



**STANDING COMMITTEE ON PUBLIC  
ADMINISTRATION**

**THIRD REPORT**

**on its inquiry into**

**THE DISTRIBUTION ADJUSTMENT ASSISTANCE  
SCHEME (DAAS)**

**Presented by The Hon Kim Chance MLC  
(Chairman)**

**3**  
**NOVEMBER 1997**

### **Members of the Committee**

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

### **Members of the Subcommittee**

Hon Kim Chance MLC  
Hon Murray Criddle MLC

### **Advisory/Research Officer**

Elizabeth Lawton

### **Committee Clerk**

Jason Agar

### **Address**

Parliament House, Perth WA 6000, Telephone: 9222 7222

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## 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 367(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;
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- (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;"
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## TERMS OF REFERENCE FOR THE INQUIRY AND INTRODUCTION

Although there are no specific terms of reference for this inquiry, this matter was formally referred to the former Standing Committee on Government Agencies in January 1996 by letter from a representative of some of the former licenced milk vendors, who lost their businesses as a result of the passage of the *Dairy Industry Amendment Act 1994* ("the Act"). The Committee resolved on 3 April 1996 to undertake an inquiry into the claims made by some of the former licenced milk vendors.

The Act was created to facilitate the deregulation of the distribution and vending sector of the dairy industry, amongst a number of other issues. Debate in Parliament has centred not so much on the wording or form of the legislation, but on the scheme which is consequential to section 91 of the Act.

Section 91 sets up a scheme for the Dairy Industry Authority ("DIA") to make payments to vendors and distributors who are exiting the industry as a result of deregulation. This scheme is known as the Distribution Adjustment Assistance Scheme ("DAAS"). The Committee, in this report, focuses upon the adequacy or otherwise of the adjustment assistance measures consequent to this scheme, rather than on the wording or structure of the scheme itself.

The view of the milk vendors who are involved in this inquiry is that deregulation of the industry was unnecessary, and that the level of assistance offered within DAAS was inadequate. The alternative view is that the process of deregulation was inevitable, and that the improvements made to DAAS levels previously proposed by the Minister are acceptable, and should be accepted by the aggrieved milk vendors.

As the licences for participation in the industry are issued by the DIA, and the DIA is an agency of government, this matter falls clearly within the jurisdiction of the Standing Committee on Public Administration for review and assessment. All inquiries being undertaken by the former Standing Committee on Government Agencies were transferred to the new Standing Committee on Public Administration in November 1996, when this new Committee was created to replace the Government Agencies Committee. Pursuant to Standing Order 339 of the Legislative Council, a Subcommittee consisting of the Hon Kim Chance and the Hon Murray Criddle was formed to assist in the taking of evidence for this inquiry.

The Committee has had discussions with some of the former milk vendors, as well as receiving written submissions from various parties.

The Committee is thankful for all information and statistics provided by the Minister for Primary Industry, the Hon Monty House MLA, his Department, and the DIA itself.

The Terms and Conditions of DAAS are attached at Appendix A.

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## 1. BACKGROUND TO THE INQUIRY - WHAT IS THE DISTRIBUTION ADJUSTMENT ASSISTANCE SCHEME (DAAS)?

- 1.1 The *Dairy Industry Amendment Act 1994* (“the Act”) was created to facilitate the deregulation of the distribution and vending sector of the dairy industry, amongst a number of other issues. Section 91 of the Act set up a scheme for the Dairy Industry Authority (“DIA”) to make payments to vendors and distributors who are exiting the industry as a result of deregulation.
- 1.2 The DIA is the regulating body for the whole of the dairy industry. The scheme implemented by the DIA is known as the Distribution Adjustment Assistance Scheme (“DAAS”). The DIA is established by section 10 of the *Dairy Industry Act 1973*. The DIA is a body corporate with perpetual succession. It may sue, and can be sued in its corporate name.<sup>1</sup> Sections 22 and 23 of the *Dairy Industry Act 1973* outline the basic functions and powers of the DIA<sup>2</sup>, which include powers for the “making, settlement and approval of contracts for the supply of milk by dairymen” to the DIA or such other person as the DIA determines<sup>3</sup>. In addition to section 91 of the Act, this provision empowers the DIA to make the necessary arrangements to regulate the industry, and to draft provisions in the nature of those created as the DAAS Terms and Conditions (Appendix A).
- 1.3 In 1993, the Minister at the time appointed the Milk Distribution Review Committee chaired by Mr Eric Kelly to review the dairy industry. The main recommendation of that Committee was a controlled and phased-in deregulation process of the distribution and vending sector of the industry<sup>4</sup>. On page 16 of this report, the Milk Distribution Review Committee stated that deregulation would place control of the distribution of milk and milk products very largely in the hands of the dairy processing companies. This raises the issue of whether deregulation of the industry has been achieved at all, or whether the industry has simply become ‘re-regulated’ by different bodies - ie - the dairy companies.<sup>5</sup>
- 1.4 This process of deregulation moves control of the distribution arrangements from the DIA, and transfers it to the dairy companies, who are then empowered to control the distribution aspects of the industry. This effectively means that control moves from statutory regulation, to the commercial management of the dairy companies. The Committee considers it questionable whether the transfer of the regulatory process can be viewed as ‘deregulation’ at all, except to the extent that control of the distribution sector passes from the public sector through DIA to the private sector (ie - the dairy companies). In other words, it is the Committee’s view that the process has been more one of ‘corporatisation’ than ‘deregulation’.

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<sup>1</sup> Section 10(2)(a) and (e) of the Dairy Industry Act 1973.

<sup>2</sup> See also sections 46, 49 and 57 of the Dairy Industry Act 1973.

<sup>3</sup> Section 22(2)(f) of the Dairy Industry Act 1973.

<sup>4</sup> Milk Distribution Review Committee Report 1993.

<sup>5</sup> See also Hansard, 1994, volume 20, part A at 8525.

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- 1.5 The former Labor Government reduced the number of milk districts in Perth from 228 to 90. The DAAS arrangements were introduced as an assistance measure for those who chose to leave the industry as a result of this restructuring, although it is clear on the evidence before the Committee that as a consequence of the Act, some people have had no choice but to leave the industry.
- 1.6 The Government has argued that nearly all of the then existing licenced vendors were invited by the dairy companies to take up contracts with the companies, but some declined the invitation. The figures before the Committee are that as at February 1995, a total of 214 metropolitan/country milk distributor/vendors were offered contracts. 44 metropolitan/country milk distributors/vendors were not offered contacts with the dairy companies.<sup>6</sup> This, in itself, has become an important consideration for the Committee.

## **2. WHAT ARE THE AGGRIEVED MILK VENDORS INVOLVED IN THIS INQUIRY CLAIMING?**

- 2.1 The milk vendors involved in the complaint are claiming;
- 2.1.1 that there has been a transfer of a property right from the former licenced milk vendors involved, to the dairy companies involved;
- 2.1.2 that this transfer was effected by the Act, and that the dairy companies assumed the intrinsic value of the licences without having to pay for them;
- 2.1.3 that the adjustment assistance paid to the former licenced milk vendors under the Terms and Conditions of DAAS was inadequate;
- 2.1.4 that some vendors who were awarded contracts under the new arrangements are now seeking to sell the implied right to deliver milk which is contained within the new contracts, a right which was formerly the property of the milk vendors;
- 2.1.5 that dairy companies are now able to sell, or franchise those rights;
- 2.1.5 that as a result of the above, the former licenced milk vendors involved have been dealt with unjustly and have been unfairly deprived of their property rights, notwithstanding their access to arbitration, which in any case is limited.
- 2.1.6 that the true value of the former licenced milk vendors' property rights should be determined, and this value, less any payment under the DAAS, should be recouped by the State from the identified beneficiaries of the transfer, and paid to the former licenced milk vendors.
- 2.1.7 that the DAAS settlement arrangements unfairly and unreasonably limited the former vendors' employment and economic activity.

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<sup>6</sup> Letter from the Minister of Primary Industry and Fisheries to the Standing Committee on Public Administration dated 6 October 1997.

