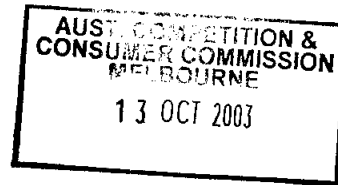


# Deacons

13 October 2003

The Commissioner  
Australian Competition and Consumer Commission  
Level 35, The Tower  
360 Elizabeth Street  
MELBOURNE VIC 3000

Our Ref: 114513



Level 24  
385 Bourke Street  
Melbourne Vic 3000  
Australia  
GPO Box 4592  
Melbourne Vic 3001  
DX445 Melbourne  
Tel +61 (0)3 8686 6000  
Fax +61 (0)3 8686 6505  
www.deacons.com.au

#### Other Offices

Brisbane  
Canberra  
Perth  
Sydney

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Hong Kong  
Indonesia  
Malaysia  
People's Republic of China  
Singapore  
Taiwan  
Thailand  
Vietnam

Dear Sir

### Stihl Pty Ltd – Exclusive Dealing Notification

Please find enclosed for lodgement an exclusive dealing notification pursuant to section 93(1) of the *Trade Practices Act 1974* (Cth), on behalf of Stihl Pty Ltd in respect of its proposed arrangements with franchisees.

We also enclose a cheque in the sum of \$2500.

Please do not hesitate to contact the writer if you require any additional information.

Yours faithfully

A handwritten signature in black ink, appearing to read "Greg Hipwell".

Greg Hipwell  
Partner  
Deacons  
Direct line: 8686 6682  
Email: greg.hipwell@deacons.com.au

FILE No:
DOC: D03/39382
MARS/PRISM:

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FORM G

COMMONWEALTH OF AUSTRALIA

*Trade Practices Act 1974 - Sub-section 93(1)*

EXCLUSIVE DEALING

NOTIFICATION

To the Australian Competition & Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974* (Cth), of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(2), (3), (4), (5), (6) or (7) or paragraph 47(8)(a), (b) or (c) or (9)(a), (b), (c) or (d) of that Act in which the person giving notice engaged or proposes to engage.

1. (a) **Name of person giving notice**

Stihl Pty Ltd ABN 76 004 881 145 ("Stihl")

(b) **Short description of business carried on by that person**

Stihl is the Australian subsidiary of the German company, Stihl International GmbH, which is an outdoor power equipment manufacturer. Stihl sells, at wholesale level, Stihl and Viking branded outdoor power equipment, spare parts, workshop tools, accessories and other outdoor power equipment items ("Stihl Products") to its network of non-exclusive specialist dealers.

(c) **Address in Australia for service of documents on that person**

2 Forbes Close, Knoxfield, Victoria 3180

2. (a) **Description of the goods or services in relation to the supply or acquisition of which this notice relates**

The notification relates to:

- (i) the supply of Stihl Products by Stihl to its dealers; and
- (ii) the acquisition by Stihl dealers of products from other manufacturers which compete with Stihl's core product range which consists of an extensive range of Stihl branded chainsaws ("Core Product Range").

(b) **Description of the conduct or proposed conduct**

**Background**

The majority of Stihl dealers operate independent multi-branded businesses and sell products supplied by competitors of Stihl. In particular, the dealers may stock:

- (i) chainsaws from manufacturers that directly compete with Stihl's Core Product Range which are of:
  - (A) similar quality and brand reputation to Stihl's Core Product range; and
  - (B) require a high standard of care and safety for their use and handling,

**("Competing Product Range");**
- (ii) chainsaws from manufacturers that are substitutable for chainsaws within Stihl's Core Product Range but which do not have the same brand reputation and are often cheaper and of inferior quality and reliability; and
- (iii) chainsaws from manufacturers that compete with Stihl in only one product or model type but who do not produce a range of products that are directly competitive with Stihl's Core Product Range.

Stihl deliberately confines the sale of its Stihl Products to consumers via specialist servicing dealers with workshops to ensure that the risk to the health and safety of users of its products and the general public is minimised. Dealers and their staff are required to be trained in pre-delivery, maintenance and repair of all Stihl Products. Pre-delivery includes:

- (i) the assembly and testing of all Stihl Products prior to delivery to the consumer after sale; and
- (ii) the training of consumers and other end users in the operation, maintenance and safe handling of Stihl Products to minimise risk to the health and safety of the user and the general public.

