

10 February 2004

Mr Tim Grimwade
General Manager, Adjudication
Australian Competition and Consumer Commission
470 Northbourne Avenue
Canberra ACT 2602

By Courier

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Dear Mr Grimwade

Application for Notification of Exclusive Dealing

We act for Sun Microsystems Australia Pty Ltd (**Sun**).

We enclose a Form G application for notification of exclusive dealing on behalf of Sun pursuant to s93(1) of the Trade Practices Act 1974 (the **Act**).

This notification is lodged in respect of conduct which may constitute exclusive dealing under s47(6) and s47(7) of the Act. It should not be taken as an admission that the conduct would contravene the statutory prohibition.

The enclosed notification relates to an earlier notification by Sun which was lodged with the Commission on 11 May 2000 and which came into effect on 26 May 2000. The earlier notification concerns an existing distribution arrangement between Sun and Alstom Australia Limited (ACN 000 215 092) (**AAL**). Sun has been informed that AAL intends to transfer its information technology business assets, including the existing distribution arrangement with Sun, to Alstom Information Technology Limited (ACN 107 656 833) (**AITL**).


Accordingly, the enclosed notification covers the distribution arrangement which is proposed to be novated to AITL, since the earlier notification by Sun does not extend to AAL's successors in title (or recipients of a novation or assignment of the distribution agreement).

Our enclosed submissions in support of the Form G address the continuing applicability of the public benefits to the distribution arrangement being novated to AITL.

We also enclose a cheque payable to the Commission in the amount of \$100 to cover the lodgement fees for Sun.

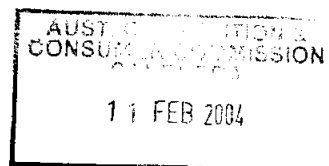
Please contact us if you have any questions in relation to this notification.

Yours sincerely


Peter CJ James
Partner
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Tel 61 2 9230 4334

Our Ref PCJB:AWRB

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Sydney
Melbourne
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Singapore
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Bangkok
Phnom Penh

FORM G

Regulation 9

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* of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(6) or (7), of that Act in which the person giving notice engages or proposes to engage.

1. (a) Name of person giving notice:

Sun Microsystems Australia Pty Limited (ACN 003 145 337) (*Sun*)

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

Supply of computer hardware and software

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

C/- Peter CJ James

Partner

Allens Arthur Robinson

Level 17, Chifley Tower,

2 Chifley Square

Sydney, NSW 2000

Telephone: (02) 9230 4334

Fax: (02) 9230 5333

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

This notification relates to all computer hardware and software products listed in Sun's Australian price list from time to time which includes Unix hardware, Sun's operating systems software (*Solaris*) and Middleware Software (*Java*) and associated hardware and software.

(b) Description of the conduct or proposed conduct:

See Attachment A.

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

Sun resellers and service providers, including value added resellers, system providers and other resellers certified by Sun, and Sun Customers.

(b) Number of those persons:

At the present time – approximately 111 resellers.

Form G – Third Line Forcing Notification

Allens Arthur Robinson



Estimate within the next year – approximately 100 resellers.

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

Not applicable

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

Peter CJ James
Partner
Allens Arthur Robinson
Level 17, Chifley Tower
2 Chifley Square
SYDNEY NSW 2000

Dated: 10 February 2004

Signed on behalf of the person giving this notice:



(Signature)

PETER CJ JAMES

PARTNER, ALLENS ARTHUR ROBINSON,
solicitors for the person giving
this notice



ATTACHMENT A

Description of the Conduct and Public Benefit for Exclusive Dealing Notification**1. Background**

- 1.1 Sun Microsystems Australia Pty Ltd (**Sun**) is a subsidiary of Sun Microsystems, Inc., which manufactures and supplies computer hardware and software.
- 1.2 Sun distributes its products in Australia through its network of resellers, dealers and partners (**the dealers**).
- 1.3 Sun focuses primarily on the sale and marketing of its products rather than the logistics of supply and distribution of its products. Sun also has authorised dealers with which it works closely in the promotion and marketing of Sun products in Australia.
- 1.4 Sun has outsourced the distribution logistics and credit management functions by appointing an order fulfilment partner, Alstom Australia Limited (ACN 000 215 092) (**AAL**), under distribution arrangements between Sun and AAL.
- 1.5 AAL is considering transferring its information technology business assets, including the distribution agreement between AAL and Sun, to Alstom Information Technology Limited (ACN 107 656 833) (**AITL**).
- 1.6 Sun and AAL propose to novate the distribution agreement to AITL, as the new distributor.
- 1.7 For the purposes of the following submissions in support of the Form G, the reference to "**the distributor**" refers to "AAL" prior to the distribution agreement being novated to AITL, and refers to "AITL" after the distribution agreement is novated to it.
- 1.8 The distributor is an independent third party and purchases the products directly from Sun. The distributor on sells those products to Sun's dealers. The distributor has a distribution centre and other infrastructure and is responsible for handling all issues associated with processing, tracking, fulfilling and delivering dealers' orders of Sun products. It does not have any marketing or promotional responsibilities for Sun products. It is also primarily responsible for all credit issues associated with its sale of the products to the dealers.

