

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: VID738/2020
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
AUSTRALASIAN FOOD GROUP PTY LTD
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 20/11/2020 11:05:01 AM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Concise Statement

No. VID



Federal Court of Australia
District Registry: Victoria
Division: General

Australian Competition and Consumer Commission

Applicant

Australasian Food Group Pty Ltd (ACN 154 314 913)

Respondent

A. OVERVIEW

1. In this proceeding, the Applicant (**ACCC**) alleges that the Respondent, trading as Peters Ice Cream (**Peters**), engaged in the practice of exclusive dealing in contravention of section 47(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) during the period from at least 21 November 2014 to in or around December 2019 (**Relevant Period**).
2. During the Relevant Period, under the terms of a distribution agreement entered into on or about 21 November 2014 (the **Distribution Agreement**), Peters supplied its ice cream products to PFD Food Services Pty Ltd (**PFD**) and PFD distributed Peters' ice cream products (by way of re-supply or through the provision of distribution services) on the condition that PFD would not distribute competing ice cream products in various geographic areas throughout Australia.
3. During the Relevant Period, Peters was one of two major suppliers of single-wrapped ice cream and frozen confectionary products (**Single Serve Ice Cream Products**) distributed to petrol and convenience store retailers (**P&C Retailers**). Peters used PFD, along with its own frozen transport trucks, to distribute its Single Serve Ice Cream Products to P&C Retailers throughout Australia.
4. Peters' exclusive dealing conduct had the purpose, effect and/or likely effect of substantially lessening competition in the market for the supply of Single Serve Ice Cream Products to P&C Retailers (or alternatively to retailers of Single Serve Ice Cream Products) in Australia (**Relevant Market**).

Filed on behalf of (name & role of party)	Australian Competition and Consumer Commission, the Applicant	
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5. The inability of would-be competing suppliers of Single Serve Ice Cream Products to use PFD to distribute their products hindered and/or prevented new entry and expansion in the Relevant Market. PFD was the only commercially viable option available to new entrants to distribute those products to P&C Retailers who operate national retail petrol and convenience store businesses (**national P&C Retailers**). A substantial purpose of Peters engaging in the exclusive dealing conduct was to protect its market position from competitors, as one of only two major suppliers of Single Serve Ice Cream Products, who together held a combined market share of over 95%, throughout the Relevant Period, and its conduct had the effect of shielding Peters from competitive entry and expansion.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

Market characteristics

6. During the Relevant Period, the largest customers for Single Serve Ice Cream Products in the Relevant Market included national P&C Retailers such as Woolworths Group Limited trading as “Woolworths Petrol”, B P Australia Pty Ltd trading as “BP”, Eureka Operations Pty Ltd trading as “Coles Express”, United Petroleum Pty Ltd trading as “United”, and Caltex Australia Petroleum Pty Ltd trading as “Caltex”. Another large customer was 7-Eleven Stores Pty Ltd trading as “7-Eleven”, a P&C Retailer, which had stores in all states and territories except South Australia, Tasmania and the Northern Territory and which arranged for its own distribution.
7. During the Relevant Period, in order to supply Single Serve Ice Cream Products to national P&C Retailers in the Relevant Market, it was generally necessary to distribute the products on a national basis.
8. National P&C Retailers generally sought to maintain consistency of product lines in all of their stores. National P&C Retailers also generally preferred to limit the number of deliveries that they received at each site and to avoid having to manage multiple information and pricing platforms and distribution relationships each day.
9. During the Relevant Period, the two major suppliers of Single Serve Ice Cream Products distributed to P&C Retailers were Peters and Unilever Australia (Holdings) Pty Ltd trading as “Streets” (**Streets**). In this regard:
 - (a) Peters distributed its Single Serve Ice Cream Products to P&C Retailers nationally using its own frozen transport trucks in metropolitan Melbourne, Sydney, Brisbane and parts of Queensland, and otherwise used PFD and to a much more limited extent a small number of other local distributors.

- (b) For many years Streets has distributed its Single Serve Ice Cream Products to P&C Retailers on a national basis using some of its frozen transport trucks and a number of distributors throughout Australia.

Peters Distribution Agreement

- 10. The Distribution Agreement included terms to the following effect. During the term of the Agreement, PFD must not¹, without the prior written consent of Peters, market, promote, sell or distribute, or cause to be marketed, promoted, sold or distributed, Competing Products in the Territory in circumstances where:
 - (a) “Competing Product” means an Ice Cream Product that is not supplied by Peters, that competes with any Product supplied by Peters and is visually merchandised on display to consumers with the intention of creating the impulse to purchase;
 - (b) “Ice Cream Products” means ice-cream, ice confection, gelati (or equivalent), frozen yoghurt and water ice products sold individually wrapped, in multipacks, in trays or in tubs for ‘scoop’ or ‘take home’ or to be served in soft-serve format; and
 - (c) “Territory” means the Geographic Areas set out in Schedule 2 as amended from time to time by agreement, being certain geographic areas located throughout Australia not including metropolitan Melbourne, Sydney and Brisbane and the eastern coast of Queensland.
- 11. The Distribution Agreement expired on 30 June 2018. Up until at least in or about December 2019, PFD and Peters continued to operate under the terms of the Distribution Agreement.

