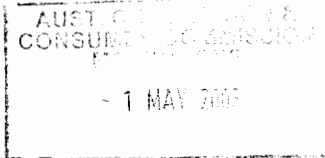


N40979



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**BLAKE DAWSON WALDRON**  
L A W Y E R S

Mr Scott Gregson  
Acting General Manager, Adjudications  
Australian Competition & Consumer Commission  
470 Northbourne Avenue  
DICKSON ACT 2602

Our reference  
AAG JJO 03 1394 4667

1 May 2006

Dear Mr Gregson

**Bell Potter Capital Limited – Notice under section 93 of the *Trade Practices Act* (TPA)**

We act for Bell Potter Capital Limited.

We enclose our client's notice and supporting submission for notification of exclusive dealing for third line forcing under s 93(1) of the *Trade Practices Act 1974* (Cth) (TPA), for proposed conduct that may amount to a third line force.

If the Commission wishes to sight any of the documents referred to in our client's submission, or has any queries about the notice or the proposed conduct, please do not hesitate to contact Ayman Guirguis on (03) 9679 3778.

Yours sincerely

**Ayman Guirguis**  
Partner  
Tel: (03) 9679 3778  
ayman.guirguis@bdw.com

FILE No:
DOC:
MARS/PRISM:

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PERTH  
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LONDON  
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JAKARTA  
SHANGHAI

## **Submission to the Australian Competition and Consumer Commission in Support of a Notification under Section 93(1) of the *Trade Practices Act 1974***

### **1. Introduction**

This submission is in support of a notification under section 93(1) of the *Trade Practices Act 1974* (the **TPA**) in relation to conduct which potentially falls within sub-sections 47(6) or (7) of the TPA. Accordingly, the relevant test to be applied by the Commission is set out in sub-section 93(3A) of the TPA, whereby the Commission assesses whether the public benefits associated with the relevant conduct outweigh any likely public detriment.

Bell Potter Capital Pty Limited ACN 085 797 735 (**BPC**) proposes to offer the Bell Potter Margin Loan (**Margin Loan**) from 15 May 2006. The Margin Loan will allow borrowers to invest in a range of Australian Stock Exchange (**ASX**) listed shares, listed and unlisted unit trusts (**securities**) and other property. The borrower and any third party security provider will then mortgage these securities and other property to BPC as security for the loan.

#### **1.1 Listed securities**

ASX listed shares and units are "uncertificated" securities (not evidenced by a share or unit certificate). The issue, transfer and recording of uncertificated shares is facilitated by the Clearing House Electronic Sub-register System (**CHESS**) operated by ASX Settlement and Transfer Corporation Pty Ltd.

The ASX Settlement and Transfer Corporation Operating Rules (**ASTC Operating Rules**) do not provide a means for a secured lender, such as BPC, to register or note its interest in mortgaged securities on CHESS. Hence, lenders need to establish a method of protecting their interests in mortgaged securities on CHESS for margin lending to be commercially practical.

#### **1.2 Other securities**

BPC will also permit borrowers to mortgage unlisted securities to BPC as security for the Margin Loan. Typically, these securities will be interests in unlisted managed funds. To protect its interest in these securities, BPC will require borrowers and any third party security providers to transfer legal ownership in the securities to a nominee.

### 1.3 **Nominee Agreement and Sponsorship Agreement**

In order to protect its interest in mortgaged securities, BPC will be requiring borrowers to enter into a Nominee Agreement and a Sponsorship Agreement.

Under the Nominee Agreement, the borrower and each other security provider agrees that securities may be held on its behalf by a specified person known as a "nominee" (in practice, the nominee will generally hold any securities that cannot be registered on the CHESS system)

Under the Sponsorship Agreement, the borrower and each other security provider agrees to enter into a "sponsorship" arrangement with a specified person who will become the controlling participant of any securities registered on the CHESS system.

The borrower and each other security provider can instruct the nominee and the sponsor to transfer securities only with the consent of BPC. Accordingly, BPC is able to protect its interest in the mortgaged securities through the Nominee Agreement and the Sponsorship Agreement.

BPC Custody Pty Limited (**BPC Custody**) acts as the nominee under the Nominee Agreement. BPC Securities Pty Ltd (**BPC Securities**) acts as the controlling participant under the Sponsorship Agreement.

