



REPORT OF THE  
STANDING COMMITTEE ON PUBLIC ADMINISTRATION  
IN RELATION TO THE  
**DISTRIBUTION ADJUSTMENT ASSISTANCE  
SCHEME (DAAS): GUIDELINES**

Presented by the Hon Kim Chance MLC (Chairman)

Report 6

June 1998

## **STANDING COMMITTEE ON PUBLIC ADMINISTRATION**

### **Date first appointed:**

7 November 1996

### **Members of the Committee**

Hon Kim Chance MLC (Chair)  
Hon Barbara Scott MLC (Deputy Chair)  
Hon Murray Criddle MLC  
Hon Cheryl Davenport MLC  
Hon Helen Hodgson MLC  
Hon Barry House MLC

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See Appendix 1

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## **Report of the Legislative Council Standing Committee on Public Administration**

**in relation to the**

### **Distribution Adjustment Assistance Scheme (DAAS): Guidelines**

#### **1 Introduction**

- 1.1 On 27 November 1997 the Standing Committee on Public Administration (“Committee”) presented its report on its enquiry into the Distribution Adjustment Assistance Scheme (“DAAS”) (“Third Report”). The Third Report was formally referred back to the Committee on Thursday 9 April 1998 by the House on the motion of the Hon Mr Derrick Tomlinson MLC that: *“The 3rd report of the Standing Committee on Public Administration be returned to the Committee with a recommendation that it prepare strict guidelines for the compensation of the milk vendors affected by the legislative decision of 1995”*<sup>1</sup>.
- 1.2 In the course of its deliberations the Committee reviewed a number of submissions including one lodged by a group of former milk vendors in May 1998 (“Vendor’s submission”)<sup>2</sup> and one from The West Australian Small Business and Enterprise Association Inc (“WASBEA submission”) dated 29 May 1998<sup>3</sup>.
- 1.3 The Committee is cognisant of the variations in milk vending/distribution businesses and has not attempted to define a formula as this would be too inflexible for a case by case application. Subject to the recommendations in this report the Committee considers that further assistance be determined on a case by case basis within the parameters recommended in this report.
- 1.4 In this report references to “vendor” means those former and current milk distributors/vendors who are eligible for assistance under DAAS, whether or not they have already been granted assistance under the existing DAAS scheme or as a result of the arbitration process.

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<sup>1</sup> Hansard, 1998, Volume 4, page 1802.

<sup>2</sup> Submission to the Standing Committee on Public Administration regarding its enquiry into the Distribution Adjustment Assistance Scheme delivered to the Chairman, Hon Kim Chance MLC, in May 1998.

<sup>3</sup> Letter from the West Australian Small Business and Enterprise Association Inc to the Standing Committee on Public Administration dated 29 May 1998.

**2****Recommendations**

- 2.1 The Committee recommend that compensation should be paid to each vendor on the following basis:
- 2.1.1 An assessment is to be made of the vendor's initial loss by assessing the capital value of the vendor's business prior to deregulation.
- 2.1.2 The capital value is to be calculated by multiplying the annual gross margin of the vendor's business prior to deregulation by:
- (a) in the case of metropolitan businesses, a multiple of no less than two and no more than four to obtain a base figure; and
  - (b) in the case of country businesses, a multiple at the discretion of the independent arbitrator to obtain a base figure.
- 2.1.3 The base figure should be subject to the following deductions:
- (a) any adjustment assistance received by the vendor pursuant to the DAAS arrangements;
  - (b) any payments received by the vendor pursuant to the arbitration process;
  - (c) any payments received by the vendor resulting from arrangements between the vendor as outgoing licensee from an incoming contractor (save and except for any payments received or component of consideration referable to premises, plant, equipment or vehicles or, if the arrangements or contract of sale does not specify an amount, an estimate by the arbitrator of the value of such premises, plant, equipment and vehicles); and
  - (d) any payments received by the vendor from the sale of a contract with a dairy company, that vendor having been a licensed vendor prior to deregulation who had taken up a contract with the dairy companies and has since sold that contract prior to March 1998 (save and except for any payments received or component of consideration referable to premises, plant, equipment or vehicles or, if the contract of sale does not specify an amount, an estimate by the arbitrator of the value of such premises, plant, equipment and vehicles);
- 2.1.4 In addition compensation should be considered in light of the factors raised in section 5 of this report, with particular reference to those former vendors who did not take up a contract with a dairy company at the commencement of DAAS.