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### 3. LEGAL ISSUES

#### 3.1 Property rights in licences and compensation

- 3.1.1 At the time in question, vendors of white milk needed a licence to operate in a limited entry market that was established by statute. Wholemilk producers still need a licence to operate. In each case, the right to compete in that market, either by licence or quota, had been capitalised into a transferable value, and into a property right which was tradable between the parties in its own right. As the requisite licence was an instrument of entry to a prescribed market, it was understood to have a value of its own at law.
- 3.1.2 The milk vendors involved in this dispute have argued that the legislative changes outlined in the Act have the effect of transferring the value of this property right to the dairy companies, who in the future, could realise on that value by selling franchise rights to other milk vendors, or by issuing contracts. The aggrieved milk vendors raised this argument before the DIA, to be told that it was not the companies' intention to sell franchise rights, and that any changes involved were designed to reduce costs in the structure of the whole industry. Therefore, the DIA has argued that as there was no transfer of a property right to the dairy companies, there was no need for full financial compensation of the milk vendors. More specifically, the DIA has maintained that they were not obliged to establish and compensate licence values as the deregulatory process could not be compared to the transaction of business between commercial entities.<sup>7</sup> This issue is hotly in dispute between the two parties.
- 3.1.3 The aggrieved milk vendors have always maintained that by holding a State issued licence to compete in a limited entry market, they held something of intrinsic market value that was easily quantified (in much the same way as a rock lobster fisherman holds a licence which is his property to sell or deal with as he wishes). They believe that they have not been afforded justice in their dealings with the DIA in its non-recognition of this intrinsic market value.
- 3.1.4 Although the State must always have the right to alter such arrangements in the public interest, there is a well-established convention that proprietary rights are recognised in licencing arrangements. This is particularly so when changes are made that impinge on those rights, and which are beyond the control of the holders of the licence.<sup>8</sup>
- 3.1.5 The value of the licence which was transferred to the dairy companies (by delegation to their contractors) by the DIA is not recognised as compensable under DAAS. There does appear to be disparity in a scheme that does not recognise an intrinsic value in a property licence when it is commonly recognised at law. Although it appears unlikely at this stage that the dairy companies will sell the franchise rights, there is nothing preventing the companies from onselling the rights in the future should there be a change of company policy, for example. Indeed, company shareholders could reasonably insist that the latent value of the rights be utilised for the benefit of the particular dairy company.

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<sup>7</sup> Hansard, 1994, volume 20, part A at 8523.

<sup>8</sup> Australian Commercial Law by Yorston, Fortescue and Turner 18th Ed., 1990, Law Book Company, page 473-474.

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**3.2 Prior to the changes in the legislation in 1994, did the vendors hold licences to which a property right attached?**

- 3.2.1 There are two fundamental aspects to the matter of property rights attaching to a transferable and negotiable licence, permit or endorsement which endows the holder of such right to engage in an activity which is regulated by law, such as in the milk vending industry, the taxi industry, wholemilk production, and in the regulation of the fishing industry.
- 3.2.2 The first aspect is that of the usual public perception of ownership of a tradable right or property. The second is the treatment of such rights at common law.
- 3.2.3 As to the first aspect, the Committee is left in no doubt that it is a normal community standard that if a milk vendor legally purchases and holds a licence and a right to deliver milk within an area, then that licence, and all of the rights attached to the licence, is the property of the licence holder.
- 3.2.4 At common law, the position is no different. While debate may take place in some industries such as fishing and forestry as to the political or environmental desirability of some forms of property rights within a commonly owned resource, the common law is clear that once a transferable right to perform a function has been granted, that right becomes the property of the licensee.
- 3.2.5 Although there is, in some circumstances, a recognised right of compensation for the removal of a property right at common law, this is always subject to the law made by the legislature. Some statutes actually provide for the provision of compensation when rights are removed, although at law, there is no compulsion upon a State as a sovereign power to provide compensation when an Act removes property rights. The most recent example of a statute providing for compensation is the *Fishing and Related Industries Compensation (Marine Reserve) Act 1997*, in which fishermen who are excluded by the declaration of a marine reserve from certain areas in which they presently have rights to fish, are entitled to full compensation under the empowering legislation.

***Committee's Finding***

- 3.2.6 *The Committee concludes that prior to the proclamation of the Act in 1995, licensed milk vendors held rights attaching to those licences, and that those rights were their legal property.*

**3.3 Did any property right that may have been held, cease upon proclamation of the amended Act in early 1995?*****Committee's Finding***

- 3.3.1 *The Committee concludes that the property rights held by the licenced vendors prior to the proclamation of the Act, were rendered void as a result of the Act.*
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### **3.4 If a loss did occur, is the amount of the loss quantifiable?**

- 3.4.1 The market value of the rights associated with the former licences are common knowledge within the industry, and can be verified by business brokers and actual sales. The Committee has heard evidence from the former vendors that the value of a licence was generally the equivalent to the sum of two years (gross return) of the business. To some extent, this is confirmed by the present prices asked for the new contracts on the market which are about that level. The Committee is concerned that some of the former vendors' businesses acquired under the DAAS currently are being sold at market value, which was never recognised in some cases where vendors received but a fraction of the value of what they could have sold their business for on the open market.
- 3.4.2 The Committee does not necessarily accept this figure of two years gross return. A report prepared by consultants ACIL Australia Ltd for the DIA in 1991 put the market value of licences nearer to the sum of four years gross return.<sup>9</sup>
- 3.4.3 It would appear possible that uncertainty about the future of regulation in the industry had the effect of artificially depressing market prices for licences in the period leading up to deregulation, and that the then traded price of licences at double the annual gross profit was lower than the historical prices.
- 3.4.4 In any event, the Committee is not required to make a quantitative judgement on the value of the property right, and does not seek to do so.

#### ***Committee's Finding***

- 3.4.5 *It is the Committee's conclusion, however, 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 licences prior to deregulation.*

### **3.5 Is there justification for compensation for that loss?**

- 3.5.1 As has been discussed, the law may require full compensation for a person who has suffered a loss of property rights, although this is subject to the statutory law in question. Further, the position is not straightforward when property rights have been removed by an Act of Parliament.
- 3.5.2 There is no question that the Parliament had the legal capacity to take the action that it did in altering milk distribution arrangements. From time to time, it is necessary for Parliament to act in a manner which might disadvantage an individual or a group, but is in the overall public interest. The strict issue for the Committee is not the legality or even the propriety of the actions that were taken by the Parliament, but the adequacy of the arrangements that were made to recompense the former vendors for their loss.

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<sup>9</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.

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3.5.3 In this context, the Committee has raised the question whether there is a constitutional obligation upon Parliament to compensate members of the public for losses they may have suffered as a result of the passing of a certain piece of legislation. This is a difficult issue which involves consideration of state and federal constitutional law.

3.5.4 Section 51 of the Commonwealth Constitution authorises the Commonwealth Parliament to make laws with respect to:“(t)he acquisition on just terms from any State or person in respect of which the Parliament has the power to make laws...”<sup>10</sup>

3.5.5 Dixon J stated in *Bank of New South Wales v Commonwealth*<sup>11</sup> that:

*“Section 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property at the same time, as a condition upon the exercise of the power, it provides the individual or the State affected with a protection against governmental interferences with his proprietary rights without just recompense...In requiring just terms s51(xxxi) fetters the legislative power by forbidding laws with respect to acquisition on any terms that are not just.”*

3.5.6 Starke J in *Minister of Army v Dalziel*<sup>12</sup> described the term ‘property’ in section 51(xxxi) as extending “to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use of land of another, and choses in action”.

The property which the Commonwealth cannot take unless it gives “just terms” covers any kind of proprietary interest.

3.5.7 In his book “An Introduction to the Australian Constitutions”<sup>13</sup>, PH Lane states at page 104 that there are two limitations on the Commonwealth Parliament’s acquisition power, namely that the Parliament must always give “just terms”, and that the Parliament can take property only for one of the special purposes in the list of Commonwealth legislative matters. He adds that the States have neither of these limits in their acquisition powers. In the decision of *Magennis v the Commonwealth*<sup>14</sup>, it was held that the State of New South Wales was not required to give “just terms” in its acquisition of property.

3.5.8 The Committee has also examined the issue of compensation by Parliaments in other jurisdictions. In his book “Liability of the Crown”<sup>15</sup>, Peter Hogg states about the Canadian jurisdiction that:

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<sup>10</sup> Commonwealth Constitution section 51(xxxi).

<sup>11</sup> (1948) 76 CLR 1, at 349-50

<sup>12</sup> (1944) 68 CLR 261 at 290.

<sup>13</sup> 6th Ed., Law Book Company, 1994.

<sup>14</sup> (1949) 80 CLR 382.

<sup>15</sup> Liability of the Crown by Peter W. Hogg, Law Book Company, 1989, at 105.

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*“If a statute authorizes an act that causes injury to a private person, and is silent with respect to compensation for the injury, the general rule is that no compensation is payable in respect of the injury. Since the act cannot be a tort because of the existence of statutory authority, common law damages are not payable either. The injured person is left without redress. Only an express statutory right to compensation would afford redress.*

*An exception to the general rule of no compensation is the case where a statute takes private property. In that case, if the statute is silent respecting compensation, the statute will be interpreted as implicitly requiring compensation to be paid. The Supreme Court of Canada in *Manitoba Fisheries v The Queen* (1978)<sup>16</sup> held that the establishment of a Crown monopoly of fish exporting amounted to the taking of property of a private fish exporter who had been put out of business by the statute that established the monopoly. This meant that the exporter was entitled to compensation, despite the silence of the statute. With such a liberal definition of taking, it may be anticipated that other injuries to property will be held to attract compensation.”*

- 3.5.9 It should be noted, however, there is a difference between the Canadian and Australian jurisdictions in that within the Australian federal jurisdiction, there is a constitutional requirement for compensation when property is taken under section 51(xxxi). It is also acknowledged by the Committee that the system of state and federal powers is significantly different to that in operation in Australia, and makes any comparison of legal precedent on these types of issues difficult, and uncertain.

