



Australian  
Competition &  
Consumer  
Commission

# **Draft** Notice

in respect of notifications lodged by

**Seal-A-Fridge Pty Ltd and others**

**Date: 23 May 2007**

**Notification nos. N50197, N50198,  
N50199 and  
N92676**

**Public Register no. C2006/1982**

**Commissioners: Samuel  
Sylvan  
King  
Martin  
McNeill  
Willett**

## Summary

The ACCC has decided to issue draft notices proposing to revoke third line forcing notifications N50197, N50198, N50199 and N92676. The ACCC does not propose to take any further action at this time in respect of exclusive dealing notification N50196.

### **The notification process**

The Australian Competition and Consumer Commission (ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act).

Section 47 of the Act prohibits conduct known as exclusive dealing. Broadly, exclusive dealing involves one trader imposing restrictions on another person's freedom to choose with whom, in what or where they deal.

A common form of exclusive dealing is third line forcing. Third line forcing involves the supply of goods or services on condition that the purchaser also acquires goods or services from a third party. Another form of exclusive dealing is the supply of goods or services on condition that the buyer will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier.

Businesses may obtain immunity for conduct that might risk breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC.

The ACCC may revoke a third line forcing notification if it is satisfied that the likely benefit to the public from the proposed conduct will not outweigh the likely detriment to the public from the conduct. Revoking a notification removes the immunity conferred by the lodging of the notification.

The ACCC may revoke a notification for exclusive dealing other than third line forcing if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition and the likely benefit to the public will not outweigh the detriment to the public from the lessening competition.

### **The notifications**

The Seal-A-Fridge franchisors, Seal-A-Fridge Pty Ltd (SAF), Mr Nigel Rooney and Mr Nigel and Mrs Linda Rooney (in partnership), lodged five exclusive dealing notifications in October 2006 for conduct associated with Seal-A-Fridge franchise supply arrangements.

Seal-A-Fridge franchisees operate a mobile refrigeration seal replacement service. Under the notified conduct, the franchisors seek to require franchisees to acquire the two goods used in the manufacture of refrigeration seals, PVC extrusion and flexible magnet products, from SAF (notification N50196) or nominated approved suppliers (notifications N50197, N50198, N50199 and N92676).

## **ACCC assessment**

It is not uncommon for franchisors to require franchisees to acquire stock or equipment from nominated suppliers. By their very nature, franchise arrangements will impose restrictions on franchisees' freedom to choose with whom, in what or where they deal in acquiring supplies. While such restrictions may be a breach of the Act, they often give rise to a number of public benefits, for example, higher quality and greater consistency of end products and/or cost savings to franchisees as a result of increased buying power.

In this instance, however, the ACCC considers there is little, if any, public benefit from the notified conduct. The ACCC is particularly concerned that the restriction is to be introduced well after the franchise agreements were entered into and is not supported by a significant proportion of franchisees. It is not clear that the price of PVC extrusion and flexible magnet products (including transport costs) will be lower under the notified conduct than in the situation without the arrangements. Further, the ACCC is not satisfied there will be an increase in the quality of the end product to consumers or timeliness of supply or improved reputation of the Seal-A-Fridge brand as a result of the conduct.

Further, the ACCC considers there is likely to be a small detriment to the public from the conduct as it reduces competition between suppliers to supply PVC extrusion and flexible magnet products to Seal-A-Fridge franchisees. In the markets for the repair of refrigeration seals, the ACCC considers there is some detriment from the reduced ability of franchisees to choose suppliers based on value for money and to compete to provide services to certain customers. The ACCC notes there are other, less restrictive means of achieving the franchisors' stated goals.

Overall, the ACCC is satisfied that for each of the third line forcing notifications lodged the likely benefits to the public will not outweigh the likely detriment.

