

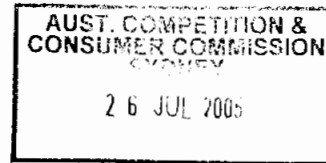
# CLAYTON UTZ

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26 July 2005

## By Hand

Mr Scott Gregson  
Acting General Manager - Adjudication  
Adjudications Branch  
Australian Competition & Consumer Commission  
C/- Level 7  
Angel Place  
123 Pitt Street  
SYDNEY NSW 2000

FILE No.
DOC:
MARS/PRISM:

Our reference: 217/14739/80027404

Dear Scott

### Third Line Forcing Notification: Abbott Australasia Pty Ltd

We act for Abbott Australasia Pty Ltd ("**Abbott**").

We enclose the following:

1. a Form G Notification of conduct referred to in subsections 47(6) and (7) of the *Trade Practices Act 1974*, lodged by Abbott;
2. a submission in support of the Notification which attaches a "Vaporiser Master Loan Agreement"; and
3. a cheque for \$100 on behalf of Abbott.

Thank you for your consideration of this matter.

Please do not hesitate to contact us if you have any further queries.

Yours sincerely

A handwritten signature in black ink, appearing to read "Linda Evans".

**Linda Evans, Partner**  
+61 2 9353 4217  
levans@claytonutz.com

**Nevenka Codevelle, Senior Associate**  
+61 2 9353 4749  
[ncodevelle@claytonutz.com](mailto:ncodevelle@claytonutz.com)

Attachments

**Form G**

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

N31426

**EXCLUSIVE DEALING  
 NOTIFICATION**

To the Australian Competition and 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(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 engages or proposes to engage.

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(PLEASE READ DIRECTIONS AND NOTICE ON BACK OF FORM)

1. (a) Name of person giving notice:

Abbott Australasia Pty. Ltd (ABN 95 000 180 389)

(See Direction 2 on the back of this Form)

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

Abbott Australasia Pty. Ltd is a wholly owned subsidiary of Abbott Laboratories. Abbott Laboratories is a US diversified health care company that discovers, develops, manufactures and markets products and services in the health care sector, including pharmaceuticals, nutritional products and diagnostic products.

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

Linda Evans, Partner, Clayton Utz, 1 O'Connell Street, Sydney, 2000.

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

The loan of inhalational anaesthetic vaporisers.

- (b) Description of the conduct or proposed conduct:

See Attachment A.

(See Direction 4 on the back of this Form)

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

Hospitals and day surgeries.

(b) Number of those persons:

(i) At present time:

More than 50

(ii) Estimated within the next year:

More than 50

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

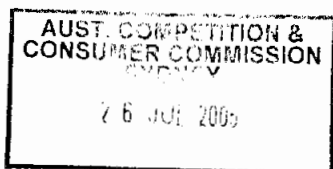
Not applicable

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

Linda Evans, Partner, Clayton Utz, 1 O'Connell Street, Sydney, 2000.

Dated:

26/7/05



Signed by/on behalf of the person giving this notice

(Signature)

Linda Evans

(Full Name)

Applicant's Solicitor

(Description)

## DIRECTIONS

1. If there is insufficient space on this form for the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the person giving the notice.
2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. In item 1(b), describe that part of the business of the person giving the notice in the course of which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9) of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. In item 3(a), describe the nature of the business carried on by the persons referred to in that item.
6. In item 3(b)(ii), state an estimate of the highest number of persons with whom the person giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.

## NOTICE

If this notification is in respect of conduct of a kind referred to in subsection 47(6) or (7), or paragraph 47(8)(c) or (9)(d), of the *Trade Practices Act 1974* (the "**Act**"), it comes into force at the end of the period described for the purposes of subsection 93(7A) of the Act (the "**prescribed period**") unless the Commission gives a notice under subsection 93A(2) of the Act within the prescribed period, or this notification is withdrawn.

The prescribed period is 21 days (if this notification is given on or before 30 June 1996) or 14 days (if this notification is given after 30 June 1996), starting on the day when this notification is given.

If the Commission gives a notice under subsection 93A(2) of the Act within the prescribed period, this notification will not come into force unless the Commission, after completing the procedures in section 93A of the Act, decides not to give a notice under subsection 93(3A) of the Act. The notification comes into force when that decision is made.

If this notification is in respect of conduct of a kind referred to in subsection 47(2), (3), (4) or (5), or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c), of the Act, it comes into force when it is given.