### ***Committee’s Finding***

- 3.5.10 *Although there is Canadian authority to the effect that a common law right to compensate exists when Parliament removes rights, and there is an obligation upon the Federal Parliament under the Commonwealth Constitution to provide “just terms” when acquiring property, it is clear that the State as a sovereign power is not under any legal obligation to provide compensation when property rights are removed by legislation. The requirement for “just terms” does not apply to the Western Australian legislature.*

## **3.6 Ouster Clauses**

- 3.6.1 The Committee also has questioned the legality and appropriateness of clause 2 in section E of the DAAS Terms and Conditions which provides:

*“The applicant hereby agrees with the Authority (DIA) in consideration of the Authority accepting an application for assistance pursuant to the Distribution Adjustment Assistance Scheme (DAAS) I/We will not at any time subsequent to such acceptance commence legal proceedings for the purpose of seeking judicial review of the decision to be made by the Authority as to whether or not to grant assistance to the applicant.”*

- 3.6.2 Although it is not stated expressly in the Act, as a general rule of law, there are various ways in which Parliament can restrict the scope of judicial review of a particular action or decision. Many Acts, for example, say of the decision they wish to protect from

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<sup>16</sup> [1979] 1 SCR 101.

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judicial review of a tribunal or other body that it is final, no appeal should lie from it, nor shall it be questioned, challenged or reviewed. These types of clauses are generally called “ouster clauses” or “privative clauses”.<sup>17</sup> It is important to read ouster clauses carefully, in order to see exactly what it is that they are designed to protect. For example, an ouster clause which protects a tribunal’s determination does not oust prohibition before the tribunal has handed down its determination.<sup>18</sup>

3.6.3 The normal ouster clause is directed at the nature of the body’s acts, rather than at the nature of the body itself. Although the Australian cases are inconclusive<sup>19</sup>, ouster clauses are read as narrowly as possible by the courts, the principle being that only clear words will deprive the courts of their power of review. On that basis, an assessment of clause 2 in section E would confine it to prohibiting judicial review of DIA’s decision as to whether or not to grant assistance to the applicant, and may not extend to, for example, judicial review of an application to *increase* a DAAS payment, nor would it seem to prohibit a review of the procedures and mechanisms whereby a decision by the DIA is reached. In any event, the Committee considers that this provision is highly prejudicial to many of the former licenced milk vendors who had no choice but to exit the industry on the terms provided.

3.6.4 The Committee has also inquired into the jurisdiction of the DIA to incorporate an ouster clause in the DAAS Terms and Conditions. Section 91 of the Act states at subsection (2) that:

*“Subject to subsection (3), the Authority may make payments to a milk distributor or a vendor who enters into an arrangement to sell or otherwise not continue in the business of milk distribution or milk vending, as the case may be, where the arrangement includes a restraint of trade provision that meets the Authority’s requirements”.*

3.6.5 Subsection (3) states that subsection (2) applies only in respect of applications for payment that are received by the Authority before 1 July 1995.

### ***Committee’s Finding***

3.6.6 *Although it is probably within the DIA’s power to create the necessary terms and conditions for arranging the payments to the milk vendors exiting the industry, the Committee queries whether it is reasonable that no judicial review of the decision of the DIA be permitted under the DAAS when the empowering Act has not specifically precluded judicial review. Although the ouster clause contained in the DAAS Terms and Conditions may not be strictly ultra vires to the DIA’s authority, the Committee is concerned that this ousting of judicial review may not, in all the circumstances, be reasonable or fair given that many of the DAAS applicants have had little option but to leave the industry without proper means of challenging the conditions of their exit. Although the Committee does not hold itself out as a court of law, the Committee*

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<sup>17</sup> Judicial Review of Administrative Action by Mark Aronson and Bruce Dyer, The Law Book Company 1996, page 942.

<sup>18</sup> Belmore Property Co (Pty) Ltd v Allen (1950) 80 CLR 191 at 196.

<sup>19</sup> Judicial Review of Administrative Action by Mark Aronson and Bruce Dyer, The Law Book Company 1996, page 947.

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*considers the clause precluding judicial review is highly unreasonable, and that it may be held to be unlawful if contested.*

### **3.7 Restraint of Trade**

3.7.1 The Committee has considered clause 1 and 2 of the Terms and Conditions of DAAS which provide that:

*“(i)n order to obtain DAAS assistance, all people associated with a particular milk distributor/vendor business will be expected to leave the industry.”<sup>20</sup>*

It is further specified in clause 2 under the Terms and Conditions that the former distributor/vendor will not be involved in a milk delivery business until after the expiry of three years from signing the Deed of Agreement to be paid an amount pursuant to DAAS.

3.7.2 Many kinds of anti-competitive conduct are now proscribed by the Commonwealth *Trade Practices Act 1974* (“TPA”). Section 46 of the TPA proscribes misuse of market power by corporations which have a “substantial” degree of power in a market. Section 46(1) prohibits corporations with a substantial degree of market power taking advantage of that power to:

- substantially damage or eliminate a competitor;
- substantially damage or eliminate competitors generally, a class of competitors or any particular competitor; and
- prevent or deter anyone from engaging in competitive conduct in any market.

3.7.3 Section 46(2) provides for the aggregation of the market power of related corporations for the purpose of assessing market power.

3.7.4 Section 46(4) contains a number of provisions which seek to refine section 46(1). Section 46(4)(a) provides that the term “power” referred to in section 46(1) means market power. Section 46(4)(b) provides that the term “market” refers to a market for goods and services. Section 46(4)(c) provides that the power which a corporation may possess for the purposes of the section may be the power either as a supplier or as an acquirer of goods or services. As has been previously noted in this report, the DIA is a corporation, and is thereby subject to the provisions of the TPA.

3.7.5 The Committee suggests that the former milk vendors involved in this complaint have rights under section 46 to show that the corporations involved in the deregulation process of the industry have taken advantage of their power to substantially damage them as competitors, or to eliminate them from the industry entirely. Further, transferral of the milk vendors’ interests to the dairy companies through the DIA has not only created a duopoly, but may be a misuse of market power by both the DIA and the dairy companies

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<sup>20</sup> Term and Condition 1, DAAS.

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to vest autonomy in three corporations exclusively, each with a substantial degree of market power as corporations in their own right, and also cumulatively.

3.7.6 The Committee notes the case of *Midland Milk Pty Ltd v Victorian Dairy Industry Authority*<sup>21</sup> where a milk processing company succeeded in obtaining an interlocutory injunction for breach of section 46 of the TPA against a milk authority to restrain the authority from terminating a milk supply agreement. On the facts before the Committee, the former milk vendors involved in this complaint may have a similar case to that outlined in the *Midland Milk* decision, although this is not for the Committee to conclude or advise upon.

3.7.7 Further, the common law restraint of trade doctrine will often govern contracts for the sale of a business, or contracts of employment. As Terms 1 and 2 of DAAS deal with the vendors' future employment in the dairy industry, and often amount to a relinquishment of their milk vending/distributing business, the Committee considers it appropriate that recourse also be had to the common law to assess the legality and appropriateness of such provisions.

3.7.8 An agreement or contract in restraint of trade is one which restricts a person from freely exercising his or her trade, business or profession. The most widely accepted definition of restraint of trade is that enunciated by Diplock LJ in *Petrofina (Great Britain) Ltd v Martin*<sup>22</sup> where he stated that:

*"A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such a manner as he chooses."*

3.7.9 A contract, or a provision of a contract, which is a restraint of trade is prima facie void as being contrary to public policy but will be binding on the parties if the court is satisfied that it is reasonable in the circumstances. The main points in considering whether a contract in restraint of trade at common law is void or binding are:

- the restraint must be reasonable and fair as between the parties - ie - it must be no wider than is reasonably necessary to protect the person (or authority) for whose benefit it is imposed and it must not be exercised through coercion; and
- the restraint must be reasonable in the interest of the public. The duration and extent of the area of the restraint are important, and particularly when dealing with contracts of employment, the courts may also have regard to the relative bargaining positions of the two parties involved. That means that where there is a perceived inequality of bargaining power, the courts will have regard to the fairness of the bargain in determining whether the restraint in question is reasonable in the circumstances.<sup>23</sup>

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<sup>21</sup> (1988) 82 ALR 279.