However, the ACCC does not have before it any evidence to suggest that a purpose of the conduct is to substantially lessen competition in any relevant market. Further, given that Seal-A-Fridge franchisees constitute a small proportion of the Australian market for PVC extrusion, flexible magnet and ready-made seals and the cost of the goods constitutes less than 10 per cent of the total price charged to end consumers, the ACCC is not satisfied that the notified conduct has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

## **Draft notices**

Accordingly, the ACCC proposes to issue notices under section 93(3A) of the Act to revoke the immunity afforded by third line forcing notifications N50197, N50198, N50199 and N92676. Such notices would remove the immunity provided by the notifications 31 days after the date they are issued.

As the ACCC is not satisfied that the notified conduct has the purpose, effect, or likely effect of substantially lessening competition in a relevant market, no further action will be taken in respect of notification N50196 at this time. Legal immunity conferred by the notification commenced on 6 October 2006.

## **The next steps**

The ACCC now seeks further submissions from interested parties in respect of the draft notices proposing to revoke the third line forcing notifications lodged by the Seal-A-Fridge franchisors. In addition, any of the franchisors, franchisees, suppliers or any other interested party may request that the ACCC hold a conference in relation to these draft notices, in accordance with section 93A of the Act.

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## List of abbreviations

ACCC	Australian Competition and Consumer Commission
Austwide	Austwide Plastics Pty Ltd
K-Weld	K-Weld Plastics and Engineering Pty Ltd
products market	The Australian market for the wholesale supply of PVC extrusion, flexible magnet products and ready-made seals
RBM	RBM Plastic Extrusions Pty Ltd
repair markets	The markets for the repair of refrigeration seals to households and businesses
SAF	Seal-A-Fridge Pty Ltd
the Act	<i>Trade Practices Act 1974</i>

# 1. Introduction

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2 Section 47 of the Act prohibits conduct known as exclusive dealing. Broadly, exclusive dealing involves a trader imposing restrictions on another person's freedom to choose with whom, in what or where they deal.
- 1.3 A common form of exclusive dealing is third line forcing. Third line forcing involves the supply of goods or services on condition that the purchaser also acquires goods or services from a third party. Subsections 47(6) and 47(7) prohibit third line forcing *per se*, meaning that a breach of the Act can be established regardless of the effect on competition.
- 1.4 Another form of exclusive dealing is the supply of goods or services on condition that the buyer will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier. This form of exclusive dealing conduct will only raise concerns under the Act if it has the purpose, effect or likely effect of substantially lessening competition in a market.
- 1.5 Businesses may obtain immunity for conduct that might risk breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC in accordance with subsection 93(1). Legal immunity conferred by a notification lodged for third line forcing conduct commences 14 days after the notification is validly lodged. Legal immunity conferred by a notification for exclusive dealing conduct other than third line forcing commences immediately once the notification is validly lodged.
- 1.6 The ACCC may revoke a third line forcing notification if it is satisfied that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct. Revoking a notification removes the immunity conferred by the lodging of the notification.
- 1.7 The ACCC may revoke a notification for exclusive dealing other than third line forcing if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition, and in all the circumstances:
  - the conduct has not resulted or is not likely to result in a benefit to the public; or
  - the benefit will not outweigh the detriment to the public by a lessening of competition resulting from the conduct.

- 1.8 Prior to issuing a notice to revoke a notification, the ACCC must issue a draft notice setting out its reasons and providing an opportunity for the notifying party and other interested parties to request a conference in relation to the draft notice.
- 1.9 The appendixes to this document include draft notices proposing to revoke notification N50197 lodged by Seal-A-Fridge Pty Ltd (SAF), notifications N50198 and N92676 lodged by Mr Nigel and Mrs Linda Rooney and notification N50199 lodged by Mr Nigel Rooney.
- 1.10 This document also includes assessment of notification N50196 lodged by SAF.
- 1.11 Table 1.1 provides a chronology of significant dates in the consideration of these notifications.