**3****The Base Figure**

- 3.1 In the Third Report the Committee found that the value of the rights that were lost may be quantified by reference to sale records over the preceding decade and that it is clear that the amount of that loss is no less than the market value of the licences prior to deregulation<sup>4</sup>.

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<sup>4</sup> Third Report para 3.4.5.

- 3.2 The Committee previously heard evidence from the former vendors that the value of a licenced business was generally the equivalent to the sum of two years “gross return” of the business. However the Committee does not necessarily accept this figure of two years and a report prepared by consultants, ACIL Australia Ltd, for the Dairy Industry Authority (“DIA”) in 1991 put the market value of licences for the shop trade nearer to the sum of four years “gross return”<sup>5</sup>.
- 3.3 More recently the Committee received a submission from a number of milk vendors alleging that they should be compensated, amongst other things, for three years “gross profit”<sup>6</sup>.
- 3.4 When discussing the issue of, and obtaining and reviewing evidence on, the market value of licensed businesses the Committee became aware that a number of different phrases are used in the industry when determining the market value of a licence. Further the Committee is mindful that there may be a difference between what each of the phrases used, namely, “gross profit” and “gross return”, mean in a colloquial sense as opposed to an accounting sense.
- 3.5 In addition, in respect of the market value of a licence, the Committee notes the comments of the 1991 ACIL report to the DIA that the capital value of a business includes a goodwill component and is necessarily influenced by the value of the non-licensed trade<sup>7</sup>. The Committee notes and recognises that this does not fall within the scope of DAAS.
- 3.6 As a result of its investigations the Committee has determined that, given the nature of milk vending/distribution businesses, “gross profit” and “gross return” mean the same thing and in using those phrases the industry is in fact referring to the gross margin of the business, that is annual total sales of milk and milk products less annual total costs of purchasing milk and milk products. In other words, the difference between the buying and selling prices before deduction of overheads and outgoings. To avoid confusion the Committee has adopted the phrase “gross margin” in its recommendations.
- 3.7 The Committee notes that the gross margin may be readily determined by reference to invoices submitted to each vendor by the dairy companies which show, in relation to each vendor’s customer, the type, cost of and volume of products, the recommended retail price and the profit margin.
- 3.8 In light of the Committee’s comments at paragraphs 3.1 and 3.2 of this report, it is inappropriate for the Committee to conclusively determine and recommend a mandatory figure, by which to multiply the gross margin, to obtain the base figure.

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<sup>5</sup> “An Adjustment Assistance Scheme for the Milk Distribution Sector - A Report for The Dairy Industry Authority of Western Australia”, February 1991, by ACIL Australia Ltd. See also Third Report para 3.4.2.

<sup>6</sup> Vendor’s submission p. 2.

<sup>7</sup> Op. cit. pp. 13 and 15.

The precise multiple should be determined in the arbitration process but, in the case of metropolitan businesses, should be a figure of no less than 2 which was the basis of market valuation prior to deregulation, and no more than 4 which is the highest figure indicated in the ACIL report, prior to deregulation for the shop trade.

- 3.9 The Committee recognises that different multiples apply in respect of country areas and recommend that, in light of substantial regional variations, the arbitrator assess an appropriate multiple on a case by case basis.

#### **4 Deductions From the Base Figure**

- 4.1 The base figure should be subject to a number of deductions to reflect adjustment assistance already granted, payments made pursuant to arbitration and values realised from the sale of business. These include the factors listed at paragraph 2.1.3 above.

