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N50186

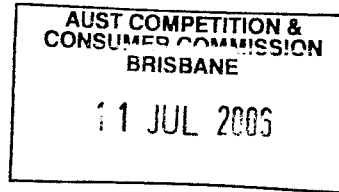
Our reference
ECS/NAVM12023-9030994/4

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**CORRS
CHAMBERS
WESTGARTH**
lawyers

11 July 2006

By delivery



Sydney
Melbourne
Brisbane
Perth
Canberra
Gold Coast

Mr Scott Gregson
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
Level 3
AAMI Building
500 Queen Street
BRISBANE QLD 4000

Partner
Eddie Scuderi (07) 3228 9319
Email: eddie.scuderi@corrs.com.au

Dear Sir

Southern Group (SG) Pty Ltd exclusive dealing notifications

We act for Southern Group (SG) Pty Ltd (SG).

SG wishes to notify the ACCC pursuant to section 93(1) of the *Trade Practices Act 1974* (Cth) (**TP Act**) that it proposes to engage in conduct that may constitute exclusive dealing within the meaning of section 47(6) of the TP Act. SG submits that the likely benefit to the public from the proposed exclusive dealing outweighs the likely detriment to the public from the proposed exclusive dealing.

We **attach** two completed Form G notification forms and a cheque for \$200, the requisite application fee.

Proposed exclusive dealing

SG has agreed to acquire the business and assets (including trade marks) of Wendy's Supa Sundaes Pty. Limited (**Wendy's**). Wendy's franchises other persons to conduct businesses using the image and technique for the marketing, preparation, and sale of specialised ice cream, soft serve, toppings, flavourings, hot dogs, home packs, drinks, ice cream cakes and other related products through specialised ice cream parlours that operate under the name "Wendy's". There are currently approximately 250 Wendy's-franchised businesses throughout Australia.

On acquiring Wendy's assets, SG proposes to engage in two related types of conduct that may contravene section 47(6) of the TP Act:

- 1 supplying services to franchisees (namely, the grant of the franchise) on condition that they acquire goods (namely, goods used from time to time in the operation of the franchised business) from distributors identified by SG; and
- 2 supplying services to distributors (namely, the benefit of the franchisees' custom) on condition that they acquire goods (namely, goods used from time to time in the

operation of the franchisees' franchised businesses) from manufacturers or wholesalers identified by SG.

In essence, SG proposes to require its franchisees use, say, only Masterfoods tomato sauce in conducting the franchised business. This may contravene constitute exclusive dealing within the meaning of section 47(6) of the TP Act because those goods must be acquired, at least indirectly, from the manufacturer of Masterfoods tomato sauce.

We **attach** an indicative list of the products that SG proposes to direct franchisees to acquire from distributors identified by SG, and distributors to acquire from manufacturers or wholesalers identified by SG.

Public benefit to proposed exclusive dealing

SG contends that the likely benefit to the public from the proposed conduct outweighs the likely detriment to the public from the proposed conduct for the following reasons.

- 1 *No competitive detriment.* There is likely to be no competitive detriment from the proposed conduct. The proposed conduct only applies to current Wendy's franchisees (who will become SG's franchisees). The products that SG's franchisees acquire from suppliers directed by SG are either "Wendy's"-branded (the only possible purchasers of which would be SG's franchisees in any event), or common products purchased by other businesses (in relation to which SG is aware of no evidence suggesting any lessening of competition because of this proposed conduct).
- 2 *Lower prices for ice cream-buying public.* The proposed conduct will allow SG to, in effect, negotiate for the acquisition of goods on behalf of all franchisees. This will likely allow franchisees to enjoy volume-based discounts that they would have been unable to obtain had they individually negotiated with the suppliers. This is likely to translate to lower prices for franchisees' customers—the ice cream-buying public.
- 3 *Consistency of image.* By directing the products that franchisees are to use in their businesses, SG can ensure that franchisees' customers—the ice cream-buying public—have a consistent experience no matter which SG's franchisee's business across Australia they patronise. Additionally, the manner in which SG proposes to implement this restriction, involves minimal administrative burden for both SG and the franchisees (eg, there is a reduced need for monitoring of franchisees by SG).
- 4 *Uniformity of quality.* Related to reason 3 above, the proposed exclusive dealing allows SG to be satisfied that franchisees are using products in their businesses that are of an appropriate quality to protect SG's goodwill in the "Wendy's" trade marks.
- 5 *Identification of ingredients.* As franchisees sell food to the general public, it is important that SG is aware of, and control, the ingredients of that food. In addition to the quality and consistency reasons identified above, this is relevant because:

- (a) if food labelling is required (eg, labelling similar to that contemplated by the *Truth in Food Labelling Bill 2003* (Cth)), then SG can facilitate that on behalf of franchisees; and
- (b) if a manufacturer issues a product recall for an ingredient, then SG can coordinate that recall (or identify that no recall is necessary) in relation to franchisees.