**Table 1.1 Chronology**

<b>DATE</b>	<b>ACTION</b>
6 October 2006	Lodgement of notifications N50196, N50197 and N50199.
25 October 2006	Lodgement of notifications N50198 and N92676 completed.
17 November 2006	Information requested from notifying parties.
13 December 2006	Notifying parties provide requested information.
21 December 2006	Submissions requested from interested parties.
17 January 2007	Closing date for submissions from interested parties. Submissions received by the ACCC until 30 January 2007.
5 February 2007	Further information requested from notifying parties.
15 March 2007	Notifying parties provide requested information and response to interested party submissions.
23 May 2007	Draft notices issued in respect of notifications N50197, N50198, N50199 and N92676.

## **2. The notifications**

- 2.1 The Seal-A-Fridge franchisors lodged five exclusive dealing notifications in October 2006 for conduct associated with Seal-A-Fridge franchise supply arrangements. Mr Rooney is listed as the person authorised to provide additional information in relation to each of the notifications.
- 2.2 Mr Rooney submits the notifying parties have developed and are proprietors of a system for mobile refrigeration seal replacement and manufacture which has been operating under the name of Seal-A-Fridge since 1994.<sup>1</sup> Mr Rooney submits that the product and service sold by franchisees is subject to trademark number 632127, owned by Mr Rooney and registered on 14 June 1994.
- 2.3 Mr Rooney sold the first Seal-A-Fridge franchise in 1997 to a franchisee in Darwin.<sup>2</sup> Mr and Mrs Rooney subsequently sold (in partnership) a second Seal-A-Fridge franchise. Mr and Mrs Rooney are directors of SAF, which has 30 franchises throughout Australia: 13 in New South Wales; 10 in Queensland; six in Victoria; and one in Western Australia.<sup>3</sup> SAF expects to have 35 franchisees across Australia within the next year.<sup>4</sup>
- 2.4 Notifications N50196 and N50197 were lodged by SAF, notification N50199 was lodged by Mr Rooney and notifications N50198 and N92676 were lodged by Mr and Mrs Rooney.
- 2.5 The notifications are in respect of conduct proposing to restrict with whom franchisees can deal in acquiring the two products used in the manufacture of refrigeration seals, PVC extrusion (or gasket) and flexible magnet products. Mr Rooney indicates that the notified conduct will not commence until the ACCC has completed its review of the notifications.<sup>5</sup>
- 2.6 The ACCC requested further information from Mr Rooney in respect of the notifications on 17 November 2006 and 5 February 2007. Responses were received in submissions dated 11 December 2006 and 14 March 2007.

### **Exclusive dealing notification N50196**

- 2.7 SAF lodged notification N50196 for exclusive dealing conduct other than third line forcing on 6 October 2006. SAF describes the conduct the subject of notification N50196 as:

requirement for Franchisees to purchase supplies from the Franchisor (Seal-A-Fridge Pty Ltd).

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<sup>1</sup> SAF, Submission in support of notification N50196, 6 October 2006, p. 1; SAF, Submission in support of notification N50197, 6 October 2006, p. 1; Nigel Rooney, Submission in support of notification N50199, 6 October 2006, p. 1; Nigel and Linda Rooney, Submission in support of notifications N50198 and N92676, 25 October 2006, p. 1.

<sup>2</sup> Nigel and Linda Rooney, Submission in support of N50198 and N92676, p. 1

<sup>3</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 2.

<sup>4</sup> SAF, Notification N50196, 6 October 2006.

<sup>5</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 7.

- 2.8 Notification N50196 relates to the 30 current franchisees of SAF and any future SAF franchisees.
- 2.9 Mr Rooney indicates that SAF does not manufacture PVC extrusion or flexible magnet products.<sup>6</sup> He submits that SAF acquires products directly or indirectly from Patrick Products, RBM Plastic Extrusions Pty Ltd (RBM), Austwide Plastics Pty Ltd (Austwide) and Electrolux.<sup>7</sup>
- 2.10 Mr Rooney indicates that SAF will purchase the relevant goods in bulk from ‘any business or company that will provide supplies at a consistent standard that meets our requirements and at an agreed price.’<sup>8</sup>
- 2.11 If notification N50196 is not revoked, Mr Rooney submits that SAF intends to cover 100 per cent of the products required by Seal-A-Fridge franchisees.<sup>9</sup>