Stihl does not permit sales of its Stihl Products in boxes without pre-delivery including where the product is purchased by insurance consolidators to satisfy insurance claims. For this reason, bulk retailers or other retailers who are not in a position to comply with Stihl's high standards of care towards employees of dealers, end users of equipment and the general public are not supplied with Stihl Products.

Each dealer has entered into a standard form dealer agreement known as a dealer agreement ("**Dealer Agreement**"). Stihl has amended the Dealer Agreement and introduced a form of addendum ("**Addendum**") to the Dealer Agreement.

For the purposes of this notification, the amended Dealer Agreement will be referred to as the "**New Dealer Agreement**" and the previous form of the Dealer Agreement will be referred to as the "**Old Dealer Agreement**".

Relevant to this notification is that:

- (i) the Old Dealer Agreement includes a general provision that the dealer complies with all reasonable directives, suggestions and policies of Stihl in relation to the marketing, promotion or servicing of the Stihl Products and to acquire, erect and maintain good and presentable product and service signs approved by Stihl to identify the dealer's premises as a Stihl dealer;
- (ii) the New Dealer Agreement provides greater obligations on a dealer to conform to the current standards and image of Stihl including express obligations to:
  - (A) upgrade the dealer's premises to ensure that they are up to Stihl's current standards of presentation and corporate image (including internal and external signage, design and décor) of a Stihl dealership;
  - (B) comply with all reasonable directions of Stihl to ensure that the operation of the Stihl store by the dealer conforms to the then current standards and corporate image as prescribed by Stihl; and
- (iii) the Addendum permits a dealer to trade under a business name incorporating the words "STIHL Shop" and requires the dealer to adhere to internal and external fit out and signage guidelines specified by Stihl.

However, there is no provision in the Dealer Agreement or the Addendum:

- (i) placing an obligation on the Stihl dealer to sell exclusively Stihl Products or to sell a specified portion of Stihl Products as a percentage of the dealer overall product sales; or
- (ii) prohibiting a Stihl dealer from selling products supplied by a competitor of Stihl.

In addition, either Stihl or a dealer may terminate both the New or Old Dealer Agreement on 60 days notice.

Stihl is currently implementing a nationwide external and internal imaging upgrade program for its dealer network ("**Imaging Program**").

The purpose of the Imaging Program is to increase consumer brand awareness and dealer sales of Stihl Products by upgrading the external and internal image of the Stihl stores in accordance with Stihl's uniform prescribed methods and standards.

Image upgrading is optional for existing Stihl dealers. However, it is compulsory for new dealers which have either purchased a new or existing Stihl dealership, except in limited circumstances where approval is obtained from Stihl not to re-image.

In order to ensure that the Imaging Program is implemented consistently in each case, Stihl has developed imaging guidelines for each dealer that elects or is required to upgrade its store ("**Imaging Guidelines**"). The Imaging Guidelines may be summarised as follows:

- (i) all existing external signs must be removed and replaced with uniform external signage as prescribed by Stihl;
- (ii) all internal showrooms (ie signage and fit out) must be upgraded to the same professional standard; and
- (iii) Stihl will pay the following proportions of the external and internal costs of each dealer which undertakes the imaging upgrade:
  - (A) 50% of the external imaging costs where dealers operate a STIHL Shop or wish to be predominantly recognised as a Stihl dealer;
  - (B) 25% of the external imaging costs for the building and fascia and 50% of the imaging costs for the free-standing pylon where dealers operate multi-branded stores; and
  - (C) payment of all internal signage for all dealers and 50% of internal imaging costs (ie signage, shelving, stands etc) where dealers operate a STIHL Shop.

### **Proposed conduct**

Stihl proposes that it will permit dealers to participate in the Imaging Program and will supply dealers, who are participating in the Imaging Program in accordance with the Imaging Guidelines ("**Imaged Dealers**"), with Stihl Products, on the condition that the dealers do not acquire any Competing Product Ranges for promotion and resale within their businesses.

However, Stihl will permit Imaged Dealers to continue stocking and selling brands of chainsaws from manufacturers that do not compete with Stihl's Core Product Range.

### **Trade Practices Act: Exclusive Dealing**

Section 47 of the *Trade Practices Act 1974* (Cth) ("**Act**") prohibits anti-competitive dealing and outlines a number of proscribed practices which amount to exclusive dealing.

Section 47(10) of the Act provides that conduct which falls within the definition of exclusive dealing in section 47(2) only contravenes the Act if the relevant conduct has the purpose or is likely to have the effect of substantially lessening competition in any relevant market.

