



29 September 2021

Director Adjudication  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601  
By email: adjudication@accg.gov.au

Dear Director

**Re: CB10000475 – Premium Milk – submission**

Thank you for the opportunity to make a submission on the collective bargaining notification by Premium Milk Ltd (**Premium**) for approval to collectively bargain for the supply of raw milk.

As Lactalis was not led to understand that Premium's notification to the ACCC would involve Premium seeking to negotiate with other processors, certain issues relating to that proposition remain unresolved as between Lactalis and Premium in the current timeframe in which Lactalis has had to respond to the ACCC. Lactalis appreciates that the ACCC allowing the notification by Premium to stand does not affect the underlying commercial rights between the parties. However, Lactalis would have appreciated the opportunity to discuss and consider the issues raised by the notification to seek a constructive solution.

Against this background, Lactalis has no issues with the Premium collective bargaining application in so far it relates to exclusive collective bargaining with Lactalis. However, Lactalis is not in a position to support the proposed arrangements put forward by Premium in so far as they would relate to collective bargaining also occurring with other processors or through those negotiations fundamentally changing the commercial arrangements between Lactalis and Premium. This is because of the contractual commitments previously made by Premium in one form or another over the last 20 years and the extensive financial support that Lactalis has made to Premium over that time on the basis of its exclusive arrangements with Lactalis.

In these circumstances Lactalis needs to reserve its rights and position in respect of how these proposed arrangements from Premium operate having regard to the complex issues that arise under the new mandatory Dairy Code (**Code**) and whether the proposed arrangements would involve the acquisition of property rights of Lactalis other than on just terms contrary to the provisions of the Code.

**Background**

By way of background, Premium first requested approval from the ACCC to collectively bargain in 2000 following deregulation of the state regulated dairy industries. That initial 10 year and the further 10 year authorisation provided approval for Premium to bargain for the supply of raw milk solely to Lactalis Australia (formerly Parmalat Australia).

That initial approval to collectively bargain was in turn supported by a formal Premium / Lactalis Supply Agreement that established a contractual basis for Premium and Lactalis to negotiate annually (or more frequently if required) on prices and supply conditions for the Lactalis Queensland farm suppliers (and a small number in northern NSW). That initial Agreement was in turn renewed late in 2012 for a further 10 year and subject to the continuing ACCC authorisation will expire in December 2022. Importantly, the Premium / Lactalis Agreement provides for arbitration in the event the parties cannot reach agreement on various supply matters. In the 18 years of operation Premium and Lactalis have had to resort to arbitration only once preferring in the main to seek mutual agreement.

At the time Premium was created, Lactalis (then Pauls Milk) was acquiring milk from some 6 supplier Co-operatives in Queensland. Premium consolidated the process of discussion and negotiation with those groups into a single organisation that remains largely unchanged today (central Queensland farms in the Port Curtis group remain outside Premium).

Lactalis has supported and continues to see value in collective bargaining.

#### **Dairyfields Contract**

In September 1998, Lactalis (then Parmalat) acquired the operations of Dairyfields Co-operative including its factories at Labrador and Warwick. As part of that transaction the Dairyfields supplying farms formed the Dairyfields Milk Suppliers Co-operative Limited (Dairyfields) which in turn contracted to supply all its members milk to Lactalis for an indefinite period.

Although the Dairyfields agreement provides for regular negotiations with Lactalis around milk price and supply terms and conditions, Dairyfields elected to become members of Premium Milk when it was formed. Premium therefore represents Dairyfields suppliers in negotiations with Lactalis. Lactalis would contend that Premium is not free to negotiate with other parties (at least in respect of the Dairyfields suppliers) as that would in fact be inconsistent with the Dairyfields Lactalis supply agreement.

#### **Premium / Lactalis Agreement**

Under the notification to the ACCC, Premium is seeking to widen the scope of parties it may bargain with and in particular bargaining with Lactalis' competitors. As this was only raised with Lactalis via the notification, it is unclear what safeguards Premium is proposing to put in place to protect the confidential information of Lactalis or how Premium would protect the confidential information of other competitors with whom Premium is proposing to deal.

Given that Premium also represents a significant portion of dairy farmers in Queensland and other farmers would likely be contractually committed to other competitors such as Norco, there are some competition effects that also arise from the notification

In our view, granting Premium an authorisation to bargain with Lactalis competitors is directly inconsistent with the fundamental purpose of the Premium / Lactalis Agreement may render the agreement void. In doing so Premium may lose the right to arbitration .

As noted above, from Lactalis' perspective we would also be concerned to be negotiating with an organisation that is receiving confidential information from Lactalis and at the same time is bargaining with our competitors. Lactalis has previously supported Premium's applications to collectively bargain as this presented benefits to both parties. If Premium is to also negotiate with our competitors, the balance of such benefits to Lactalis in dealing with Premium would change and perhaps fundamentally so.

### **Dairy Code of Conduct**

It's also worth considering changes that have occurred across industry in the past year. In particular the newly introduced Code has created a more transparent structure for engagement between processors and suppliers in the following ways;

- Milk supply can only be acquired under contract
- Contracts proposed by processors must be published by 2pm on 1 June each year including minimum pricing along with all other terms and conditions of supply
- Contracts must provide for mediation of disputes (and *optionally* arbitration if both parties agree)
- Contracts include cooling off periods.
- Processors who offer exclusive supply agreements are also required to publish non-exclusive supply agreements.

Under the new Code suppliers have visibility of all processor offers for the coming fiscal year. While only for the first year of the Code, in time suppliers will become familiar with the annual contract offer / acceptance process.

Lactalis is therefore unclear as to the continuing role of collective bargaining in the new Code environment. The Code does not provide for agreements between processor and bargaining representation groups. Contracts must be at individual supplier levels and must still be published on 1 June each year. The notion of collective bargaining appears to have been significantly overridden by the Code as a practical matter.

Lactalis appreciates that while the ACCC may grant an organisation the right to collectively bargain, it can't force another party to enter negotiations. Whereas the obligation to bargain in "good faith" is now part of the Code, that resides with individual suppliers and not collective bargaining groups.

Lactalis understand that the original application submitted by Premium was to renew its authorisation for a further 10 years to bargain solely with Lactalis and that it was following discussions with the ACCC that Premium formed a view that a wider remit for negotiations was encouraged. The application also provides that "There will be no obligation on the Target to acquire milk at the relevant prices negotiated and there will be nothing preventing the Target from acquiring milk from any other party at the same or a different price." It is not clear how this is correct without Premium relinquishing the underlying agreements referred to above with Lactalis, nor does it make it clear that individual Premium members are not compelled to negotiate with Premium

Equally, it is not clear whether it could be said in these particular circumstances whether any attempt to impose a requirement on Lactalis under the Code to provide non-exclusive contracts to Premium

would be the acquisition of property rights other than on just terms as prohibited by section 58 of the Code.

In conclusion, Lactalis is concerned that Premium in seeking to extend collective bargaining beyond negotiating exclusively with Lactalis will be inconsistent with several long standing contracts that are the foundation of the Premium and Lactalis bargaining process in the past 18 years. Lactalis is therefore not supportive of the Premium collective bargaining notification request as it currently stands. However Lactalis is not opposed to the original application by Premium to bargain exclusively with Lactalis.

Yours sincerely

Lactalis Australia Pty Ltd



Vince Houlihan

General Manager Supply Chain