#### **5 Compounding Factors**

- 5.1 The Committee is aware of claims made in the Vendor's submission and the WASBEA submission namely, claims for:
- 5.1.1 the loss of business profits;
- 5.1.2 interest that would have accumulated if the vendors had been properly compensated. In this respect the WASBEA submission claims interest at the base rate charged by the Commonwealth Bank for small business overdrafts of \$100,000 or less, on the full amount of compensation from the date the vendor exited or was forced from the industry until the last day of the month preceding the receipt of the full compensation amount<sup>8</sup>;
- 5.1.3 and also whether the former vendors should receive some monetary recognition for the personal trauma that they have undoubtedly suffered. In this respect the WASBEA submission notes that the vendors who were forced from the industry lost the ability to work in their chosen trade for a period of three years. WASBEA claims an ex gratia payment of \$25,000 per annum per round up to a maximum of three years in recognition of this loss of earning capacity<sup>9</sup>.
- 5.2 The Committee is also aware of the case of *Nagy v Masters Dairy Limited*<sup>10</sup>. Claims made in the Vendor's submission and the WASBEA submission are similar to those made in the *Nagy* case. In that action, brought by a former milk vendor against Masters Dairy Limited, the Federal Court held that Masters Dairy Limited breached s 52 of the Trade Practices Act ("Act")<sup>11</sup>. It was found that the conduct of Masters in December 1994 in not disclosing to the Nagys that a deadline had been reached for taking up a milk round known as the Maddington zone was causative of a loss

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<sup>8</sup> WASBEA submission p2.

<sup>9</sup> WASBEA submission p 3.

<sup>10</sup> (1997) ATPR (Digest) 46-1164 (initial judgment delivered 13 December 1996), [1997] 1410 FCA (assessment of damages judgment delivered 12 December 1997).

<sup>11</sup> Section 52 of the Trade Practices Act stipulates that it is an offence if a corporation engages in misleading or deceptive conduct.



of commercial opportunity to the Nagys. This commercial opportunity was held by the court to be of value, namely a value approximating the value of the milk round which would have been allocated to the Nagys as a result of the opportunity to conclude a 3 year contract, the probabilities or possibilities of that occurring on the facts of the particular case being extraordinarily high.

- 5.3 In *Nagy v Masters Dairy Limited* damages for loss of a commercial opportunity was ascertained by reference to the court's assessment of the prospect of success had the opportunity been pursued, in other words assessing the loss of future profits that could have been earned by the Nagys.
- 5.4 In the Committee's view this is a different issue to assessing "fair recompense for the loss of property rights which have occurred as a result of altered legislative arrangements"<sup>12</sup>
- 5.5 In *Nagy v Masters Dairy Limited* damages were assessed by the court on the basis of a loss of commercial opportunity as a result of a breach of the Trade Practices Act based on private contractual dealings between the parties. It is inappropriate for the Committee to comment on the claims for damages raised by this case and also referred to at paragraph 5.1 of this report as:
- 5.5.1 it is not the role of the Committee to assess damages. In any event damages were awarded in the *Nagy* case because of the particular factual circumstances surrounding the private dealings between the parties involved; and
- 5.5.2 the Committee's role and mandate is to consider the operation of DAAS and to issue guidelines on compensation in that context. This does not extend to a consideration on the availability or operation of common law or statutory damages because of a private action which may or may not exist between private parties.
- 5.6 Accordingly the Committee notes these issues and recommends that Government take full account of them in their consideration of what is a proper and just outcome to recompense each and every vendor.

## 6 Quantum

- 6.1 On the most recent figures available to the Committee, as at 29 May 1997 there was \$4,175, 874 remaining of the \$7 million originally set aside for DAAS<sup>13</sup>. The Committee does not regard this sum as either a ceiling or a "target" figure but rather an undistributed surplus from a scheme designated for another purpose, that of adjustment as opposed to compensation.
- 6.2 If the undistributed balance in the DAAS fund is insufficient to meet the assessment and payment of claims pursuant to this report the Committee reiterates its previous

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<sup>12</sup> Third Report para 6.3.1.

