. Pursuant to s101 of the CCA, the Application for a Review is a *de novo* rehearing of the Application.
49. The Applicant contends that the relevant factual is the future in which some processors (both those already paying above the SFFP and some other processors) engage in the Proposed Conduct.
50. The Applicant contends that the relevant counterfactual is the future in which the Proposed Conduct does not occur, and the status quo is maintained.
51. The role of the Tribunal is to assess whether the Proposed Conduct satisfies the statutory test under s90(7) of the CCA.

Public detriments

³⁹ QDO submission to the ACCC, 27 November 2020, paragraph 39(b)

52. The Applicant contends that the Proposed Conduct, if implemented, will give rise to significant public detriments.

53. These public detriments are:

- a. that the use of the Trade Mark is likely to mislead or deceive consumers; and
- b. the Proposed Conduct is likely to give rise to inefficiencies in the operation of Queensland milk farms.

Misleading or deceptive conduct

54. Consumers are likely to be misled, insofar as the use of the Trade Mark:

- a. represents that the farmers have been paid a fair and sustainable price, as opposed to farmers having been paid a price which accords with the QDO's definition of a price that is fair and reasonable; and
- b. leads to the perception that only Products promoted with the Trade Mark were produced with milk that acquired a sustainable and fair price (or otherwise in circumstances that give farmers a "fair go"),⁴⁰ and that other Products are produced with milk acquired at a price that is neither sustainable nor fair.

55. In the case of many processors who supply Products in Queensland, those processors will be incapable of satisfying the requirement that 80% of the unprocessed milk is sourced from Queensland farmers due to the shortfall in Queensland supply compared to Queensland demand.

56. Even accepting the QDO's own data, 60% of Queensland milk is processed by processors who are incapable of meeting the Scheme requirements, even if they offered the SFFP.⁴¹

⁴⁰ This inference is supported by the QDO's own contentions, in that the QDO contends that the use of the Trade Mark will enable consumers to identify which Products meet the specified SFFP and [where the processors in question] are objectively paying a fair price to farmers (Submission, paragraph 10(c)); the inference being that consumers who are concerned about fair prices being paid to farmers will not acquire competing Products which are not accompanied by the Trade Mark.

⁴¹ QDO submission to ACCC, 27 November 2020, paragraph 40

57. As such, those processors would be unable to use the Trade Mark, regardless of the price paid for the farmgate milk, thereby reinforcing the representation that they have not paid a fair price for their farmgate milk (or otherwise given farmers a “fair go”).
58. Further, and separately, the inherent unreliability of the formula used to calculate the SFFP (in particular, the QDAS price) is likely to mislead consumers as to whether or not farmers have been paid a price for farmgate milk which is a fair price (or given a “fair go”).⁴²
59. In circumstances where it is anticipated that qualifying processors will promote their Products by reference to the Trade Mark,⁴³ it gives rise to the clear inferences that other Products did not qualify for the Trade Mark.
60. As such, the use of the Trade Mark is likely to involve conduct that inherently involves a public detriment

SFFP is inherently unreliable and likely to generate inefficiencies

61. Inefficiencies are likely to arise in two respects:
- a. firstly, in respect of consumer purchasing decisions; and
 - b. secondly, in respect of farm and processing investment.
62. Generally, the Proposed Conduct may result in consumers making purchasing decisions which do not necessarily maximise consumer wellbeing. This arises by reason of the Proposed Conduct being likely to mislead consumers as to which Products were produced with milk acquired at a sustainable and fair price.
63. Relying on an *average* farmgate price as a ‘baseline’ for the SFFP means that some farmers may be compensated well above their cost of production (including allowance

⁴² The QDO uses the terms SFFP and “fair price” interchangeably (see, for example, paragraph 10(c) of the Submission), reinforcing the perception that only the SFFP calculated in accordance with the Scheme Rules is a fair price.

⁴³ Submission, at sub-paragraphs 3.3(c),(f),(h),(i),(j) and (l)

for any reasonable margin) while inefficient farmers may effectively be supported by the requirement to use the SFFP (thereby subsidising those inefficiencies).

Farm investment

64. As the QDAS price is not reflective of costs across all (or even a majority) of Queensland milk farms, its accuracy is inherently unreliable.
65. Farmers who are able to benefit from a SFFP calculated in accordance with the Scheme will benefit from a floor price and they will have no incentive to operate more efficiently, as they would if faced with a true market price.

