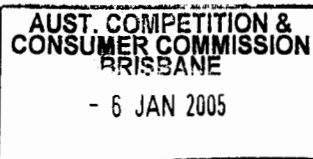


MALLESONS STEPHEN JAQUES



Mr Scott Gregson
Acting General Manager of
Adjudication
Australian Competition and
Consumer Commission
PO Box 1199
Dickson ACT 2602

6 January 2005

J Swinson
Partner
Direct line
+ 61 7 3244 8050

Lodged in Brisbane at:
Level 3
500 Queen St
BRISBANE QLD 4000

Dear Mr Gregson

Telstra Corporation Limited - Notification of potential third line forcing in Free Dance Music Download promotion

We act for Telstra Corporation Limited ("Telstra").

We enclose an exclusive dealing notification for lodgment, together with a cheque for the applicable lodgment fee of \$1,000.00

Please contact us if you have any questions, or if you require further information.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Swinson".

John Swinson
Partner

Direct line +61 7 3244 8050
Email john.swinson@malleons.com

Solicitors

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COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 - Subsection 93(1)

EXCLUSIVE DEALING NOTIFICATION

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93(1) of the Trade Practices Act 1974, of particulars of conduct or proposed conduct of a kind referred to in subsection 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:**

Telstra Corporation Limited (“Telstra”) (ABN 33 051 775 556).
- (b) **Short description of business carried on by that person:**

Telstra is a telecommunications and information services company.
- (c) **Address in Australia for service of documents on that person:**

c/John Swinson
Partner
Mallesons Stephen Jaques
Level 30, Waterfront Place
1 Eagle Street
Brisbane, Queensland, 4000
2. (a) **Description of the goods or services in relation to the supply or acquisition of which this notice relates:**

Telstra has offered and supplied a range of telephony, internet, and other telecommunications services to retail customers for many years.

The particular goods and services to which the supply covered in this notification relates are membership to Telstra’s BigPond Music service and the benefit of free online music download services available through the Bigpond Music service under the Smirnoff® Ice “Free Dance Music Download” Promotion (“**the Promotion**”).
- (b) **Description of the conduct or proposed conduct:**

Diageo Australia Ltd (ABN 33 004 167 720) propose to promote an online dance music download giveaway called the “Free Dance Music Download” promotion.

To be able to receive a benefit under the Promotion, a participant must:

 - (i) be a resident of Australia aged 18 years or over;
 - (ii) purchase a specially marked 4 pack or 6 pack of Smirnoff Ice or Smirnoff Ice Double Black featuring the “Free Dance Music Download” promotion

with the unique promotional product code (“**Product Code**”) on the inside of the pack wrap; and

- (iii) after entering a valid Product Code, follow the directions at www.inthemix.com.au/smirnoff to become a BigPond Music member.

After following these steps, a participant is entitled to download one BigPond Music dance music track from a selected dance music menu at no charge.

Smirnoff Ice and Smirnoff Ice Double Black products are supplied by third party retailers who acquire the product from Diageo Australia Ltd (ABN 33 004 167 720).

The Promotion is to be launched on 16 January 2005 and will close on 30 April 2005.

Through the Promotion, Telstra proposes to supply a benefit (namely the chance to legally download a dance music track at no charge) to consumers who enter the valid Product Code from the packaging of the particular abovementioned Smirnoff Ice or Smirnoff Ice Double Black products. If someone who did not have a valid Product Code were to ask that Telstra supply the same dance music track at no charge, Telstra would refuse to provide the free BigPond Music dance music track for the reason that the person did not have a valid Product Code from the third party product. In the event this were to occur, it could arguably be conduct that breaches section 47(7) of the Trade Practices Act 1974.

It is submitted the proposed conduct, if it occurs, will clearly have a public benefit that outweighs any possible detriment considered to arise from the proposed conduct because:

- (i) the Promotion promotes a lawful rather than illegal means of downloading music from the internet, which generates economic benefits for participants in the music industry;
- (ii) the Promotion generally increases awareness of a lawful means of downloading music from the internet;
- (iii) as a form of expression and art, music and access to it is arguably in the public interest. Encouraging lawful access to music by providing limited, controlled access at no charge through the Promotion will assist with the promotion, and potentially the further use, of lawful music download services. This is to be contrasted with the detrimental impacts of illegal music downloads to participants of the music industry;
- (iv) the proposed conduct does not require participants to purchase another’s goods other than on a normal commercial basis. Smirnoff Ice products are at all times being sold at their usual commercial prices and the normal BigPond Music membership terms apply;
- (v) it is reasonable to conclude that many participants would purchase the Smirnoff Ice products irrespective of the Promotion. Therefore, in order to take advantage of the benefit under the Promotion, such participants

would be using the Product Code from a product they have already purchased for their ordinary use. In addition, many participants may already be members of Telstra's BigPond Music service;

- (vi) the proposed conduct may increase competition in similar markets by stimulating competitors to match or better Telstra's offer under this Promotion.

Further, it is submitted the proposed conduct will result in little, if any, detriment to the public because:

- (i) the proposed conduct is voluntary. The proposed conduct does not involve a consumer being only able to acquire BigPond Music membership and BigPond Music online music tracks if they also purchase Smirnoff Ice products. Rather it is only the benefit of acquiring one music track download at no charge that is contingent upon having both a Telstra product (the BigPond Music membership) and another person's product;
- (ii) the Commission recognises that third line forcing conduct which is voluntary on the part of the customer is usually beneficial. For example, in the Commission's publication entitled *Guide to Authorisation and Notification for Third Line Forcing Conduct*, dated February 1998 (page 17), the Commission states:

Accordingly, ... [the Commission] does not pursue all third line forcing conduct of which it becomes aware...

The Commission is unlikely to be concerned where potential purchasers have a genuine choice, based on quality and price, whether or not to purchase product A alone or to accept the supplier's third line forcing terms for the package of products A and B.

- (iii) because of the relatively small number of customers involved and the fact that the Promotion only runs for a limited period of time, it is unlikely to have a substantial effect on competition in any relevant markets; and
- (iv) the Dawson Committee has recommended that the third line forcing prohibition should be made subject to a substantial lessening of competition test. The Australian Government accepted that view on the grounds third line forcing can be beneficial. As at today's date however no legislation to give effect to this has been passed.

Therefore we submit that on a net benefit analysis, the proposed conduct not be opposed by the Commission.

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

Those consumers interested in downloading music from the internet.

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

(i) **At present time:**

No figures available.

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

No figures available.

(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:

John Swinson

Partner

Mallesons Stephen Jaques

Level 30, Waterfront Place

1 Eagle St

Brisbane, Queensland, 4000

Dated: 6 January 2005



John Swinson

Mallesons Stephen Jaques