## Attachment A

### Exclusive Dealing Notification

#### Background

1. Abbott Australasia Pty. Ltd ("**Abbott**") is a wholly owned subsidiary of Abbott Laboratories. Abbott Laboratories is a US company involved in the development, manufacture and marketing of products in the healthcare industry.
2. Abbott is currently a leading supplier of inhalational anaesthetics to hospitals and day surgeries in Australia. Inhalational anaesthetics (otherwise known as volatile anaesthetics) are anaesthetic agents used during surgical procedures and operations. The agents are administered to patients in a gaseous form. A vaporiser is required to convert the volatile anaesthetic agents to the form required for inhalation by patients.
3. Volatile anaesthetic agents currently supplied by Abbott are SEVOrane (Sevoflurane) and Forthane (Isoflurane). There are a number of other inhalational anaesthetic agents available to hospitals including Desflurane and Aerane (both supplied by Baxter Healthcare), Halothane (provided by Astra Zeneca) and other generic isoflurane products.
4. Abbott currently lends vaporisers to hospitals for use with SEVOrane and Forthane at no charge for the vaporiser. Similarly, Baxter Healthcare lends vaporisers free of charge to hospitals for use with its Desflurane and Aerane products. Vaporisers are specifically calibrated by the manufacturers for use with particular volatile anaesthetic agent products. For example, a vaporiser intended for use with SEVOrane would be calibrated for such use by the manufacturer. Typically, hospitals will have a number of vaporisers for use with different inhalational anaesthetic agents. The vaporiser loan arrangements do not restrict the ability of hospitals to acquire vaporisers and inhalational anaesthetic agents from competing suppliers.

#### Potential third line forcing conduct

5. Abbott proposes to lend vaporisers free of charge to hospitals pursuant to a contract of bailment known as a Vaporiser Loan Agreement. The most recent copy of the Vaporiser Master Loan Agreement is attached. Clause 3 of the Agreement requires that the customer only use a recommended service agent for the regular maintenance of Abbott supplied vaporisers. The condition specifies that the vaporiser must not be serviced or sent to a non-approved service centre. Approved service providers are those approved by the relevant vaporiser manufacturer ("**Service Condition**"). This condition may give rise to concerns under section 47(6) of the *Trade Practices Act 1974* ("**TPA**").

#### Public benefit

6. Vaporisers are an essential piece of equipment in the use of inhalational anaesthetic agents. The sole purpose of the Service Condition is to ensure the optimal functioning of the vaporisers lent by Abbott to hospitals and to minimise patient safety risks.
7. A vaporiser is a highly specialised piece of medical equipment. It requires regular servicing in accordance with specific and specialised manufacturer requirements in order to minimise performance failure risks. If the equipment is serviced other than by a service agent who is qualified to do so, substantial public health risk could arise. Abbott seeks, by the imposition of the Service Condition, to minimise this risk. This desire is also reflected in the vaporiser supply agreement between Abbott and the vaporiser manufacturers. Under the terms of the supply agreement, the performance warranties proffered by the manufacturer are only on condition that the vaporisers are serviced in accordance with the manufacturer's instructions and by approved service agents.

8. The Service Condition mirrors this obligation. The consequences of suboptimal use of the vaporiser could be severe both commercially and more importantly, in terms of patient safety. The Service Condition is intended to minimise this risk.

#### **No Competitive Detriment**

9. The Service Condition will not give rise to any competitive detriment. The Service Condition does not require hospitals to use a specific service repair technician. Rather, the requirement is that customers use any service technician that has been approved by the manufacturer. There is no leveraging from any market as hospitals are free to use any inhalational anaesthetic and any vaporiser they choose.
10. Likewise, service technicians are approved by vaporiser manufacturers following completion of appropriate training and recognition of technical competency. There are no competitive impediments to a medical equipment service technician obtaining approval. There are currently five service technicians operating throughout Australia approved to service vaporisers calibrated for use with Abbott products. As such, hospitals have a significant number of service technicians from which to choose. Similarly, technicians wishing to contract for such work would be able to gain approval status without significant impediments.

#### **Conclusion**

11. For the reasons set out above, there is substantial public benefit arising from the Service Condition and no competitive detriment. Accordingly, Abbott considers there to be no grounds under section 93(3A) for the ACCC to issue a notice in response to Abbott's notification under section 93(1) of the TPA.

**Abbott Australasia Pty Ltd  
Vaporiser Master Loan Agreement for Placement**

This Vaporiser Master Loan Agreement is entered into by and between Abbott Australasia Pty Ltd, incorporated in New South Wales, 32-24 Lord Street, Botany, NSW, 2019 and:

Customer: ..... Account No: .....

Address: ..... Phone No: .....

City: ..... State: ..... Postcode: .....

Abbott Australasia Pty Ltd ("Abbott") has provided/is providing/will from time to time provide Loan Vaporiser(s) to the customer on condition that the customer uses only Abbott anaesthetic agents Forthane® and/or SEVOrane® (in Forthane® Vaporisers and SEVOrane® Vaporisers respectively) upon the terms and conditions detailed overleaf and in consideration of the promises contained in those terms and conditions.