Anti-competitive purpose

- 12. A substantial purpose of Peters engaging in the exclusive dealing conduct was to protect its market share from competitors, as one of only two major suppliers of Single Serve Ice Cream Products, by restricting access by competitors to distribution services from PFD and thereby hindering and/or preventing their entry or expansion in the Relevant Market.

Competitive effect

- 13. During the Relevant Period, Peters’ exclusive dealing conduct had the effect, or was likely to have the effect, of hindering and/or preventing new entrants from entering and expanding in the Relevant Market by distributing Single Serve Ice Cream Products to national P&C Retailers.
- 14. By way of illustration, during the Relevant Period, Regal Cream Products Pty Ltd (**Bulla**) sought to obtain distribution of its ice cream products to national P&C Retailers, including

¹ Subject to certain exceptions contained in clauses 2.3(b) and 2.3(d) which are not relevant or material.

Caltex and Woolworths Petrol. In this regard, Bulla sought to have PFD distribute those products. PFD told Bulla that, after checking with Peters, it was unable to distribute Bulla's ice cream products due to exclusivity arrangements with Peters. Bulla could not find another commercially viable way to distribute its Single Serve Ice Cream Products to national P&C Retailers. As such, Bulla did not distribute its Single Serve Ice Cream Products to national P&C Retailers.

15. Further, during the Relevant Period, PFD was the only commercially viable option for new entrants to distribute Single Serve Ice Cream Products to national P&C Retailers:
 - (a) Other potential distributors did not have a frozen food route to P&C Retailers nationally.
 - (b) Other potential distributors required minimum order quantities, which were not commercially viable, or required other uncommercial terms, for new entrants such as Bulla.
 - (c) It was not commercially viable for new entrants such as Bulla to incur the cost of establishing their own distribution network to distribute Single Serve Ice Cream Products to P&C Retailers nationally.
 - (d) It was not feasible or commercially viable for new entrants such as Bulla to distribute their products nationally to P&C Retailers using a number of distributors.
16. But for Peters' exclusive dealing conduct, other new entrants, such as Bulla, would or would likely have entered or expanded in the Relevant Market and competed substantially against Peters and Streets for the supply of Single Serve Ice Cream Products to national P&C Retailers.

C. RELIEF SOUGHT FROM THE COURT

17. The ACCC seeks the relief set out in the accompanying Originating Application.

D. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

18. During the Relevant Period, by reason of the conduct identified in paragraphs 6 to 16, above, Peters engaged in the practice of exclusive dealing in contravention of section 47(1) of the CCA in that:
 - (a) Peters engaged in exclusive dealing as defined in subsection 47(2)(d) by offering to supply, and/or supplying, its ice cream products to PFD on the condition that PFD would not acquire ice cream products from competitors of Peters;
 - (b) Peters engaged in exclusive dealing as defined in section 47(2)(e) by offering to supply, and/or supplying, its ice cream products to PFD on the condition that PFD would not re-supply ice cream products acquired from competitors of Peters;

- (c) Peters engaged in exclusive dealing as defined in subsection 47(4)(c) by offering to acquire, and/or acquiring, distribution services from PFD on the condition that PFD would not supply distribution services for ice cream products that competed with Peters' ice cream products to suppliers of ice cream products that compete with Peters' ice cream products; and/or
 - (d) Peters engaged in exclusive dealing as defined in subsection 47(4)(d) by offering to acquire, and/or acquiring, distribution services from PFD on the condition that PFD would not supply distribution services for ice cream products that competed with Peters' ice cream products in particular classes of places, namely in the Territory as defined in the Distribution Agreement.
19. Peters' exclusive dealing conduct had the purpose, effect or likely effect of substantially lessening competition within the meaning of section 4G of the CCA in the Relevant Market for the purposes of s 47(10) of the CCA in circumstances where:
- (a) the state of competition in the Relevant Market during the Relevant Period was dominated by the distribution of Peters' and Streets' ice cream products to P&C Retailers and PFD was the only commercially viable option for new entrants to distribute Single Serve Ice Cream Products to national P&C Retailers; and
 - (b) the conduct had the purpose, effect and/or likely effect, of hindering and/or preventing the distribution of Single Serve Ice Cream Products, which competed with Peters' ice-cream products, to national P&C Retailers.

E. ALLEGED HARM

20. Peters' exclusive dealing conduct caused harm because it hindered and/or prevented new entry and expansion by competitors in the Relevant Market, with the consequence that consumers were denied the benefits of competition – which can result in improvements in choice, innovation, quality and price.

Date: 19 November 2020



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Signed by Daniel John Marquet
Partner, Corrs Chambers Westgarth
Lawyer for the Applicant

This Concise Statement was prepared by Wendy Harris QC, Nicholas De Young QC and Clare Cunliffe of Counsel

Certificate of lawyer

I Daniel John Marquet certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the concise statement.

Date: 19 November 2020



Signed by Daniel John Marquet
Partner, Corrs Chambers Westgarth
Lawyer for the Applicant