<sup>22</sup> [1966] 1 All ER 126 at 138.

<sup>23</sup> A. Schroeder Music Publishing Co. Ltd v Macaulay, [1974] 1 WLR 1308.

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**Committee's Finding**

- 3.7.10 *The Committee acknowledges that the DIA is empowered under section 91 of the Act to include a restraint of trade provision in the DAAS Terms and Conditions. Although the Committee does not hold itself out as a court of law in reviewing the strict legality of matters raised by this inquiry, the Committee is of the view that the Terms restraining trade for vendors for three years after a DAAS payment are unreasonable, both under the common law, and also could be in conflict with section 46 of the Trade Practices Act. Many of the vendors have received considerably less than the true value of their business even though the main objective of the DAAS is to assist those vendors who are adjusting to the new 'deregulated' environment. The Committee is also concerned that this provision may not be regarded as fair for all DAAS applicants given that over 40 vendors were not given any choice to continue in the industry they had worked in, some for significant periods of time. This effectively meant that some vendors had their livelihood taken away from them, with nothing to replace their business, and without an option to continue in some capacity in the dairy industry once a sum had been paid to them under the DAAS, even though the sum was often much less than the established worth of their business.*
- 3.7.11 *In this context, the Committee also considers that the relative bargaining positions of the DIA and the former vendors are not equal for the purposes of negotiations under the DAAS, and that there has potentially been a misuse of market power by the dairy companies and the DIA to corporatise the industry on their own terms.*

**4. POLITICAL BACKGROUND TO THIS INQUIRY.**

- 4.1 Under the current terms of the DAAS offered by the Minister, the amount of adjustment assistance available is in total, the sum of \$7 million. This has been increased from the sum of \$4.7 million. The Minister's proposed cap for an individual with a legitimate claim is the sum of \$150,000, although this limit has been exceeded in some cases based on grounds such as financial hardship. The West Australian Small Business and Enterprise Association Inc ("WASBEA") proposed a package of funding in the sum of \$9.3 million. This package proposed by the WASBEA was partially self-funded in the sense that on a reduced sliding scale, vendors would have the ability to onsell their rounds. This would also mean that the beneficiaries of those onsold rounds would pay something for it. This package was also said to have the advantage of allowing experienced operators to remain in the industry. In essence, this proposed package assigns an inherent value to the licence itself.
- 4.2 This package proposed by the WASBEA was rejected by the Minister. The WASBEA then suggested that the Minister convene a forum of industry participants under the chairmanship of an independent arbitrator to establish guidelines for the allocation of the outlined funds. This forum was to include representatives of the Minister's office, dairy companies, the DIA, the Milk Vendor's Association, and the WASBEA.
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- 4.3 The Minister has advised the Committee that as a review of the DAAS had been undertaken prior to the receipt of the submission by WASBEA, this forum was never convened.<sup>24</sup>

## **5. DOES THE ACT RESULT IN DEREGULATION OF THE DAIRY INDUSTRY?**

- 5.1 The Act ensures that regulation is retained in both the farming and the processing sectors of the industry. It is therefore important to recognise that the Act does not provide for an *outright* deregulation of the industry. Although the Act does provide for deregulation at the vending and distribution level, there is no deregulation of either the production or the processing sectors. Therefore, it is actually only one in a relatively small part of the whole industry that has gone through the process of deregulation under the legislation.
- 5.2 This process of deregulation moves control from the DIA, and transfers it to the dairy companies, who are then empowered to control the distribution aspects of the industry. This effectively means that control moves from statutory regulation, to the commercial management of the dairy companies. The Committee considers it questionable whether the transfer of the regulatory process can be viewed as 'deregulation' at all, except to the extent that control of the distribution sector passes from the public sector through DIA to the private sector (ie - the dairy companies). This was noted as an outcome of the deregulatory process by the Milk Distribution Review Committee in its 1993 report, and has been previously commented on by the Committee at paragraph 1.3 of this report.
- 5.3 Further, on a simplistic level, all that appears to be removed by the Act is the ability to trade in white milk (ie - by-product trading was never subject to deregulation - these products include items such as non-fat milk, flavoured milk, yoghurt, cheese etc). The fact is, however, that without the ability to trade in white milk, there is limited opportunity for the milk vendors to trade in any of the milk by-products. Proof of this lies in the fact that no former vendor has been able to continue to trade in by-products after losing their right to deliver white milk.

## **6. ADJUSTMENT VERSUS COMPENSATION**

### **6.1 Does DAAS offer adjustment or compensation?**

- 6.1.1 There is little argument that significant losses have occurred on the part of some of the milk vendors. It is acknowledged by the Minister that the DAAS payments were never intended to provide for full compensation to the milk vendors. In fact, the DAAS scheme was never intended to offer 'compensation' at all. The Government claims that DAAS is not a compensatory measure, but rather an 'aid to adjustment'.
- 6.1.2 More specifically, the Government has argued that DAAS was introduced to facilitate the adjustment of the milk vending and distribution sector to a deregulated environment. The DAAS scheme was never held out by the Government as a compensation scheme. It is

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<sup>24</sup> Letter from the Minister of Primary Industry and Fisheries to the Standing Committee on Public Administration dated 16 June 1997.

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arguable that this does not support the claim by the milk vendors for full compensation for their alleged losses. Nonetheless, this does not necessarily mean that the DAAS is a fair and equitable mechanism by which to resolve this issue, even if it was never intended to offer full compensation.

### *Committee's Finding*

6.1.3 *It is the Committee's view, however, that this raises the question whether full compensation should have been offered to the aggrieved milk vendors, which is addressed later in this report by the Committee.*

## **6.2 Were the vendors fairly and fully 'compensated' either according to the law or according to the common standards, expectations and practices of the community?**

6.2.1 The Committee has considered the arrangements that were put in place to facilitate the altered distribution system.

6.2.2 These were in three parts, vis:

- there was an expectation that the incoming contractors would make a payment to the outgoing licensee;
- there were the DAAS provisions; and
- there were the arbitration provisions as a 'safety net'.

6.2.3 The expectation of a commercial settlement between the incoming contractor and the outgoing licensee was bizarre from the outset. The outgoing licensee had nothing left to sell to the incoming contractor since the principal asset that was held by the licensee had been invalidated by the legislation. Any expectation that a commercial transaction would take place seems to rely on nothing more than an act of kindness. The outcome of this component was no better than can be expected. Some vendors did receive some payment from the new contractor, others received nothing at all.

6.2.4 The DAAS is not, and has never been claimed to be, a compensatory mechanism. DAAS is, as its name suggests, an adjustment scheme put in place to assist the process of change. Any attempt that has been made to expand the function of DAAS to meet a perceived need for compensation has been resisted by Government on the stated basis that it was never intended to provide full compensation.

6.2.5 Similarly the arbitration process has also been limited in its function of addressing cases of hardship. The arbitrator has felt enjoined firstly to confine awards to fit within the total sum of money available under the DAAS, and secondly to consider Government policy in the matter of the adjustment provisions. This policy did not contemplate the question of full compensation.

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***Committee's Finding***

6.2.6 *The Committee concludes that while adjustment assistance has been provided to some of the former vendors, they have never been fully or fairly 'compensated' according to the common law or according to the standards, expectations and practices of the community. This is outlined in paragraph 6.2.4 above.*

**6.3 Should full and fair 'compensation' have been paid to the aggrieved milk vendors?*****Committee's Finding***

6.3.1 *The Committee concludes that full and fair 'compensation' should have been provided, and that a moral and ethical duty exists to ensure that the former licensed milk vendors are fairly recompensed for the loss of property rights which occurred as a result of altered legislative arrangements.*

**6.4 If full 'compensation' should have been paid, to whom should it be paid, and who should accept the responsibility to make that payment?**

6.4.1 The first part of this question is more complex than appears at first sight, and to some extent it is necessary to refer to the DAAS provisions for assistance under that scheme.

6.4.2 DAAS provided for assistance to those vendors who did not take up contracts (or were not offered them) at the time the changes took effect. There was provision however for a second wave of persons leaving the industry within the first three years of the implementation of the new arrangements in that they would remain eligible for assistance. The three year period is significant as this was the term of the initial processor/distributor contracts, and the Committee's interest ceases at that point.

6.4.3 The Committee has been somewhat puzzled by the low uptake of the DAAS funding. As at 29 May 1997, only \$2 824 126 of the maximum \$7 million has been paid out in initial and arbitrated awards, leaving \$4 175 874 still to be awarded or to be 'returned' unused.<sup>25</sup>

6.4.4 As the three year "initial processor contract" period that was specified for the use of DAAS funds is not far from expiring, the Committee is uncertain of the reason for the lower than expected use of the fund and can only speculate that far fewer vendors actually left the industry than was first anticipated. Alternatively, it is possible that a large number of the present vendors will exit the industry during the next few months, claiming DAAS assistance to do so.