### **Third line forcing notifications N50197-N50199 and N92676**

- 2.12 Each of the notifying parties describe the conduct the subject of their third line forcing notification as:
- requirement for Franchisees to purchase supplies from nominated approved suppliers.
- 2.13 Notification N50197 was lodged by SAF on 6 October 2006 for third line forcing conduct in respect of 30 SAF franchisees.
- 2.14 Notification N50199 was lodged by Mr Rooney on 6 October 2006 in respect of one Darwin Seal-A-Fridge franchise for which he is the franchisor.
- 2.15 Lodgement of notifications N50198 and N92676 was completed by Mr and Mrs Rooney on 25 October 2006 in respect of one franchisee that has entered into an agreement with them.
- 2.16 Mr Rooney submits that the notified conduct will not commence until after the ACCC has reviewed the notifications, and therefore there are currently no nominated approved suppliers.<sup>10</sup>
- 2.17 To become a nominated approved supplier, Mr Rooney indicates that suppliers would be required to provide products that meet or exceed the minimum quality control standards, charge an agreed price and agree to confidentiality provisions to protect the SAF system and intellectual property and trademark.<sup>11</sup> Mr Rooney submits that potential suppliers would be encouraged

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<sup>6</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 1.

<sup>7</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 1; and SAF, Further information regarding notifications, 14 March 2007, p. 2.

<sup>8</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 1.

<sup>9</sup> *ibid.*, pp. 8.

<sup>10</sup> *ibid.*, pp. 4, 7 and 8.

<sup>11</sup> *ibid.*, p. 5.

to approach SAF through meetings, site visits, letters and email and by telephone.<sup>12</sup>

- 2.18 If franchisees are unable to source products from a nominated approved supplier, Mr Rooney submits franchisees would be able to request written permission from SAF to purchase from an alternative supplier or suppliers.<sup>13</sup> Mr Rooney suggests this process will not take longer than seven days.<sup>14</sup>

## **ACCC's understanding of the proposed arrangements**

- 2.19 The ACCC understands that, wherever possible under the terms of individual franchise agreements, the franchisors will seek to require franchisees to purchase the relevant goods from SAF.
- 2.20 In the case of SAF, the protection from legal action for this conduct is afforded by notification N50196. However, Mr Rooney submits that each of the franchise agreements entered into by SAF vary slightly.<sup>15</sup> The result is that SAF will, contractually, not be able to require all of its franchisees to purchase only from it. If, under their particular franchise agreement, franchisees have the option of purchasing from other supplies, the ACCC understands SAF proposes to require franchisees to purchase goods from nominated approved suppliers. Legal immunity for this conduct by SAF would arise from notification N50197.
- 2.21 Each of the third line forcing notifications N50198, N50199 and N92676 are in respect of Mr Rooney's and Mr and Mrs Rooney's proposal to require their franchisees to acquire goods from nominated approved suppliers. These notifications appear to be intended to give the franchisors immunity from legal action to require franchisees to purchase from nominated approved suppliers, including SAF.
- 2.22 While the ACCC understands the franchisors' preferred approach is to require franchisees to purchase from SAF, each notification refers to specific conduct, and the ACCC will consider the notified conduct under each notification on its merits.

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<sup>12</sup> SAF, Further information regarding notifications, 14 March 2007, p. 8.

<sup>13</sup> SAF, Further information regarding notifications, 11 December, Annexure A, p. 8.

<sup>14</sup> SAF, Further information regarding notifications, 11 December, Annexure A, p. 8; and SAF, Response to individual interested party submissions, 14 March 2007, p. 19.

<sup>15</sup> SAF, Submission in support of notification N50196, 6 October 2006, p. 3.