6 *Distributors can choose their preferred wholesalers.* The agreements that SG proposes to enter into with distributors (for the second type of conduct identified above) allow the distributor to change wholesalers of the particular items. The agreements require the distributor to provide SG with 14 days notice of an intent to change wholesaler and require SG to provide its approval to the change, with such approval not to be unreasonably withheld.

ACCC's treatment of similar applications by franchisors

SG notes that many other franchisors have lodged similar notifications with the ACCC. The ACCC has generally acknowledged the public benefits outlined above (or similar benefits) and not revoked the immunity provided by the notification, eg:

- the notifications lodged by Hallas Franchising Company Pty Ltd in March 2006 (N92457 and N92458);
- the notification lodged by Snap Franchising Ltd in December 2005 (N70437);
- the notification lodged by AKJ Fencing (Franchises) Pty Ltd in September 2005 (N31466);
- the notification lodged by Bob Jane Corporation Pty Ltd in August 2005 (N40915);
- the notification lodged by The Cheesecake Shop Pty Ltd in March 2005 (N31363);
- the notification lodged by B.T.T Franchising Pty Ltd in October 2004 (N91551);
- the notifications lodged by Burger King Corporation in September 2002 (N31190) and October 2003 (N31259);
- the notification lodged by A.F.F. Franchising Pty Ltd in July 2003 (N70367);
- the notification lodged by Amalgamated Food & Poultry Pty Ltd in June 2003 (N70366);
- the notification lodged by CNW Franchising Pty Ltd in April 2003 (N31223);
- the notification lodged by Independent Franchise Systems Pty Ltd in March 2001 (N50121).

SG submits that the conduct in which it proposes to engage is substantively indistinguishable from the conduct that the ACCC has previously considered in the context of these notifications.

11 July 2006

Australian Competition and Consumer Commission
**Southern Group (SG) Pty Ltd exclusive dealing
notifications**

**CORRS
CHAMBERS
WESTGARTH**
lawyers

Further information

If the ACCC requires any further information about SG's proposed conduct, please contact Eddie Scuderi on (07) 3228 9319.

Yours faithfully
Corrs Chambers Westgarth

f.p. 
Eddie Scuderi
Partner

attachments

Form G

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 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.

(PLEASE READ DIRECTIONS AND NOTICE ON BACK OF FORM)

1 (a) Name of person giving notice:

Southern Group (SG) Pty Ltd ACN 119 719 247 (SG)

*(See Direction 2 on the back of this Form)***(b) Short description of business carried on by that person:**

Franchising businesses for the sale of specialised ice cream, soft serve, toppings, flavourings, hot dogs, home packs, drinks, ice cream cakes and other related products through specialised ice cream parlours that operate under the name "Wendy's"

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

Corrs Chambers Westgarth
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

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

Goods used in businesses operating under a franchise from SG

(b) Description of the conduct or proposed conduct:

SG proposes to enter into agreements with its franchisees that require the franchisees to acquire goods used from time to time in the course of the franchised business from suppliers identified by SG.

*(See Direction 4 on the back of this Form)***3 (a) Class or classes of persons to which the conduct relates:**

SG's franchisees

(b) Number of those persons:**(i) At present time:**

247

(ii) Estimated within the next year:

250

(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 applicant to provide additional information in relation to this notice:

Eddie Scuderi
Corrs Chambers Westgarth
Level 35
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

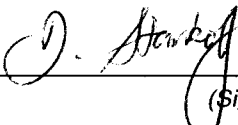
Phone: (07) 3228 9319

Fax: (07) 3228 9444

Email: eddie.scuderi@corrs.com.au

Signed on behalf of the person giving this notice:

Dated: 11 July 2006



(Signature)
David Starkoff

(Full Name)

Solicitor, Corrs Chambers Westgarth

(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* (**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 9(a), (b) or (c), of the Act, it comes into force when it is given.

Form G

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 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.