6.4.5 Accordingly the Committee felt that any decision on which of the former vendors should be eligible for further recompense should, for the sake of consistency, be linked to the DAAS, and adopt the same time scales under which the DAAS operates.

6.4.6 In determining the second part of the question -ie- who bears responsibility for paying compensation, two factors arise. The first is a matter of determining who caused the loss to occur. In this case, the loss occurred as a result of an Act of the Parliament. The

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<sup>25</sup> Letter from the Dairy Industry Authority to the Standing Committee on Public Administration dated 29 May 1997.

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second factor is, was there a direct beneficiary from the change and if so, does that beneficiary have, or share, the responsibility for the losses of others? In this inquiry, there is an identifiable beneficiary, being the dairy companies.

- 6.4.7 During debate on the second reading of the Act in 1994, it was argued that there was a significant transfer of value involved in the shift from vendor ownership of delivery rights to others.<sup>26</sup> The recipient of that value is the entity which controls the new distribution arrangements and is able, by exercising that control, to realise on that latent value by selling distribution franchise arrangements. That entity is the dairy companies who have assumed the control of distribution arrangements from the public, as represented by the DIA, without charge.
- 6.4.8 It would be quite wrong to assume that the former licenced vendors obtained their right to distribute milk without charge. Leaving aside the fact that they had to purchase their licence from an outgoing vendor, which is a private business arrangement, vendors were charged an ad valorem fee by the DIA according to the number of litres of milk they delivered.

### ***Committee's Finding***

- 6.4.10 *The Committee therefore concludes that while the responsibility for providing fair recompense to the former vendors rests with the Government, it would be appropriate and proper for the Government to recoup all or part of the cost from the dairy companies by means of a distribution levy administered by the DIA.*

## **6.5 Is the DAAS an equitable mechanism?**

- 6.5.1 The Committee has been less concerned with the equity aspects of the DAAS than it has with the more fundamental questions of property rights and compensation issues.
- 6.5.2 As has been discussed, DAAS was not intended to be a compensatory measure, but rather an adjustment mechanism. The Committee acknowledges that genuine attempts were made by the Government to improve its capacity to facilitate adjustment under the DAAS.
- 6.5.3 The Committee, therefore, makes only three comments with regard to equity issues in DAAS:
- DAAS provided for payments to vendors on the basis of a lump sum of \$50 for each daily litre delivered to retail outlets, and \$20 for each daily litre delivered to homes. The Committee is of the view that there seems to be no justification for this differential;
  - DAAS guidelines required a commitment from applicants that they would not work in any capacity in the industry if they were successful in gaining DAAS assistance on leaving the industry. This was a offensive provision which was

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<sup>26</sup> Hansard, 1994, volume 20, part A, page 8503

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modified to some extent after consultation between the Minister and the DAAS applicants; and

- The upper limit of \$150 000 payment per applicant under the DAAS provisions meant that larger vendors (some with an investment of more than \$500 000) suffered much larger losses relative to the smaller vendors in the industry.

### ***Committee's Finding***

6.5.4 *The Committee concludes that the DAAS provisions have not been viewed in the same way as a compensation package might be and as such, the Committee does not raise comprehensive issues of equity. There were aspects of the scheme that were seen by many of the former vendors to be offensive, and to some extent inequitable. In the context of an appropriate package, however, it is the Committee's view the principal inequities can be overcome.*

## **7. THE ARBITRATOR**

### **7.1 Role of the Arbitrator**

7.1.1 As part of the DAAS process, an independent arbitrator was appointed to assess claims by some of the aggrieved milk vendors that the assistance received under DAAS was insufficient or inadequate. The Committee refers to the Ministerial direction in the DIA's Annual Report for 1996-1997<sup>27</sup> which records the "appointment by the Minister of an independent arbitrator to consider appeals by aggrieved milk distributors or vendors against assessed rates of payment made under the DAAS". The Government has argued that the appointment of an arbitrator provided an independent review procedure as part of the deregulation process.

7.1.2 The Government also has argued that each applicant had an opportunity to state their grievances as part of the DAAS scheme, and that Government policy placed no constraints on this process. It is submitted by the Government that the arbitrator has only been constrained in the sense that the rules guiding the DAAS reflect limitations on finance and are in the nature of:

- ensuring that DAAS is only directed to genuine applicants and that the total funding of \$7 million is not exceeded. The total amount of assistance paid to the aggrieved milk vendors to 29 May 1997 is \$2 824 126. It is understood by the Committee that as at 6 October 1997, 53 DAAS payments have been made to aggrieved milk distributors/vendors<sup>28</sup>. The remaining amount of funds available under the DAAS process as at 29 May 1997 was \$4 175 874<sup>29</sup>;

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<sup>27</sup> Dairy Industry Authority of Western Australia Annual Report 1996-1997, page 7.

<sup>28</sup> Letter from the Minister for Primary Industry and Fisheries to the Standing Committee on Public Administration dated 6 October 1997.

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

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- as at 29 May 1997, the independent arbitrator, Mr John Negus, had conducted 21 DAAS appeals against payments determined by the DIA; and
- the appeals have operated under the Terms and Conditions for the independent arbitrator of applications for special relief from the requirements of DAAS.<sup>30</sup>

7.1.3 The milk vendors have expressed reservations about the limitations on the arbitrator's Terms of Reference. It is noted by the Committee, however, that Mr Negus has exceeded the \$150,000 maximum limit set down under the DAAS Terms and Conditions<sup>31</sup> for some distributors based on various factors, including financial hardship.

## **7.2 Has the arbitration system met the needs that it was designed and expected to meet?**

7.2.1 The initiation of the arbitration system was generally welcomed at the time of the debate on the Act, on the basis that it could overcome deficiencies that were foreseen in the DAAS guidelines, and also that it could deal with cases of individual hardship that the Minister and other Members had become aware of. There was an expectation created that the arbitrator would be free from direction, and would operate independently from policy or other restrictions.

7.2.2 In the main, neither expectation was realised. The arbitrator has noted in his statement of reasons for some of the former vendors that he did feel enjoined to consider both Government policy and the quantum of funds available under DAAS when reaching his decisions.<sup>32</sup>

7.2.3 Vendors who took appeals to the arbitrator were variously grateful for what they did receive, or became further embittered as a result of the reasons given for rejection of their application for assistance.

### ***Committee's Finding***

7.2.4 *The Committee concludes that the process of arbitration did provide valuable assistance to some former vendors whose financial position was particularly difficult, however, the restrictions that were applied to the awards that could be made reduced the arbitrator's effectiveness as a means of addressing inequities created under the DAAS.*

## **8. DEREGULATION**

### **8.1 Have there been advantages from 'deregulation'?**

8.1.1 There is some dispute as to whether the costs of milk distribution have been affected by deregulation. The Government has argued that the suggestion by the milk vendors that

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<sup>30</sup> Terms and Conditions for DAAS, 'Further Information' on page 3 of document C.

<sup>31</sup> Terms and Conditions of DAAS, document C, appendix 1, page 4.

<sup>32</sup> Decision of Mr J.A Negus, Independent Arbitrator for Messrs Chapman (dated 19 March 1996), Messrs Lewis (dated 6 December 1995).

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the costs of milk vending have increased is not correct. The Government has also argued that there are now fewer vendors handling larger rounds, and that the unit costs of milk distribution have fallen, not increased. The Committee notes that the fixed payment per litre for vendors has risen (ie - vendors' margins have increased). The Government has said that on a 'like to like' comparison, the goodwill value of franchisees rounds have declined, and now more closely reflect open market value rather than an inflated value.

8.1.2 On the other hand, the aggrieved milk vendors have suggested that the argument of increased efficiency does not add up given the increase in the costs of distribution since the deregulation process.

## **8.2 Has the process of deregulation been beneficial to the State as a whole and to the specific individuals who have been affected by it?**

8.2.1 The Committee has examined evidence which points to an increase in the margin paid to milk distributors since deregulation. The cost to consumers has thus risen, rather than fallen.

8.2.2 There has been no apparent increase in competition or efficiency in the distribution of milk since deregulation. On the contrary, as distributors may now carry only one brand of product rather than the multiple brands as under the former system, it would appear that choice to retailers and possibly also to consumers has been limited.

8.2.3 Due to the need for different distributors for each brand line, it is apparent that at least two distributors, rather than one, need to stop at each retailer's shop each day if more than one brand line is to be carried by that retailer.

8.2.4 Individual retailers are 'assigned' to contractors in a manner that restricts both their choice, and the principle of competition within a given contracted area. The Subcommittee heard evidence that contracted districts overlapped with each other and that contractors were assigned clients who were located far from their area, whilst other contractors were assigned clients that were within their area.

