

Form G

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

**EXCLUSIVE DEALING
NOTIFICATION**

N92538

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.

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1. (a) Name of person giving notice

ResMed Asia Pacific Limited ACN 86 070 076 470

(See Direction 2 on the back of this form)

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

Distributor and seller of consumer and clinical products for the treatment and management of snoring, sleep apnea and other sleep disordered breathing health conditions and services related to such products.

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

97 Waterloo Road, North Ryde NSW 2113

Attention: Mark Abourizk (V.P. Intellectual Property & Legal Affairs Asia Pacific)

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

Products for the treatment of snoring and sleep apnea and other sleep disordered breathing health conditions (known as "CPAP Products") and the pre- and after-sales service and support in relation to the CPAP Products.

(b) Description of the conduct or proposed conduct

Sales of the CPAP Products are made through a network of partners accredited by ResMed. It is proposed that the accredited partners:

- will only be permitted to sell the CPAP Products direct to patients;
- will only be permitted to sell the CPAP Products from a physical site, except with ResMed's express consent; and
- will not be permitted to sell the CPAP Products by remote methods (eg by mail order, Internet, telephone or facsimile sales), except with ResMed's express consent

(See Direction 4 on the back of this Form)

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

Accredited partners who are authorised by ResMed to sell the CPAP Products and provide the associated services.

Current and future customers who buy CPAP Products

(b) Number of those persons –

(i) At present timeUnknown, but more than 50

(ii) Estimated within the next yearUnknown, but 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. Names and addresses of person authorised by the person giving this notice to provide additional information in relation to this notice

Scott Sloan, Partner, Dibbs Abbott Stillman, Lawyers, Level 8 Angel Place, 123 Pitt Street
Sydney NSW 2000

Dated...30 June....., 2006.....

Signed by/on behalf of the applicant giving notice

(Signature) 
JOHN ASTLEY BUXTON
Solicitor ACT/NSW/VIC/WA

(Full name)

(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 sub-section 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 sub-section 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 sub-section 93A(2) of the Act within the prescribed period, or this notification is withdrawn.

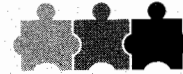
The prescribed period is 21 days (if this notification is given on or before 30 June 1996) or 14 days (if this notification is given after 30 June 1996), starting on the day when this notification is given.

If the Commission gives a notice under sub-section 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.

Level 6 Canberra House 40 Marcus Clarke Street Canberra ACT 2600
GPO Box 819 Canberra ACT 2601 DX 5614 Canberra
Tel 61 2 6201 7222 Fax 61 2 6257 4011
www.daslaw.com.au

30 June 2006



DIBBS ABBOTT STILLMAN | LAWYERS

Australian Competition and Consumer Commission
470 Northbourne Avenue
DICKSON ACT 2602

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Dear Sir/Madam

Exclusive Dealing: Notification pursuant to s93 of Trade Practices Act
Our Ref: SRS

~~**Confidentiality**~~

~~Please consider the contents of this letter as a confidential part of the notification application. We should be grateful if the information submitted in this letter is excluded from the Register by reason of its confidential nature.~~

Background

We act for ResMed Asia Pacific Limited ("ResMed").

We enclose a Form G Exclusive Dealing Notification and a cheque for the applicable lodgement fee.

ResMed distributes consumer and clinical products for the treatment of snoring, sleep apnea and other sleep disordered breathing health conditions (the "CPAP Products"). The CPAP Products are designed and manufactured in Australia by ResMed Limited. Both ResMed and ResMed Limited are members of the group of companies of which ResMed Inc is the ultimate holding company. ResMed CPAP products are world renowned in the field for the treatment and management of sleep disordered breathing, and the ResMed Group is at the cutting edge of the research and design of these types of products, including the provision of advice and support in relation to the sale and use of the CPAP Products.

ResMed Accredited Partner Program

CPAP Products are sold by ResMed, in Australia, through a network of accredited partners appointed by ResMed ("APs"). The APs interact directly with patients in conjunction with respiratory and other physicians and general practitioners. The APs provide a network that sells the CPAP Products and provides the necessary pre and after sales service and support for the CPAP Products.

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Sydney
T 61 2 8233 9500
F 61 2 8233 9555

Melbourne
T 61 3 8080 3500
F 61 3 8080 3599

Brisbane
T 61 7 3100 5000
F 61 7 3100 5001

Perth
T 61 8 9321 6533
F 61 8 9321 9123

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Consumers that buy the CPAP Products are generally patients that have received medical advice advising them to purchase one. The CPAP Products are designed to treat and manage sleep disordered breathing health conditions, including snoring and sleep apnea. The quality of service is essential. It relates to assistance with the decision as to which CPAP Product to use, as well as the fitting of the CPAP Products mask, the operation of the CPAP Products flow generator and the subsequent patient follow ups. The human variables mean that there is no such thing as a "standard" fitting, and each sale must take into account the peculiarities of each patient's circumstances. The APs are appointed on the basis that they are able to demonstrate a clear understanding and technical knowledge of the CPAP Products as well as being able to provide the necessary pre and after sales service and support that compliments the particular technical requirements of the CPAP Products, and enhances the high reputation of ResMed and the CPAP Products.