### 3. Background

#### The Seal-A-Fridge franchise

- 3.1 Seal-A-Fridge franchises operate a mobile refrigeration and freezer seal replacement service. Customers telephone an advertised central number (13 14 79), which is diverted to a local Seal-A-Fridge franchise. Franchisees travel in custom built vans to their customers and repair refrigeration seals onsite. Seal-A-Fridge franchisees service both domestic and commercial customers.
- 3.2 Refrigerator door seals are made up of four pieces of PVC extrusion and flexible magnet.<sup>16</sup> Franchisees cut the extrusion into lengths, insert magnet strips into the top compartment and weld together the four corners with the assistance of a special die before fitting the seal to a customer's refrigerator. Where a franchise does not have suitable equipment for a particular profile, they can purchase ready-made seals.
- 3.3 Franchisee submissions indicate that the cost of PVC extrusion and flexible magnet used to replace the seal on an average refrigerator is around \$10.60-\$11.00.<sup>17</sup> The price charged to the end customer is upwards of \$120.00, therefore the cost of PVC extrusion and flexible magnet constitutes less than 10 per cent of the price charged to end customers.<sup>18</sup> The more significant costs incurred by franchisees include labour costs, advertising costs, franchise fees, petrol, vehicle maintenance and telephone costs.<sup>19</sup>
- 3.4 Mr Rooney submits Seal-A-Fridge franchisees compete for customers with a number of suppliers, including but not limited to:
- (a) Original manufacturers of the equipment eg; Electrolux, Kelvinator, Westinghouse, Fisher & Paykel, Ignis, Sharp, General Electric, Philips, Admiral
  - (b) Appliance spare parts suppliers
  - (c) Refrigeration Mechanics
  - (d) Appliance Repairers
  - (e) Electricians
  - (f) After market refrigeration door seal manufacturers.
  - (g) Home handypersons.
  - (h) Do-it-yourself Installations.

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<sup>16</sup> Austwide, Specifications, viewed 20 February 2007  
<<http://www.austplas.com.au/specifications.shtml>>.

<sup>17</sup> Seal-A-Fridge (Cairns), Submission regarding notifications, 2 January 2007, p. 2; and Seal-A-Fridge (Perth North), Submission regarding notifications, 17 January 2007, p. 1.

<sup>18</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 4; Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, p. 2; and Seal-A-Fridge (Perth North), Submission regarding notifications, 17 January 2007, p. 2.

<sup>19</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 4; and Seal-A-Fridge (South Eastern Melbourne), Submission regarding notifications, 22 January 2007, p. 1.

(i) Online refrigeration parts suppliers domestic and international.<sup>20</sup>

3.5 Mr Rooney initially submitted that SAF franchisees have a market share of about 25 per cent.<sup>21</sup> However, in his response to interested party submissions, Mr Rooney submits that Seal-A-Fridge franchisees ‘install less than 10% of the refrigeration seals replaced in Australia’.<sup>22</sup>

3.6 The relationship between Mr Rooney and a number of the franchisees appears to be strained. This seems to have occurred, in part, because until recently, franchisees have been allowed to operate their franchise businesses relatively independently.<sup>23</sup> The proposed arrangements will restrict how franchisees operate their businesses.

## The franchise agreements

3.7 Mr Rooney submits that each of the franchise agreements entered into by the franchisors have slight variations due to changes to the standard agreement over a 10 year period and negotiations at the time of executing individual agreements.<sup>24</sup>

3.8 Mr Rooney submits that 21 of the 30 SAF agreements have clause 1F in their agreements as either:

Purchases by the Franchisee of supplies to be used in the Franchise business from the Franchisor or its nominated suppliers or through nominated associates of the Franchisors acting as buying agents for and on behalf of the Franchisee will be on the following basis:

- (a) The prices of the supplies will be no greater than the quoted wholesale prices of the manufacturer’s of the supplies.
- (b) The Franchisee will bear all costs of cartage freight and insurance involved in the delivery of supplies; and
- (c) The purchases will be on the standard terms and conditions of sale of the Franchisor or relevant supplier from time to time.