Processor investment

66. Processors who source more than 20% of their unprocessed milk from outside Queensland, cannot qualify for a licence of the Trade Mark, even if they offer farmgate pricing that meets or exceeds the SFFP.
67. In these instances, and having regard to the lack of unprocessed milk available from Queensland farms to meet processing volume requirements for Products to be sold in Queensland, at least some processors will need to undertake significant capital investment in order to ensure that at least some of their Products could meet the qualifying 80% requirement.
68. This capital investment can represent an inefficient allocation of resources and may simply increase processors' costs, putting greater downward pressure on farmgate prices, so as to preserve processing margins.

Public benefits

69. To the extent that the Proposed Conduct gives rise to any public benefits, these are minor.
70. The QDO broadly asserts that the Scheme and the Proposed Conduct will address an imbalance that exists in the dairy industry, with respect to the respective bargaining power of processors and farmers.

71. The QDO largely relies on the findings of the ACCC in its Final Report to support its contentions. However, it does not address the Code and the role played by the Code to address these imbalances.

72. The QDO separately identifies the various public benefits, including:

- a. consumers having greater choice when purchasing Products, particularly where the consumers have an interest in the ensuring that farmers are paid a fair price;⁴⁴
- b. more sustainable prices being offered to farmers by processors;⁴⁵
- c. increased competition between processors;⁴⁶ and
- d. greater transparency or efficiency.⁴⁷

Consumer choice

73. No evidence has been put forward to support the assertion that the Scheme would facilitate greater consumer choice between dairy products or an improvement in consumer information about whether farmers are being treated fairly by the imposition of the Scheme. In fact, for the reasons discussed above, ADPF contends that the Scheme will, at a minimum, create confusion and, more likely, mislead consumers in this respect.

Fair price

74. The Applicant refers to its contentions above that the Scheme does not clarify what is meant by a “fair price”, such that consumers can have any confidence that prices paid by processors who are unable to participate in the Scheme and use the Trade Mark (whether due to the price paid or the source of their milk) are therefore not paying a fair price for their unprocessed milk.

⁴⁴ Submission, paragraphs 10(a) – (d) and (o)

⁴⁵ Submission, paragraphs 10(u) – (w)

⁴⁶ Submission, paragraphs 10(p), (q), (t) and (x)

⁴⁷ Submission, paragraphs 10(w) and (x)

75. Even the ACCC acknowledged that this public benefit was small, noting the lack of clarity around the meaning of the Trade Mark and the structure of the Scheme's requirements with respect to milk sources.⁴⁸

76. The Applicant contends that such benefit as might exist – limited as it may be – is outweighed by the associated detriments.

More sustainable prices

77. The Applicant contends that while those processors who already qualify for the Scheme are likely to engage in the Proposed Conduct, processors who do not qualify for the Scheme (whether due to prices offered or the location of the milk sourced by them) are unlikely to participate in the Scheme.

78. As such, the Proposed Conduct is unlikely to result in any relevant increase in competition between processors.

79. Further, to the extent that processors are unable to comply with the 80% requirement – and are therefore unable to participate in the Scheme – there will be no benefit for the farmers supplying those processors.

Increased competition

80. Even if the Proposed Conduct results in some increase in retail competition between Products promoted with the Trade Mark and other Products, there is no basis for concluding that such competition will necessarily manifest in any change in the farmgate price paid for the milk.

81. This is consistent with the ACCC's conclusion that such an outcome was unlikely during the term of the proposed authorisation.⁴⁹

Greater transparency or efficiency

⁴⁸ Determination, paragraph 4.25

⁴⁹ Determination, paragraph 4.33

82. No evidence has been put forward to support the assertion that the Scheme would facilitate greater transparency of, or facilitate the more efficient negotiation of, the terms and conditions of milk supply agreements, particularly having regard to the operation of the Dairy Code.

Any benefits are largely private

83. Any benefits arising from the Scheme are largely private, with the beneficiaries being those farmers who might receive a SFFP. There is no basis for concluding that the Scheme will promote efficiencies and/or provide benefits to consumers.

Net public benefit

84. In the circumstances, it is the Applicant's contention that the limited potential public benefits associated with the Proposed Conduct are significantly outweighed by the associated public detriments and that the Proposed Conduct does not satisfy the net public benefit test set out at s90(7)(b) of the CCA.

Orders sought from the Tribunal

85. The Applicant seeks an Order that the Proposed Conduct does not satisfy the net public benefit test at s90(7)(b) of the CCA and that authorisation not be granted for the Proposed Conduct.

Dated: 16 August 2021



D Preston

Owen Dixon Chambers West

Hall & Wilcox

Solicitors for the Applicant