8.2.5 The Subcommittee was advised by former vendors that the previous system of defining clear boundaries within which a number of vendors were licenced to operate and compete with each other provided retailers with more choice, and was not only more competitive, but also more efficient.

### ***Committee's Finding***

8.2.6 *The Committee concludes that the process of deregulation of the milk distribution industry has been almost entirely negative in that:*

- *Consumers have not been advantaged, indeed it is likely that further investigation will reveal that costs to consumers has risen as a result of deregulation. In 1996-1997, there have been further increases in retail prices and continuing*
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*discounting by supermarkets which has caused difficulties for the household vendors who remain in the industry.*<sup>33</sup>

- *Choice to retailers in the manner of their deliveries, and to consumers in the manner of the range of products that are available to them have at the very least, not been improved.*
- *There is no evidence that competition between distributors has been enhanced. Clients are now "assigned" to a distributor. Previously, dissatisfied clients could obtain the services from another provider from the same dairy company. This would now be a breach of contract under the new deregulated system.*

## **9. OUTCOMES FOR INDIVIDUALS WHO HAVE PARTICIPATED IN DAAS**

9.1 In order to gain some retrospective insight into the effect of deregulation and the outcome of the measures put in place by the Parliament to facilitate adjustment, the Subcommittee took advice from individuals who had left the industry, and who had participated in the DAAS process. An informal meeting between a number of the former vendors and the Subcommittee was requested by Mr George Chapman on the former vendors' behalf. The full Committee agreed that the Subcommittee would meet with a delegation on Friday, 13 June 1997.

9.2 This date was some two and a half years following the proclamation of the Act.

9.3 The Subcommittee heard disturbing evidence of hardship and injustice from each of the persons who related their experiences since their businesses had been in effect, legislated out of existence.

9.4 Amongst the events recounted to the Subcommittee were;

- Continuing debts to the dairy companies which are being aggressively pursued by those companies;
- Loss of the family home;
- Life savings and superannuation have been consumed in attempts to re-establish themselves and to repay debts. Significantly much of the vendors' indebtedness is to the dairy companies, Masters and Peters/Brownes;
- Continuing unemployment for both the former vendors and in one case, for a disabled daughter of one of the former vendors;
- An attempt to establish a new business was endangered by a dairy company which advised potential suppliers to the new business of the debts owed by the new business to the company;

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<sup>33</sup> Dairy Industry Authority Annual Report 1996-1997, page 13.

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- Business failures and stress-related ill health arising from a difficult financial position;
  - Difficulties in obtaining credit;
  - Significant reduction in family living standards and income, in one case a fall in income from \$1620 per week to \$260 per week;
  - In the same case outlined above, the former vendor is repaying combined debts to the two dairy companies of \$31 500, at a rate of \$150 per month from a DSS payment of \$280 per week, which has now reduced to a \$260 per week payment under another arrangement. One dairy company has lodged a caveat on the former vendor's home to secure its position;
  - In another case, it was reported that a former vendor whose business was turning over \$1 000 000 per year received \$99 000 in the DAAS payment, and on seeking relief from the arbitration process, an additional payment was denied by the arbitrator;
  - A former vendor with a lifetime experience in the industry who received \$67 000 from DAAS was also denied additional assistance by the arbitrator on the grounds that as he owned some land, he was not suffering hardship, as he could sell the land to improve his financial position. This former vendor considered himself fortunate that he was able to get permission from the DIA to work for another vendor for two hours per day, for a short period;
  - It appears that DAAS payments in most cases equated to a sum less than one years gross profit. Prior to deregulation, the market value for a round was generally equivalent to two years gross profit, and had previously been as high as four years gross profit. Evidence was provided that within weeks of the new deregulated 'contractual' system beginning, the contracted rounds were again being advertised at a price equal to two years gross profit;
  - The Subcommittee was also told that the prices quoted for the contracted rounds were based on the trading figures of all commodities sold within the round-(ie)-including products other than white milk. DAAS payments were based only on the regulated white milk component of their business. In some cases, this meant that vendors' payments through the DAAS represented only a fraction of the real worth of their business;
  - The Subcommittee heard evidence that promises which had been made to the remaining home vendors that they would be allowed to service shops within their allocated district have not been honoured. Further, requests by retailers for a change in supplier due to unsatisfactory performance by their allocated contractor have been ignored by the dairy companies.
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## 10. COMMITTEE'S OVERALL FINDINGS

- 10.1 *It is clear that some of the former vendors have suffered severe hardship as a direct consequence of the change in legislative arrangements. Even in cases where real hardship is not as evident, it is apparent to the Committee that very significant financial losses have been incurred by affected parties.*
- 10.2 *The sense of injustice felt by the former vendors is strong and enduring, and in the Committee's opinion, warranted.*
- 10.3 *This sense of injustice is heightened by the fact that the milk vendors, having lost their businesses to another entity, (the dairy companies - the new legal vehicle for carrying out their former function), now see contracts being traded at the same price that they believed their businesses were worth when the Act removed their rights.<sup>34</sup>*
- 10.4 *Neither the DAAS arrangements, nor the arbitration process, have adequately addressed the financial and emotional losses that have occurred, and have not taken into account the property rights of the former licensed milk vendors. The Committee recommends that because some of the former licensed milk vendors encountered financial hardship as a result of the inadequacies of the DAAS, the Minister for Primary Industry should put in place a process whereby the former vendors are adequately recompensed. If the remaining DAAS funds are insufficient to properly recompense the former vendors, then the remaining DAAS funds should be supplemented by a continuation of the levy on milk, or recouped from the dairy companies, if it is possible to do so.*
- 10.5 *The arbitration process, in particular, has caused disillusionment. Some of the former vendors felt they had been assured that the arbitrator could consider their position without constraint, but found subsequently that the arbitrator in making decisions on their cases, noted constraints in the form of both Government policy, and the total amount of funding available.<sup>35</sup>*
- 10.6 *The Committee considers the Act is deficient given that it is silent on the issue of compensation. There is some uncertainty and confusion as to whether the adjustment assistance offered under DAAS is an exclusion to the former vendors to seek any other right at law to compensation. Parliament's intention in this regard is unclear, and the Committee considers it arguable that once assistance has been accepted by a former vendor pursuant to the Terms and Conditions of DAAS, this by implication means that any rights to claim further compensation at common law have been forfeited. The Committee acknowledges that the decision to pay compensation, regardless of whether assistance has been granted under DAAS or not, is a policy decision for the Government's consideration.*

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<sup>34</sup> See also paragraph 3.4.1 of this report.

<sup>35</sup> Decision of Mr J.A Negus, Independent Arbitrator for Messrs Chapman (dated 19 March 1996), Messrs Lewis (dated 6 December 1995).

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- 10.7 *The requirement for “just terms” under the Commonwealth Constitution for the acquisition of property in section 51 (xxxi) does not apply to the State Parliament as it is a sovereign power.*
  - 10.8 *The Committee considers there was a general failure by the DIA to examine the legal issues raised by the discontinuance of the milk vending scheme when the DAAS was created and implemented.*
  - 10.9 *The Committee finds that the deregulation process that occurred in the altered arrangements for milk distribution under the Act, has not been in the best interests of the State, and should be reviewed at an appropriate later date.*
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**11. RECOMMENDATIONS**

- 11.1 *It is the Committee's view that a clear moral and ethical duty exists to support the need for further assistance for some of the former licensed milk vendors, to an extent which fairly reflects the value of the loss of the rights which they held as licensees in the milk distribution industry. These property rights were lost as a direct consequence of the passage of the Act.*
- *The Committee recommends that the Minister for Primary Industry consider that further assistance be paid to some of the former vendors as soon as is administratively possible.*
  - *Existing available funds amounting to over \$4 million in the DAAS provisions should be utilised to fund the further assistance payments.*
- 11.2 *The precise extent of further adjustment assistance payable will need to be determined on a case by case basis, however, the financial straits of some former vendors are so severe that consideration may need to be given to according those vendors a higher priority for assessment.*
- 11.3 *The means of calculation of a further adjustment assistance package is not an issue for the Committee to determine, although the Committee recommends that provision be made for a review of the arbitration system by the Government to assist those former vendors most aggrieved by the altered legislative arrangements.*
- 11.4 *The Committee recommends that action should be taken by Government to recoup all or part of the cost of any additional assistance required from the beneficiaries of the altered arrangements.*
- 11.5 *Dairy industry legislation should be reviewed in order to determine whether the regulation of distribution arrangements should remain with the private sector or be returned to the public through the DIA, (although this is is not a unanimous view of the Committee).*
- 11.6 *The Committee recommends that whenever adjustment packages are created or reviewed, the issues raised in this report should be considered.*

**HON KIM CHANCE MLC  
CHAIRMAN**

**27 November 1997**

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# APPENDIX 1

## DAAS TERMS & CONDITIONS

# DISTRIBUTION ADJUSTMENT ASSISTANCE SCHEME



## INFORMATION FOR APPLICANTS

### PURPOSE OF THE SCHEME

The purpose of the Distribution Adjustment Assistance Scheme (DAAS) is to assist the milk distribution sector adjust to the termination of licencing.