The Margin Loan Documents (including terms of the Nominee Agreement and the Sponsorship Agreement) are in the process of being finalised. In the event that the ACCC wishes to sight the relevant agreements, they will be available shortly.

## 2. **Third Line Force**

The proposed conduct potentially falls within s 47(6) of the TPA as BPC will provide finance to a borrower under the Margin Loan on the condition that the borrower and each security provider uses BPC Custody as its nominee and BPC Securities as its sponsor.

Further, the proposed conduct may fall within s 47(7) of the TPA as BPC may refuse to provide finance to a borrower under the Margin Loan if the borrower and each security provider does not use BPC Custody as its nominee and BPC Securities as its sponsor.

However, the proposed conduct is inherently pro-competitive and the public benefits resulting from the proposed conduct will outweigh any possible public detriment.

### 3. **Public Benefit and Lack of Public Detriment**

The proposed conduct is not anti-competitive. In the parties' view, the conduct will have an insignificant effect on competition in the provision of financial services or the provision of financial services to investors seeking to acquire securities.

The proposed conduct will actually increase the range of providers of such finance thereby providing consumers with greater choice of financial service providers with whom to contract.

It is not commercially practical for BPC (or other lenders) to provide these types of products without being able to secure their loan by way of a mortgage over the securities that are the subject of the loan. Accordingly, such arrangements as the Nominee Agreement and the Sponsorship Agreement are necessary in order for BPC (and other lenders) to provide products such as the Margin Loan.

In BPC proposing that borrowers and security providers must enter the Nominee Agreement with BPC Custody and the Sponsorship Agreement with BPC Securities, BPC will create efficiencies and reduce administrative costs. By reducing its risk and costs, BPC will be in a position to offer finance to customers seeking such products at a lower cost than would otherwise be the case.

The proposed conduct also provides an opportunity for investors to increase their investment in securities.

The type of product offered by the Margin Loan (financing the acquisition of securities and using the securities acquired as security for the loan) is very common and a number of competitors of BPC provide products that are very similar to the Margin Loan, including but not limited to:

- Australia and New Zealand Banking Group Limited
- HSBC Bank Australia Limited
- Leveraged Equities Limited
- Macquarie Bank Limited
- National Australia Bank Limited

- St George Bank Ltd

We note that in the past the Commission has accepted a number of notifications relating to products that are very similar to the Margin Loan, including:

- N90841 – Bendigo Bank Limited;
- N40619 – UBS Australia Ltd;
- N91318 and N91319 – Leveraged Equities Limited; and
- N31275 – Westpac Banking Corporation.

In addition, there are a wide range of other leveraged finance products available to consumers.

COMMONWEALTH OF AUSTRALIA  
*Trade Practices Act 1974* – Sub-section 93 (1)  
 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 subsection 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.

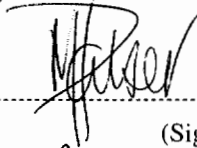
- 
1. (a) Name of person giving notice **Bell Potter Capital Pty Limited ACN 085 797 735**
- (b) Short description of business carried on by that person **Financial Services**
- (c) Address in Australia for service of documents on that person **Level 28, 101 Collins Street, Melbourne 3000**
2. (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates  
**Bell Potter Margin Lending – finance provided to borrowers to acquire securities (typically shares and units in trusts) and other property with the securities and the property being used as security for the amount being financed.**
- (b) Description of the conduct or proposed conduct **Bell Potter Capital will offer Bell Potter Margin Lending to customers on the condition that customers use the nominee services of BPC Custody Pty Limited ACN 006 600 746 and sponsorship services of BPC Securities Pty Limited ACN 072 910 966 .**
3. (a) Class or classes of persons to which the conduct relates  
**Bell Potter Margin Lending customers;**  
**Bell Potter Capital Pty Limited;**  
**BPC Custody Pty Limited; and**  
**BPC Securities Pty Limited.**
- (b) Number of those persons-
- (i) At present time **nil**
- (ii) Estimated within the next year **500 – 1000**

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

4. Name and address of person authorized by the person giving this notice to provide additional information in relation to this notice. **Ayman Guirguis, Blake Dawson Waldron, Level 39, 101 Collins Street, Melbourne, 3000**

Dated 1 May 2006

Signed by/on behalf of the person giving this notice



(Signature)



AYMAN GUIRGUIS

(Full Name)

Blake Dawson Waldron as solicitors for  
Bell Potter Capital Limited  
(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 prescribed 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.