3.9 Or:

To ensure quality control and to protect the Seal-A-Fridge trademark and image purchases by the Franchisee of supplies to be used in the Franchise Business for the manufacture of refrigeration door seals must be from the Franchisor or its nominated suppliers or through nominated associates of The Franchisor acting as buying agents and on behalf of the Franchisee will be on the following basis:

- (a) The prices of the supplies will be no greater than the quoted wholesale prices of the manufacturer’s of the supplies.

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<sup>20</sup> SAF, Submission in support of notification N50196, 6 October 2006, pp. 5-6; SAF, Submission in support of notification N50197, 6 October 2006, pp. 5-6; Nigel and Linda Rooney, Submission in support of notifications N50198 and N92676, 25 October 2006, p. 5; and Nigel Rooney, Submission in support of notification N50199, 6 October 2006, pp. 4-5.

<sup>21</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 13.

<sup>22</sup> SAF, Response to interested party submissions, 14 March 2007, pp. 14-15.

<sup>23</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 9; and Seal-A-Fridge (Darwin), Submission regarding notifications, 15 January 2007, p. 7.

<sup>24</sup> SAF, Submission in support of notification N50196, 6 October 2006, p. 3.

- (b) The franchisee will bear all costs of cartage freight and insurance included in the delivery of supplies; and
- (c) The purchases will be on the standard terms and conditions of sale of the Franchise or relevant supplier from time to time.<sup>25</sup>

3.10 Mr Rooney submits that the other nine SAF agreements have clause 1F in the following terms:

The Franchisee shall have the option of purchasing the material from the Franchisor or from other manufacturer's

3.11 Mr Rooney submits that 'at the core' of all franchise agreements is the following:

- 'Authorized Products or Services' means those products or services approved by the franchisor for sale by the franchisee as set forth from time to time in writing by the franchisor.
- 'Seal-A-Fridge System' means the marketing sale and maintenance of the Authorized Products and Services under the name 'Seal-A-Fridge' system.
- The franchisor grants to the franchisee a franchise and right to use the marks and the Seal-A-Fridge system in the operation by the franchisee of the business of marketing the Authorized Products and Services for the term within the territory (clause 1B).
- The franchisee agrees not to deviate from the specifications, standards and procedures set by the franchisor for the operation of the franchise business (clause 4C).
- There are certain obligations on the franchisor to provide support and technical assistance (clause 2B).
- The franchisor may terminate the franchise agreement for material breach of the agreement (clause 6B or 5B in some agreements).
- There are certain remedies for breach (clause 6C or 7B in some agreements).<sup>26</sup>

3.12 Mr Rooney highlights clause 4A as another important provision in most agreements.<sup>27</sup> He submits the clause is in the following terms:

4A Authorised Products

"The Franchisee shall offer to his customers all and only those products or service specified by the Franchisor from time to time. The Franchisee shall not offer for sale any non-approved products or services without the prior written consent of the Franchisor"

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<sup>25</sup> SAF, Further information regarding notifications, 14 March 2007, p. 10.

<sup>26</sup> SAF, Further information regarding notifications, 14 March 2007, p. 9.

<sup>27</sup> SAF, Submission in support of notification N50196, 6 October 2006, p. 3; and SAF, Submission in support of notification N50197, 6 October 2006, p. 3.

- 3.13 Mr Rooney notes however, that clause 4A has been deleted from three agreements: Seal-A-Fridge (South Coast), Seal-A-Fridge (Western Sydney) and Seal-A-Fridge (Brisbane North).
- 3.14 The ACCC notes that whether the proposed conduct is permitted under individual franchise agreements will depend on the clauses of those contracts, and any breach is primarily a private, contractual matter for franchisees.
- 3.15 Mr Rooney submits that SAF intends to comply with each of the franchise agreements it has entered into.<sup>28</sup>