### WHO IS ELIGIBLE?

The DAAS will only be made available to a milk distributor/vendor who does not enter a contract with a Licenced Dairy Produce Factory following the termination of licencing. The Scheme will operate for milk distributors/vendors who leave the industry after 3 February 1995. for 3 years or until the funds approved for the Scheme are fully utilised.

### HOW TO APPLY

An application form should be completed for all milk distributor/vendor trade operated by the business entity. The application form requires you to provide detailed information on sales of licenced products to households and retail trade outlets supplied by the milk distributor/vendor business for a consecutive 8 week qualifying period which you specify.

Only sales of licenced products (white wholemilk and Hi-Lo reduced fat milk) will qualify for assistance and should be included on the application form.

Original records of sales of licenced milk products for the qualifying period should be retained to allow verification.

In the case of milk distributor trade, assistance will not be offered for licenced milk product trade to retail outlets not appearing on Authority licencing records as an endorsement on the milk distributor/vendor licence issued to the applicant on 1 July 1991.

In addition, any household vendor or shop distribution trade purchased or acquired after 1 July 1991 will be ineligible.

### WHEN TO APPLY

Owners of a milk distributor/vendor business can apply for DAAS assistance at any time after the deregulation of the distribution sector from 3 February 1995. DAAS application forms are available from the Authority and should be completed and forwarded to the Authority. Authority staff will be available upon your request to help you to complete the application form.



## INFORMATION FOR APPLICANTS

### ASSESSMENT OF APPLICATIONS

All applications will be assessed by a chartered accountant appointed by the Authority as the Independent Assessment Agent for the DAAS. The Independent Assessment Agent will report to the Authority on:

1. Whether assistance should be paid and, if so,
2. The amount to be paid.

The DAAS application form requires you to sign an agreement that you will accept the **decision** of the Authority in respect of the determination of your entitlement to and the amount of assistance payable under the DAAS.

### AMOUNT OF ASSISTANCE AVAILABLE

DAAS payments will be calculated at a fixed rate for distributor (wholesale) and vendor (household) licenced milk trade in accordance with average daily deliveries during a consecutive eight week qualifying period between 1 April 1993 and 30 June 1993 or 1 April 1994 and 30 June 1994 the period to be specified by you.

Assistance will be provided on the following basis:

Distributor (wholesale) trade	:	\$50 per litre of daily * eligible trade
Vendor (household) trade	:	\$20 per litre of daily * eligible trade

*\* (daily litreage of licenced product will be calculated on the basis of deliveries over a seven day week).*

Maximum levels of assistance which individual milk distributor/vendor businesses can receive are as follows:

Milk Distributor (Wholesale) Businesses	:	\$150,000
Milk Vendor (Household) Businesses	:	\$20,000
Mixed (Milk Distributor/Vendor Businesses)	:	\$150,000

Appendix 1 on page 4 shows an example of how levels of assistance will be determined for a mixed household vending and wholesale distribution business.

As total funds available over the duration of DAAS are limited to \$7 million, applications will be processed and approved on a first-in first-out basis until funds are exhausted. Limits also apply to the proportion of these funds available to household vending and retail distribution.

## INFORMATION FOR APPLICANTS



Payment of DAAS assistance will be made as an interest free loan as follows:

- 50% within 14 days of upon receipt of a signed Deed of Agreement.
- The remaining 50% of the principal sum by a date 3 months after the date of payment of the first portion.

The interest free loan will be converted to a grant after the expiry of three years assuming all conditions of the loan are satisfied. Please note that the loan will be immediately recoverable on demand by the Authority should the applicants or any associated person or persons comprising the business breach any of the conditions upon which assistance is granted. The Authority will pay the approved assistance directly to the applicant who will be required to agree with and represent to the Authority that he/she has the authority to receive such amount on behalf of all persons associated with the business which is the subject of the transfer. Any agreement reached between such persons as to the manner or means by which such amount is to be allocated between themselves is not the concern of the Authority.

### **COUNTRY LICENCED MILK DISTRIBUTOR/VENDORS**

Country licencees will be considered for adjustment assistance on a case by case basis. Country based licencees not entering a contract with a Licenced Dairy Produce Factory, may find out more about the DAAS by calling the vending section of the Authority who will assist you with your enquiries.

### **FURTHER INFORMATION**

Authority vending staff are available to assist the lodgement of applications for DAAS assistance, and you are encouraged to call the vending section with any enquiries.

The Minister for Primary Industry has announced that he will appoint an independent arbitrator to whom DAAS applicants may appeal if they consider that special circumstances apply in their case.



**EXAMPLE OF THE CALCULATION OF THE ELIGIBLE PAYMENT FOR  
A MIXED (DISTRIBUTOR/VENDOR) MILK DELIVERY BUSINESS**

A milk delivery business with both vendor (household) and distributor (wholesale) trade, and which qualifies for adjustment assistance is limited to a cap of \$150,000 per business.

If for example, a milk delivery business comprised:

- 900 litres per day of vendor (household) trade in Wholemilk and Hi-Lo
  - for which the calculated adjustment assistance payment would be  
\$18,000 (900 litres x \$20/litre);
  
- 3,000 litres per day of shop distributor (wholesale) trade in Wholemilk and Hi-Lo
  - for which the calculated adjustment assistance payment would be  
\$150,000 (3,000 litres x \$50/litre).

This totals \$168,000. However, despite each component of the milk delivery business being below the respective maximum caps, in combination the total is over \$150,000 and so this business would qualify for a total adjustment assistance of \$150,000.

# DISTRIBUTION ADJUSTMENT ASSISTANCE SCHEME



## APPLICATION FORM

### SECTION A CONTACT DETAILS

Business Name: .....

Contact Person: .....

Contact Address: .....  
..... Post Code .....

Telephone No: .....

Facsimile No: .....

### SECTION B LICENSEE DETAILS

Adjustment assistance is only payable to a milk delivery business and payment will not be made to individual former licensees.

As a business or partnership what names were used for all the separate associated licences formerly held by the business:

1. ....
2. ....
3. ....
4. ....
5. ....
6. ....

#### NOTE:

*If there is insufficient room in any section of this application please attach sheets of paper referenced to the appropriate part of the application form*



**APPLICATION FORM**

**SECTION C MILK DELIVERY DETAILS FOR YOUR SPECIFIED QUALIFYING PERIOD**

Please provide details of the volume of licenced milk products sold (wholemilk and Hi-Lo reduced fat milk) for a consecutive eight week period between 1 April 1993 and 30 June 1993 or 1 April 1994 and 30 June 1994.

The inclusive 8 week period I wish to nominate (between 1 April 1993 and 30 June 1993 or 1 April 1994 and 30 June 1994) is as follows:

**Start Date:** ..... **Finish Date:** .....

For the Milk Distributor/Vendor Licences now held by your business complete the following details:

Disc. No	Number of Household Outlets	Household Vendor Trade (litres per day)	Number of Distributor Endorsements (Shops) or Commercial Outlets	Wholesale Distributor Trade (litres per day)

**DETAILED LIST OF DELIVERIES**

*Please attach a list of individual customers and the quantity of formerly licenced product (wholemilk and Hi-Lo reduced fat milk) delivered to each outlet for the consecutive eight week period you have nominated above between 1 April 1993 to 30 June 1993 or 1 April 1994 to 30 June 1994.*

*A proforma recording sheet for making this list is included. Please photocopy this sheet to provide sufficient room to list all customers. Alternatively, additional copies of the proforma sheet are available from the Dairy Industry Authority office.*

*Records should be available from round books, copies of invoices and/or computer printouts. Please ensure you retain these original records to support any application you make. However, do not send these records in with this application form.*

## APPLICATION FORM



### SECTION D TRADE PURCHASED SINCE 1 JULY 1991

If no trade purchased or acquired from 1 July 1991, this section does not need to be completed.

Nominate all formerly licenced milk trade *purchased or acquired from 1 July 1991*.

Only include details of the volume of formerly licenced milk products sold (wholemilk and Hi-Lo reduced fat milk) over the qualifying period for any new trade. The information provided should be for the same consecutive 8 week qualifying period nominated for total milk deliveries on the previous page.