<sup>13</sup> Letter from the Dairy Industry Authority to the Standing Committee on Public Administration dated 29 May 1997.

recommendation that action should be taken by Government to recoup all or part of any costs of any additional assistance required from the beneficiaries of the altered legislative arrangements. This could be achieved by a continuation of the levy on the milk, or recouped from the dairy companies, if it is possible to do so<sup>14</sup>.

## **7 Mechanism for Assessment**

- 7.1 The Committee recommends that the existing arbitration system (as established for DAAS) would be a suitable mechanism to make the appropriate determination on assessment and distribution of compensation.
- 7.2 The Third Report found that the arbitration process has been limited in its function of addressing cases of hardship. The arbitrator has felt enjoined to confine awards to fit within the total sum of money available under DAAS, and secondly to consider Government policy in the matter of the adjustment provisions which did not contemplate the question of full compensation<sup>15</sup>.
- 7.3 However the Committee considers that the existing arbitration system, directed appropriately in line with the recommendations in this report, will provide a speedy, flexible and low cost avenue for the assessment and payment of compensation to the vendors.
- 7.4 DAAS provides for assistance to those vendors who did not take up contracts (or were not offered them) at the time the legislative changes took effect and those persons leaving the industry within the first three years of the implementation of the new arrangements. As the initial dairy processing contracts expired in March 1998 the first wave and second wave eligible applicants can be identified. Consistent with the Third Report the Committee considers that the relevant time scales under which DAAS operates be continued. The Committee's interest therefore ceases as at 30 June 1998<sup>16</sup> and the Committee is of the opinion that claims to the DAAS scheme should be lodged by that date.

**HON KIM CHANCE MLC  
CHAIRMAN**

**18 June 1998**

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<sup>14</sup> Third Report para 10.4 and 11.4.

<sup>15</sup> Third Report para 6.2.5.

<sup>16</sup> Third Report para 6.4.2.

## APPENDIX I

### Terms of Reference for the Standing Committee on Public Administration:

Schedule 1 of the Standing Orders establishes the Standing Committee on Public Administration. The Terms of Reference for the Standing Committee are:

- "1. A Standing Committee on Public Administration is established.
2. The Committee consists of 6 members.
3. The functions of the Committee are:
  - (1) to inquire into and report to the House on the means of establishing agencies, the roles, functions, efficiency, effectiveness, and accountability of agencies and, generally, the conduct of public administration by or through agencies, including the relevance and effectiveness of applicable law and administrative practises;
  - (2) to consider and report on any bill referred to it by the House providing for the creation, alteration or abolition of an agency, including abolition or alteration by reason of privatization; and
  - (3) except as provided in Standing Order 339(c), the Committee shall not proceed to an inquiry whose sole or principal object would involve consideration of matters that fall within the purview, or are a function, of another Committee.

4. In this order:

"Agency" means-

- (a) an agent or instrumentality of the State Government, established for the purpose of developing, implementing or administering any program or policy with a public purpose or any such program or policy that relies substantially for its development, implementation or administration on public monies or revenue;
- (b) any person empowered by a written law to make a decision enforceable at law whether by that person or otherwise,

and, where appropriate, includes any agency officer or employee acting, or having ostensible authority to act, as the agent or delegate of the agency, but does not include:

- (c) a House of the Parliament, or any Committee or member of either House, or any officer or employee of a department of the Parliament;

- (d) a court of law or a court of record, or a judge or other member of either court;
- (e) any person whose functions are solely of an advisory nature and the failure to obtain or act in accordance with advice given by that person does not invalidate or make voidable a decision made by another person;
- (f) a police officer or other person in the course of exercising a power conferred by a written law to arrest or charge a person with the commission of an offence, or to enter premises and seize or detain any object or thing;
- (g) a local government within the meaning of the Local Government Act 1995;"