(PLEASE READ DIRECTIONS AND NOTICE ON BACK OF FORM)

1 (a) Name of person giving notice:

Southern Group (SG) Pty Ltd ACN 119 719 247 (SG)

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Franchising businesses for the sale of specialised ice cream, soft serve, toppings, flavourings, hot dogs, home packs, drinks, ice cream cakes and other related products through specialised ice cream parlours that operate under the name "Wendy's"

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

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Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

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

Goods used in businesses operating under a franchise from SG

(b) Description of the conduct or proposed conduct:

SG proposes to enter into agreements with distributors that require the distributors to acquire goods used from time to time in the course of SG's franchisees' franchised produced or manufactured by persons identified by SG.

*(See Direction 4 on the back of this Form)***3 (a) Class or classes of persons to which the conduct relates:**

Distributors with whom SG proposes to enter into agreements to supply goods to SG's franchisees

(b) Number of those persons:**(i) At present time:**

5

(ii) Estimated within the next year:

5

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

Jamday Pty Ltd
Unit 23/10 Benson Street
TOOWONG QLD 4066

Venasti Pty Ltd
51-53 Bourke Road
ALEXANDRIA NSW 2015

Foodland Association Limited
10 Clarke Street
O'CONNOR WA 6163

Bidvest Australia Limited
3-11 West Street
NORTH SYDNEY NSW 2060

PFD Foodservices Pty Ltd
26 Rushdale Street
KNOXFIELD VIC 3180


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

Eddie Scuderi
Corrs Chambers Westgarth
Level 35
Waterfront Place
1 Eagle Street
BRISBANE QLD 4000

Phone: (07) 3228 9319
Fax: (07) 3228 9444
Email: eddie.scuderi@corrs.com.au

Signed on behalf of the person giving this notice:

Dated: 11 July 2006



(Signature)
David Starkoff
(Full Name)
Solicitor, Corrs Chambers Westgarth
(Description)

DIRECTIONS

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- 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.
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NOTICE

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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 9(a), (b) or (c), of the Act, it comes into force when it is given.

1. Wendy's Supa Sundaes Pty Ltd - Pre-Approved Suppliers

Supplier	Product	Size
Chilly Chino Pty Ltd	Wendy's Ice Base Concentrate Blue	500ml
	Wendy's Ice Base Concentrate Neutral	4lt
Netherdale Foods Pty Ltd	Smoothy Mango Puree	1lt
Carter Holt Harvey	Wendy's Clown Print Bib	500
	Wendy's Drinking Straw	5000 per carton
	Wendy's Print Napkin 305x215	1000 per carton
Det Pak	Wendy's Hot Dog Bag	1000 per carton
	Wendy's Carry Bag Plastic	200 per carton
	Wendy's Waffle Wrap	2000 per carton
	Wendy's Sugar Cone Slv Wrap	2000 per carton
Doninant Chemicals	Wendy's Hand Cleaner	750ml
	Wendy's Clean Up Detergent	5lt
	Wendy's Clean Up Sanitiser	5lt
	Wendy's Floor Clean	2.5lt
	Wendy's Glass/Chrome Clean	4.5lt
	Wendy's Neutral Detergent	5lt
	Wendy's Sanitiser	8kg
Betta Foods	Wendy's Sanitiser Spray/Wipe	750ml
	Wendy's Wafer S/Cone Sundae	480g
	Wendy's Reg Vision Cones	400 per carton
	Wendy's Kindy Cone	300 per carton
	Wendy's Waffle Cone - Natural	240 per carton
Cadburys Food Services	Betta Double Cone	200 per carton
	Chocolate 1/2 Flake 15g	100 per carton
	Drinking Chocolate	500g
Rich's European Cream	Marshmallows	12 x 100g
	Cake Cream	4lt
Masterfoods Australia Pty Ltd	BBQ Sauce	4.7kg
	American Mustard	2.5kg
	Tomato Sauce	4lt