The proposed conduct outlined above falls within section 47(2)(d) which states that a corporation engages in the practice of exclusive dealing if the corporation:

- (i) supplies or offers to supply goods and services;

- (ii) supplies or offers to supply goods and services at a particular price; or
- (iii) gives or allows or offers to give or allow a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods and services,

on condition that the recipient will not or will not except to a limited extent acquire goods or services directly or indirectly from a competitor of the corporation.

However, Stihl maintains, as outlined below, that the purpose or effect of the proposed conduct is not to substantially lessen competition in the relevant market.

Section 93 of the Act deals with the procedure by which corporations are entitled to obtain statutory protection in relation to exclusive dealing conduct which may otherwise contravene the prohibition in section 47.

The Australian Competition and Consumer Commission ("**Commission**") is required to make certain enquiries and to comply with the pre-determination hearing procedure before making a decision to withdraw protection. Pursuant to section 93(3), the Commission is required to make a number of findings in relation to the proposed conduct before it can withdraw the statutory protection. The section requires the Commission to be satisfied that:

- (i) the conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; and
- (ii) in all the circumstances either:
  - (A) no public benefit has resulted or is likely to result from that conduct; or
  - (B) any resulting public benefit is not likely to outweigh the public detriment caused by the lessening of competition.

#### **Identification of the market**

The market can be reasonably identified as the retail market for outdoor power equipment in Australia and in some instances in a much smaller or local geographic area.

The boundaries of the market are further defined by the substitution possibilities of Stihl Products for other competing products. Stihl is constrained in its actions by its close competitors that produce an entire range of products that closely mirror Stihl's and others that compete in one or two product groups. Therefore, if Stihl were to dramatically increase its prices, consumers would be likely to buy products from competing manufacturers in preference to Stihl products. At the same time, suppliers or manufacturers of similar products may enter the market. For example, a competitor may be able to start producing

chainsaws or other types of outdoor power equipment using its existing plant and manufacturing processes.

### **Effect on competition**

A substantial lessening of competition will usually occur if the conduct changes the structure of the market, for example, changes market share or increases barriers to entry, which is to the detriment of the consumers.

Stihl maintains that it will not be in breach of section 47 of the Act by engaging the conduct proposed because it does not have the purpose, effect or likely effect of substantially lessening of competition in the broader geographic Australian market of outdoor power equipment for the following reasons:

- (i) The purpose of the proposed conduct is:
  - (A) to increase brand loyalty and sales of Stihl Products by being the only brand offered with respect to Stihl's Core Product Range within particular retail outlets;
  - (B) to protect its investment in the Imaging Program and prevent competing manufacturers who offer a Competitive Product Range from "free-riding" on the promotional and marketing benefits of the re-imaged stores and the extensive advertising campaigns conducted by Stihl; and
  - (C) to enable dealers to become more expert in Stihl Products so as to ensure pre-delivery, maintenance, repair and training of end users of the Stihl Products is carried out effectively to minimise risk to the health and safety of employees of dealers, end users of the Stihl Products and the general public.
- (ii) There are numerous brands of chainsaws available within the market throughout Australia. However, not all manufacturers have Competitive Product Ranges and therefore, the quality, reliability and reputation of the various brands of products vary markedly. This means that Stihl has been able to differentiate itself on the basis of its superior quality, reliability and high standards of care. Stihl maintains that position largely because its products are of exceptional quality and it spends more than any other manufacturer nationally on advertising its products and promoting its brand.
- (iii) Retail outlets selling Stihl and Competitive Product Ranges are numerous and fiercely competitive. Outdoor power equipment is sold at hardware stores, farm suppliers, lawnmower shops, motor cycle shops and other specialty stores. The fact that products of Stihl's competitors are not available in the stores of Imaged Dealers may remove competition within the confines of the specific store and may inconvenience a consumer, however it will not prevent consumers from shopping around and comparing prices and products in stores nearby.

- (iv) There is arguably no barrier to entry at retail level because of the sheer volume of possible retail outlets for outdoor power equipment. In small rural towns, there may only be one store that sells outdoor power equipment. If that store is an Imaged Dealer, some Competitive Product Ranges will not be available in that town. However, the products are expensive and last a long period of time which makes it reasonable to expect that a consumer would be willing to travel to the next town if it wanted to compare products and prices.
- (v) The following statistics, provided by the Outdoor Power Equipment Association at its Annual General Meeting held on 5 August 2003 and Stihl, demonstrate the competitive nature of both the outdoor power equipment and chainsaw retail markets in Australia:
- |     |  |      |
|-----|--|------|
| (A) | retailer outlets selling chainsaws in Australia:                                 | 2140 |
| (B) | specialist servicing dealers selling outdoor power equipment in Australia:       | 1800 |
| (C) | large retailers (ie non-servicing) selling outdoor power equipment in Australia: | 900  |
| (D) | Stihl dealers:   | 434  |
| (E) | Imaged Dealers (by the end of 2004):   | 145  |

In particular, the statistics reveal that the number of Imaged Dealers which will be subject to the product restriction as part of the Imaging Program by the end of 2004 is a small percentage of the overall number of chainsaw retail outlets (ie 6.8%) and outdoor power equipment servicing dealers (ie 8.1%).