This agreement pertains to Forthane® and SEVOrane® vaporiser(s) requested by the customer and supplied on loan by Abbott from time to time.

Accepted By: ..... Title: ..... Signature: .....

Witnessed By: ..... Title: ..... Signature: .....

Representative: ..... Signature: ..... Date: .....

**Blue:** Customer - **Yellow:** Business Manager - **Pink:** Service Centre - **White:** Representative

## TERMS AND CONDITIONS

1. **Use of Abbott Agents and Vaporisers:** The customer agrees to use only Abbott volatile anaesthetic agents for the agent vaporisers placed in accordance with this agreement, being Abbott Forthane® for Forthane® vaporisers and Abbott SEVOrane® for SEVOrane® Vaporisers. The customer agrees to use the vaporiser(s) only in accordance with the manufacturer(s) recommendations and Abbott's directions. Use of the vaporiser(s) other than in accordance with the foregoing is entirely at the customer's risk and constitutes a breach of this agreement.
2. **Placement of Vaporiser(s):** The customer shall use the vaporiser(s) only at the customer's address and shall not transfer or alter the vaporiser(s) without prior written consent from Abbott.
3. **Service and Maintenance:** The customer shall bear the responsibility of maintaining the vaporiser(s) in accordance with the manufacturer(s) recommendations. Regular maintenance as stated in the vaporiser user manual must be carried out and all costs incurred will be at the customer's expense. Abbott reserves the right to recommend the manufacturer(s) approved Service Agent and the customer agrees to use one of the recommended Service Agents. The vaporiser(s) must not be serviced by or sent to a non-approved service centre. The nominated Service Agent, in conjunction with the customer, must ensure that the same serialised vaporiser(s) is returned to their address at completion of service.
4. **Title:** Ownership of the vaporiser(s) remains entirely with Abbott at all times.
5. **Risk of Loss or Damage:** Abbott is responsible for each vaporiser during transit of the vaporiser from Abbott to customer. On delivery to the customer and whilst the vaporiser is in the possession of the customer, the customer is responsible for vaporiser.
6. **Labels:** The customer shall not remove any labels, symbols or serial numbers that are or may be affixed to the vaporiser(s).
7. **Warranty:**
  - (a) Abbott warrants and represents that within the initial 12 months from the date of placement the vaporiser(s) provided will perform in accordance with manufacturer(s) specifications and intended use. To the extent permitted by law and subject to clause 7(b) of this Agreement, all other express and implied warranties, guarantees and conditions under statute or general law as to merchantability, description, quality, suitability or fitness of the vaporiser(s) for any purpose or as to design, assembly, installation, materials or workmanship or otherwise are expressly excluded. Without limiting the foregoing, Abbott specifically excludes any warranty in respect of the use of the vaporiser(s) with non-Abbott agents and the customer indemnifies Abbott in respect of any such use. Use of the vaporiser(s) provided (including with non-Abbott agents) is entirely at the risk of the customer and Abbott is not liable for physical or financial injury, loss or damage or for consequential loss or damage of any kind arising out of the supply, layout, assembly, installation or operation of the vaporiser(s) or arising out of Abbott's negligence or in any other way, whatsoever.
  - (b) Abbott's liability for breach of a condition or warranty implied by the Trade Practices Act 1974 (other than section 69) is limited to (at Abbott's option):
    - (i) The replacement of the vaporiser(s) or the supply of equivalent vaporisers;
    - (ii) The repair of the vaporiser(s);
    - (iii) The payment of the cost of replacing the vaporiser(s) or of acquiring equivalent vaporiser(s);
    - (iv) The payment of the cost of having the vaporiser(s) repaired.

The customer acknowledges that it does not rely on the skill or judgement of Abbott in determining the fitness of the vaporiser(s) for the purpose for which they will be used.
8. **Return of Equipment:** Upon termination of this agreement for any reason, the customer shall permit Abbott to enter the customer's facility and remove the vaporiser(s) or their service replacements. The customer accepts all responsibility for servicing and recalibration expenses incurred by Abbott following the vaporiser(s) removal.
9. **Agreement Term:** This agreement commences and takes effect on the date it is accepted by Abbott following signature by the customer and continues for an initial term of 12 months, and will automatically thereafter renew for successive periods of 12 months unless either party gives written notice to the other that it does not wish to renew the agreement.
10. **These Terms and Prior Arrangements:** This form supersedes all previous agreements with respect to its subject matter. Abbott may amend these terms and conditions at any time by notice to the customer in writing.
11. **Termination:** The customer may terminate this agreement (and/or any loan in respect of any particular vaporiser loaned in accordance with this agreement) at any time. Abbott may terminate this agreement (and/or any loan in respect of any particular vaporiser loaned in accordance with this agreement) if the customer is in breach of this agreement on 14 days' prior written notice from Abbott.