Supplier	Product	Size
Nestle Australia Limited	Dark Chocolate Dip	15k
Berri Limited	Fruit Juice	
George Weston Foods	Hot Dog Frankfurter reg	2.5kg
	97% Fat Free Frankfurter	1kg
Austicks Pty Ltd	Wendy's Sample Sticks	3000 per carton
Bev – Pack Packaging Pty Ltd	Wendy's Sundae Cup Clear w90	400 per carton
IP Foodservice	Wendy's Sundae Tub 125is	2000 per carton
	Wendy's Ice Cream Cake Box	25 per carton
	Wendy's Take Home Base & Lid	200 per carton
	Wendy's 375p Junior Lid	2000 per carton
	Wendy's 490p Small Lid	2000 per carton
	Wendy's 685p Large Lid	2000 per carton
	Wendy's 16oz Smoothee Cup	1000 per carton
	Wendy's 24oz Smoothee Cup	600 per carton
	Wendy's Dome Smoothee Lid	1000 per carton
	Wendy's 375p Junior Cup	366
	Wendy's 490p Small Cup	1000 per carton
	Wendy's 685p Large Cup	676
	Wendy's Ice Cream Cookie carton	200 per carton
Wendy's Creative Pty Ltd	Wendy's Verry Berry Sorbet	6lt
	Wendy's 99% Fat Free Yoghurt	6lt
	Wendy's Butterscotch Ice Cream	6lt
	Wendy's Cappuccino Fix Ice Cream	6lt
	Wendy's Cookies & Cream Ice Cream	6lt
	Wendy's Macadamia Mate Ice Cream	6lt
	Wendy's Passionfruit Passion Ice Cream	6lt
	Wendy's Rum 'n' Raisin Ice Cream	6lt
	Wendy's Strawberry & Cream Ice Cream	6lt
	Wendy's Toffee Pecan Ice Cream	6lt
	Wendy's Triple Berry Ice Cream	6lt
	Wendy's Rainbow Ice Cream	6lt
	Wendy's Boysenberry Ice Cream	6lt
	Wendy's Wicked Chocolate Ice Cream	6lt
	Wendy's Honeycomb Buzz Ice Cream	6lt

Supplier	Product	Size
	Wendy's Vanilla Dream Ice Cream	6lt
	Wendy's Tropical Sensation Ice Cream	6lt
	Wendy's Bahama Banana Ice Cream	6lt
	Wendy's Lemon/Melon Sorbet	6lt
	Wendy's Old English Toffee Ice Cream	6lt
	Wendy's Tropicana Sorbet	6lt
	Wendy's Mango Mango Ice Cream	6lt
	Wendy's Licorice Twist Ice Cream	6lt
	Wendy's Mint Madness Ice Cream	6lt
	Wendy's Whip Shake Ice Cream	6lt
	Wendy's Baileys Irish Ice Cream	6lt
	Wendy's Fat Free Apricot Yogurt D'Lite	6lt
	Wendy's Mixed Berry Puree	2lt
	Wendy's Strawberry/Smoothie Puree	2lt
	Wendy's Soft Serve Yoghurt	2lt
	Wendy's Soft Serve New Chocollo	2lt
	Wendy's Vanilla Cake Base	2 per carton
	Wendy's Rainbow Cake Base	2 per carton
	Wendy's Wicked Chocolate/Cake Base	2 per carton
	Wendy's Honeycomb Cake Base	2 per carton
	Wendy's Irish Cream Cake Base	2 per carton
	Wendy's Powdered Soft Serve	3kg
Trisco Foods Pty Ltd	Wendy's Vanilla Topping	3lt
	Wendy's Banana Topping	3lt
	Wendy's Coffee Topping	3lt
	Wendy's Crunchie Topping	3lt
	Wendy's Spearmint Topping	3lt
	Wendy's Caramel Topping	3lt
	Wendy's Strawberry Topping	3lt
	Wendy's Chocolate Topping	3lt
	Wendy's Lime Topping	3lt
	Wendy's Raspberry Icy Crush Syrup	3lt
	Wendy's Blue Lemonade Icy Crush Syrup	3lt
	Wendy's Cola Icy Crush Syrup	3lt

Supplier	Product	Size
	Wendy's Cocktail Icy Crush Syrup	3lt
	Wendy's Chocolate Fudge	1.25kg
	Wendy's Caramel Fudge	1.25kg
Silex Pty Ltd	Wendy's Waffle Mix	1kg
Adelaide Injection Moulders Pty Ltd	Wendy's Sundae Spoon	2000 per carton
Temptation Bakerys	Wendy's Chocolate Chip Cookie	twin pack
	Wendy's Dark Chocolate Chip Cookie	twin pack
Mexican Express Pty Ltd	Wendy's Cheese Sauce	1kg
Coca - Cola	Soft Drinks	Direct
National Foods Limited	Fresh Milk	Direct
Tip Top Bakeries	Hot Dog Rolls	Direct
Dollar Sweets Company Pty Ltd	100's & 1,000's non pariels	1.5kg
Culpepers (WA)	Crushed Nuts	5 x 1kg
Palma Products	Crushed Nuts	5 x 1kg