The CPAP Products are technical products that require specialist advice.

All APs must abide by certain criteria known as "Accreditation Criteria."

Accreditation Criteria

ResMed is proposing to introduce certain requirements into the Accreditation Criteria that might be construed as constituting exclusive dealing within the meaning of s47(2) of the *Trade Practices Act 1974* ("TPA"). ResMed is of the view that such conduct does not have the purpose, nor does it have or is it likely to have the effect, of substantially lessening competition, in the Australian market for products that treat and manage sleep disordered breathing health conditions. Consumers are able to purchase CPAP Products from APs throughout Australia and competitive CPAP devices from a further five manufacturers supplying through a network of distributors so that these products are readily available within the Australian market. This notification is, however, lodged as a matter of abundant caution.

It is proposed that APs will have the following restrictions imposed upon them:

- (a) they are only to sell directly to patients;
- (b) they are only permitted to sell the CPAP Products from a physical site (except with ResMed's express consent in extenuating circumstances, such as sales to patients who live more than 75kms from the nearest AP physical site); and
- (c) they are not permitted to sell the CPAP Products by remote means i.e. via mail order, the Internet, or by telephone or facsimile (except with ResMed's express consent in extenuating circumstances, as indicated above).

The purpose of these restrictions is to ensure that each patient receives proper advice in relation to the CPAP Products at the time of purchase and receives the necessary pre and after sales service and support. This is essential for patients and ResMed requires these restrictions to ensure that the high standards are met.

The sale of the CPAP Products by parties that do not have a physical site at which patients can obtain the necessary service and support may be both detrimental to patient health and the capacity of the APs to provide an effective support network.

Public Benefit

ResMed submits that the proposed requirements offer considerable public benefit.

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1. Patient Benefit

CPAP Products are medical devices that should be used in a properly supervised manner. CPAP Products interact with a patient's respiratory system. A patient requiring treatment using CPAP Products needs to have the CPAP Products fitted to their requirements. A patient should receive instruction as to the proper use and operation of the CPAP Products. A patient may require further follow-up consultations and on-going advice as to their use of the CPAP Products.

ResMed believes that this level of support can only be provided by an AP, as an AP is fully trained in, and educated about, the CPAP Products and the ailments they are intended to treat. It is necessary to ensure that APs sell directly to patients to ensure that the appropriate level of support is provided to the patients by persons and organisations appropriately qualified to do so. Further, an AP needs to provide patients with a physical site to visit, as the necessary level of support cannot be conducted by way of the Internet or telephone as a rule. The fitting and demonstration of the CPAP Products, as well as the solving of future problems, requires in-person contact with an AP.

ResMed is aware, nonetheless, that some rural-based patients may not have regular or convenient access to an AP's physical site. ResMed will work with the AP in those circumstances to permit a sale by remote means whilst ensuring the standards of support are maintained.

The provision of advice and direction on the correct use of the CPAP Products in order that their use may contribute to the management of the patient's condition should be achieved through adherence to the proposed requirements.

2. AP Support

Patients buying from persons offering CPAP Products for sale by remote means such as from mail order catalogues, over the telephone or via the Internet (Remote Sellers) are unable to obtain the necessary support and pre and after sales service from the Remote Sellers. The patients are effectively buying a different product from that sold by on-site APs, as the Remote Sellers do not provide the necessary service and support element of the sale.

Unable to receive the necessary support, patients are attending the premises of on-site APs to request this support at no cost. This results in either on-site APs providing this support having received no benefit, which is not economically viable for them, or in the consumer patient not receiving the necessary fitting and post sales services.

ResMed considers it essential for the patient's successful use of CPAP Products that the sale of the CPAP Products is conducted within the framework of a sustainable support network that can provide the necessary advice, support and service to patients.

The proposed requirements will ensure that APs continue to provide the required services, and that patient health does not suffer.

Public Detriment

ResMed submits that there is no discernible public detriment inherent in the proposed conduct. APs are free to set their own prices and discounts in relation to the sale of the CPAP Products and associated services. The proposed conduct will benefit consumers of CPAP Products as

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they will be assured of being able to buy and use the CPAP Products in a controlled, informed and thus safe manner.

Products for the treatment of sleep disordered breathing health conditions will remain readily available to those that require them throughout Australia.

Conclusion

We trust that this submission deals with all the relevant issues. Please do not hesitate to call me should you require further information.

We note that the proposed conduct will be immune from any action in respect of a breach of s47(2) TPA from the date the notification is lodged with the ACCC. We understand, of course, that the ACCC may, if it decides that the proposed conduct would not result in a benefit to the public, or that any public benefit would not outweigh the detriment to the public, give notice to that effect following a pre-decision conference and the provision of reasons for its decision.

Any queries in relation to this Exclusive Dealing Notification should be addressed to Scott Sloan, Partner of our Sydney office, Level 8 Angel Place, 123 Pitt Street, Sydney NSW 2000. Alternatively, Mr Sloan may be contacted by telephone: 02 8233 9500, or by email: scott.sloan@daslaw.com.au.

Yours faithfully
Dibbs Abbott Stillman



John Buxton
Partner
Email: john.buxton@daslaw.com.au
Direct Line: 61 2 6201 7260

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