2. Relevant Conduct

- 2.1 Sun outsources the task of fulfilling dealers' orders of Sun products. This improves the efficiency with which dealers' orders are processed and shortens the delivery time for products.
- 2.2 To achieve this, Sun requires its dealers to purchase their requirements for Sun products from the distributor.
- 2.3 It is common in dealership agreements for the supplier to require that the dealer purchase all of those dealership products from the supplier to ensure product quality and standards.



- 2.4 The requirement that dealers purchase Sun products from the distributor may constitute third line forcing. Accordingly, Sun lodged a notification with the Commission on 11 May 2000 and which came into effect on 26 May 2000. This notification concerns the proposed novation of the distribution agreement to AITL, since the earlier notification by Sun does not extend to AAL's successors in title (or recipients of a novation or assignment of the distribution agreement).

3. Public Benefit

- 3.1 The conduct specified in paragraph 2.2 is pro-competitive and to the overall benefit of dealers and ultimately consumers. In particular, the conduct gives rise to the public benefits which are outlined in sections 4 to 8 below.

4. Product Availability and Business Efficiency

- 4.1 The conduct improves the business efficiency of Sun and its dealers.
- 4.2 The time between ordering and delivery of products to dealers is significantly shorter if products are sourced from a distributor rather than directly through Sun. This ensures that dealers are able to deliver those products to customers more quickly, benefiting those customers.
- 4.3 If dealers were to place their orders directly with Sun, those orders would be fulfilled by delivery by Sun which would take considerably longer. The distributor is required to maintain sufficient stock levels and it also has an extensive distribution network which enables dealers and retailers to obtain products more quickly.
- 4.4 In addition, the distributor also performs the following tasks for Sun, which Sun believes increases business efficiency and improves product availability:
- (a) receiving and processing dealers' orders for Sun products;
 - (b) maintaining stock of Sun products in its warehouse for the fulfilment of dealers' orders;
 - (c) informing dealers and Sun of stock availability;
 - (d) tracking and informing dealers and Sun of the current status of dealer orders;
 - (e) providing dealers and Sun with the estimated time on arrival of stock;
 - (f) arranging for the delivery of Sun products to dealers;
 - (g) performing credit checks;
 - (h) providing credit to dealers; and
 - (i) invoicing dealers in collecting invoice payments.

5. Price Competition

- 5.1 Sun offers the distributor an additional discount equal to the amount that Sun has promised under a contract with a dealer (a **dealer discount**) payable only if the distributor



offers the applicable dealer a discount of no less than the dealer discount to the dealer. In this way, the distributor is encouraged to sell to dealers at or below the price Sun would have charged if it is sold to the dealers directly.

- 5.2 The purchase requirement also results in lower prices to the dealers for Sun products because the distributor specialises in distribution and also distributes competing products from other vendors. If Sun distributed the products itself, Sun would not have the benefit of the economies of scale currently enjoyed by the distributor. If Sun were to take on the role of distributor, the increase in Sun's costs would be likely to result in a decrease in the level of discounts received by dealers.

6. Customer Service

- 6.1 The distributor is involved in providing assistance to dealers in configuring hardware which is essential to meet the requirements of the dealer's customers. Sun would be unable to provide the engineers to configure the hardware at a cost effective price. In addition, the distributor maintains a help desk which provides dealers with support on configuring, pricing and ordering.

7. Product Quality and Consistency

- 7.1 The requirement that dealers purchase all Sun products from the distributor assists Sun to maintain consistently high standard of product quality in Australia. Dealers and customers are able to be confident that the Sun products sold are genuine Sun products.

8. Effect on Competition

- 8.1 Rather than dealers being required to purchase Sun products from Sun itself, they are required to purchase those products from an independent third party. The "forced" Sun products are still manufactured by Sun, or its affiliates but simply supplied through a third party.
- 8.2 The conduct does not distort the demand for or the supply of Sun products by dealers. As a result, the conduct is not likely to have an anti competitive effect on the relevant market.

9. Conclusion

- 9.1 The notified conduct relates to substituting the distributor in place of Sun in relation to the processing, tracking and filling of dealers' orders of Sun Products. The continuing benefit to the public of such conduct far outweighs any possible detriment to the public.
- 9.2 The notified conduct is pro-competitive in that it enables more efficient delivery of Sun products to dealers and provides dealers with additional services designed to facilitate ordering, product records and returns, while maintaining consistency in product quality. Customers of dealers are also likely to benefit from the greater efficiencies associated with these improvements to the supply of Sun products.