Stihl contends that:

- (i) it is not trying to foreclose the market to its competitors, and given the competitive nature of the market, it is unlikely to be able to; and
- (ii) there is no substantial lessening of competition simply because consumers will be unable to compare, side-by-side any Competing Product Ranges with Stihl's Core Product Range, so that a choice can be made, for the reasons outlined above.

### **Public Benefit**

The proposed conduct is likely to have a public benefit by:

- (i) Fostering competition with other retailers of outdoor power equipment by increasing consumer brand loyalty, business efficiency and specialised customer service.



- (ii) Improving the supply of better information to consumers to permit informed choices of selecting Stihl Products. Imaged Dealers will be more skilled in their knowledge of the Stihl Products and will be able to offer a higher level of service and standard of care in safety training to assist consumers in purchasing the right product for their needs.
- (iii) Increasing the level of awareness, safety and standards of care necessary for the use of Stihl Products to minimise risk to health and safety of the employees of dealers, end users of equipment and the general public. Imaged Dealers will be more expert in the assembly, operation, repair, maintenance and safety training of one core range of outdoor power equipment. This will enable dealers to more effectively comply with Stihl's pre-delivery obligations which, as stated above, include:
  - (A) the assembly and testing of all Stihl Products prior to delivery to customers; and
  - (B) the training of customers and other end users in the operation, maintenance and safe handling of Stihl Products to minimise risk to the health and safety of the user and the general public.

In addition, the importance placed by Stihl on the training and responsibilities of its dealers to promote and maintain high standards of care for its equipment sets Stihl apart from non-specialist dealers which do not impose the same level of safety standards.

- (iv) Allowing Stihl in broad terms to control quality, manage and maintain the Stihl brand.

### **Detriment**

The proposed conduct contemplated by Stihl only marginally affects the choice of consumers in acquiring products which compete with Stihl Products as they may be required to travel to another store to acquire such products. As stated above, this will inconvenience some consumers, particularly in regional areas, but it will not ultimately prohibit consumers from comparing prices and products given the volume of single and multi branded retail outlets selling outdoor power equipment.

### **Conclusion**

Stihl contends that the proposed conduct will not contravene section 47 of the Act as it does not have the purpose, effect or likely effect to result in substantial lessening of competition in any relevant market.

Alternatively, if the Commission finds that giving effect to the proposed conduct would cause a substantial lessening of competition in any relevant market, the public benefit resulting from the proposed conduct outweighs any public detriment caused by the lessening of competition.

3. (a) **Class or classes of persons to which the conduct relates**

Dealers who are granted the right to operate Stihl retail stores in accordance with the provisions of the Dealer Agreement.

(b) **Number of those persons -**

(i) **At present time**

434 dealers of which 55 are Imaged Dealers.

(ii) **Estimated within the next year**

(A) 30 new dealers; and

(B) 145 Imaged Dealers by the end of 2004.

(c) **Where number of persons stated in item 3(b)(i) is less than 50, their names and address**

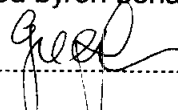
There are currently more than 50 Stihl dealers in the Stihl dealer network.

4. **Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice**

Greg Hipwell, c/-Deacons, 385 Bourke Street, Melbourne, Victoria 3000

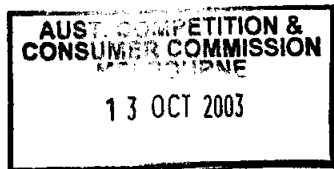
Dated 13 October 2003

Signed by/on behalf of the applicant

  
.....  
(Signature)

GREGORY HUGH HIPWELL  
.....  
(Full name)

SOLICITOR For the Applicant  
.....  
(Description)



**GREGORY HUGH HIPWELL**  
Level 24, 385 Bourke St, Melbourne 3000  
A natural person who is a legal  
practitioner within the meaning  
of the Legal Practice Act 1998