Dist. No	Number of Household Outlets	Household Vendor Trade (litres per day)	Number of Distributor Endorsements (Shops) or Commercial Outlets	Wholesale Distributor Trade (litres per day)

#### NOTES FOR COMPLETING SECTION C AND D

- Trade should be calculated as the average litreage per day (i.e. over 56 days) for the consecutive eight week period selected between 1 April 1993 and 30 June 1993 or 1 April 1994 and 30 June 1994 used on the previous page for calculating total milk delivery details.
- Do not include any trade you deliver on behalf of other licenced milk distributor/vendors or Dairy Produce Factories on a lease basis as leased trade is ineligible.
- For distributor (wholesale) trade include only outlets endorsed on licences held by the business prior to 1 July 1991.



**APPLICATION FORM**

**SECTION E      DISCLAIMER**

1. As the owner/s of the milk distributor/vendor business for which this application is made under the terms of the Distribution Adjustment Assistance Scheme, I/We agree to accept the decision of the Authority following advice from the Independent Assessment Agent, as to the eligibility for, and amount of, adjustment assistance for which the milk distributor/vendor business applies and the decision of the Authority with respect to this application.
2. The applicant hereby agrees with the Authority in consideration of the Authority accepting an application for assistance pursuant to the Distribution Adjustment Assistance Scheme I/We will not at any time subsequent to such acceptance commence legal proceedings for the purpose of seeking judicial review of the decision to be made by the Authority as to whether or not to grant assistance to the applicant.
3. The applicant hereby indemnifies the Authority against all costs, including legal costs, which are incurred by it in respect of any and all proceedings which may be brought by the applicant on the subject of the agreement contained in Clause 1.

Name/s ..... Witness. .... Date:.....

Name/s ..... Witness. .... Date:.....

Name/s ..... Witness. .... Date:.....

**SECTION F      DECLARATION**

I/We confirm I/we have read and agree to abide by the Terms and Conditions for the Distribution Adjustment Assistance Scheme and that the detail on this application form is a true and accurate record of the milk distributor/vendor business for which assistance under the Distribution Adjustment Assistance Scheme is sought.

Name/s ..... Witness: ..... Date:.....

Name/s ..... Witness: ..... Date:.....

Name/s ..... Witness: ..... Date:.....



## INFORMATION FOR APPLICANTS

### PURPOSE OF THE SCHEME

The purpose of the Distribution Adjustment Assistance Scheme (DAAS) is to assist the milk distribution sector adjust to the termination of licencing.

### WHO IS ELIGIBLE?

DAAS will only be made available if milk trade is transferred to milk distributor/vendors licenced by the Authority at the 3 February 1995 and that person(s) is currently contracted to a licenced dairy produce factory.

The scheme is scheduled to operate for registered milk distributor/vendors until 30 June 1998 or until the funds approved for the scheme are fully utilised.

### HOW TO APPLY

An application form should be completed for all milk distributor/vendor trade operated by the business entity. The application form requires you to provide detailed information on sales of licenced products to households and retail trade outlets supplied by the milk distributor/vendor business for a consecutive 8 week qualifying period which you specify.

Only sales of licenced products (white wholemilk and Hi-Lo reduced fat milk) will qualify for assistance and should be included on the application form.

Original records of sales of licenced milk products for the qualifying period should be retained to allow verification.

In the case of milk distributor trade, assistance will not be offered for licenced milk product trade to retail outlets not appearing on Authority licencing records as an endorsement on the milk distributor/vendor licence issued to the applicant on 1 July 1991.

In addition, any household vendor or shop distribution trade purchased or acquired after 1 July 1991 will be ineligible.

### WHEN TO APPLY

Owners of a milk distributor/vendor business can apply for DAAS assistance at any time after the deregulation of the distribution sector from 3 February 1995. DAAS application forms are available from the Authority and should be completed and forwarded to the Authority. Authority staff will be available upon your request to help you to complete the application form.



## INFORMATION FOR APPLICANTS

### ASSESSMENT OF APPLICATIONS

All applications will be assessed by a chartered accountant appointed by the Authority as the Independent Assessment Agent for the DAAS. The Independent Assessment Agent will report to the Authority on:

1. Whether assistance should be paid and, if so,
2. The amount to be paid.

The DAAS application form requires you to sign an agreement that you will accept the **decision** of the Authority in respect of the determination of your entitlement to and the amount of assistance payable under the DAAS.

### AMOUNT OF ASSISTANCE AVAILABLE

DAAS payments will be calculated at a fixed rate for distributor (wholesale) and vendor (household) licenced milk trade in accordance with average daily deliveries during a consecutive eight week qualifying period between 1 April 1993 and 30 June 1993 or 1 April 1994 and 30 June 1994 the period to be specified by you.

Assistance will be provided on the following basis:

Distributor (wholesale) trade	:	\$50 per litre of daily * eligible trade
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### **FURTHER INFORMATION**

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# DISTRIBUTION ADJUSTMENT ASSISTANCE SCHEME



## TERMS AND CONDITIONS

The Distribution Adjustment Assistance Scheme (DAAS) will operate under a number of rules set by the Dairy Industry Authority of Western Australia (the Authority) which are designed to ensure that the provision of assistance operates smoothly and is equitable to all concerned.

1. In order to obtain DAAS assistance all people associated with a particular milk distributor/vendor business will be expected to leave the industry. For example, both a husband and wife operating a milk delivery business will be required to terminate their involvement in the industry. In the case of multiple milk distributor/vendor licences being held, it is expected that all milk distributor/vendor licences held by persons associated<sup>1</sup> with that business, will cease.

The decision as to whether or not a person is associated with an applicant so as to constitute a single business shall be at the Authority's absolute discretion, however, persons shall not be regarded as associated if the Authority is satisfied on representations made by one or more of them and after its own enquiries (if any) that they are commercially independent in their respective enterprises.

2. Upon application the Authority will make its determination as to the persons considered to be associated with the milk distributor/vendor business. All persons determined to be associated with the exiting milk distributor/vendor business will be required to agree to a condition that, should assistance be granted, they will not be involved in a milk distributor/vendor delivery business until after the expiry of three years from the date of signing the Deed of Agreement.

The Authority may agree, under certain conditions, that this requirement may be waived, however this concession will be at the Authority's discretion.

3. Further, all persons determined by the Authority to be associated with an exiting business will on application for assistance be required to agree to accept the decision of the Authority following advice from the Independent Assessment Agent, whose function is described in the Information Paper for DAAS Applicants, as to the eligibility for, and if eligible, the amount of adjustment assistance payable in respect of such business and to waive any right or entitlement they may have to challenge the Authority's decision by way of judicial proceedings.
4. DAAS assistance is only available for milk trade which was previously covered by licensing requirements (wholemilk and Hi-Lo reduced fat milk), purchased from a registered produce factory or depot and conducted under milk distributor/vendor licences issued by this Authority to the applicants(s) prior to 1 July 1991. Leased trade, trade conducted on another licensee's behalf or trade transported on account for a licensee is not eligible.
5. New entrants to the industry after 1 July 1991 are ineligible for DAAS assistance.
6. DAAS assistance is only available for the entire milk distributor/vendor businesses and not part milk distributor/vendor businesses.
7. Nothing contained in these TERMS AND CONDITIONS or any other documents or information provided by, or to be provided by, the Authority in connection with the DAAS Scheme is intended by the Authority to warrant or represent or should otherwise be understood as a warranty or representation on the part of the Authority that an application for adjustment assistance will be successful should the business cease as a result of not entering a Dairy Produce Factory Delivery Contract.
8. The Authority would not wish the DAAS to cause a reduction in customer service. DAAS assistance will only be provided where a satisfactory milk supply continues to be made available to retailers and household customers previously serviced by the exiting milk distributor/vendor.
9. DAAS will only be made available if milk trade is transferred to milk distributor/vendors licenced by the Authority at the 3 February 1995 and that person(s) is currently contracted to a licenced dairy produce factory.

<sup>1</sup> For a definition of an associated person see over



## DEFINITION OF ASSOCIATED PERSON

The Authority may, in its absolute discretion, determine that a person is associated with an applicant so as to constitute a single "business" together with the applicant, if that person is, in the opinion of the Authority -

- (a) a member of the applicant's family, whether immediate or extended;
- (b) a partner of the applicant;
- (c) a corporation of which the applicant is an officer or director;
- (d) where the applicant is a corporation, an officer or director of the corporation;
- (e) an officer or director of any corporation of which the applicant is an officer or director;
- (f) an employee or employer of the applicant;
- (g) a person employed by a natural person who also employs the applicant;
- (h) a corporation whose directors are accustomed or under an obligation whether formal or informal, to act in accordance with the directions, instructions or wishes of the applicant or, where the person is a corporation, of the directors or management of that person;
- (i) a corporation in accordance with the directions, instructions or wishes of which, or of the directors or management of which, the applicant is accustomed or under an obligation, whether formal or informal, to act;
- (j) a corporation in which the applicant holds a substantial interest; or
- (k) where the person is a corporation - a person who holds a substantial interest in the corporation.