## Supply of PVC extrusion and magnet

### The supply of PVC extrusion and magnet generally

- 3.16 Mr Rooney indicates in his response of 11 December 2006 that the major wholesale suppliers of PVC extrusion and flexible magnet products in Australia are: RBM; Austwide; Patrick Products; Rehau Pty Ltd; Actrol Parts; SAF; and Double Glazed Products. Mr Rooney submits that none of the existing suppliers make all of the PVC extrusion profiles required to replace all of the refrigeration door seals in Australia.<sup>29</sup>
- 3.17 Mr Rooney submits that in the last five years, the three main suppliers of PVC extrusion and magnet products were Austwide, RBM and K-Weld Plastics and Engineering Pty Ltd (K-Weld).<sup>30</sup>
- 3.18 Mr Rooney indicates that RBM purchased K-Weld's business in 2004-05, leaving Austwide and RBM as the main suppliers.<sup>31</sup>
- 3.19 RBM is a local manufacturer of extruded plastic profiles and tubes (both rigid and flexible or a combination of both), flexible PVC compounds and coloured masterbatches. The PVC extrusion and magnetic strip used in the manufacture of refrigerator door seals is just part of RBM's business. RBM is located in Silverwater, New South Wales.
- 3.20 Austwide manufactures PVC extrusion for refrigeration seals and ready-made seals and is located in Moorabbin, Victoria. Austwide has operated in Australia since 1988.<sup>32</sup> Austwide submits it supplies PVC gaskets to 'hundreds of after service agencies and fridge mechanics' as well as 'all major commercial and industrial refrigeration cabinet and fridge door manufacturers

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<sup>28</sup> SAF, Further information regarding notifications, 14 March 2007, p. 12.

<sup>29</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 4; and SAF, Further information regarding notifications, 14 March 2007, p. 2; SAF, Further information regarding notifications, 14 March 2007, p. 2.

<sup>30</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 6; SAF, Further information regarding notifications, 14 March 2007, p. 5.

<sup>31</sup> SAF, Further information regarding notifications, 11 December 2006, document 4.

<sup>32</sup> Austwide, Welcome, viewed 3 April 2007, <[www.austplas.com.au](http://www.austplas.com.au)>.

throughout all the states.’<sup>33</sup> Mr Rooney submits that Austwide imports flexible magnet from China.<sup>34</sup>

3.21 At the time RBM acquired K-Weld, Mr Rooney submits that:

... K-Weld had about 60% of the Australian market leaving Austwide with about 40%. This was a very healthy balance, and prices were comparatively the same due to the competition. Both K-Weld and Austwide were suppliers solely of extrusion and magnet.

3.22 On 1 May 2005, following RBM’s acquisition of K-Weld, Mr Rooney submits that RBM increased its prices by 15 percent.<sup>35</sup> He suggests this price increase, combined with certain problems RBM experienced with the transfer of dies and product supply from K-Weld, resulted in RBM having (as at August 2005) ‘only about 15% of the market with Austwide enjoying a massive 85% which is totally unbalanced and could cause problems in the industry.’<sup>36</sup>

3.23 Mr Rooney indicates that Austwide increased its prices in a letter dated 1 July 2005, citing the increase in oil prices as the reason for the increase.<sup>37</sup>

### **The supply of PVC extrusion and magnet by SAF**

3.24 Mr Rooney wrote to franchisees on 14 August 2005 in respect of the price increases imposed by RBM and Austwide, indicating that SAF would offer to supply PVC extrusion and flexible magnet products. The letter states:

it is clearly apparent that in order to keep prices stable in the market place another supplier is needed to keep the existing suppliers price competitive. With more competition it will force RBM and Austwide to meet the market price instead of dictating the prices they do now.

...

Our aim is to purchase the highest quality magnet and extrusion in bulk from the largest manufacturers who buy their materials at the best discounts.

...

A price order list as well as samples will be forwarded to you shortly and orders can be taken from the 1<sup>st</sup> of October 2005. We anticipate being able to supply a full range of profiles and magnet by October 2005.<sup>38</sup>

3.25 SAF does not manufacture PVC extrusion or flexible magnet products. To date, SAF appears to have purchased the majority of its goods from a newly established supplier of imported material, Patrick Products. SAF indicates that all of the products in its price list issued 1 October 2005 were acquired from Patrick Products.<sup>39</sup> Mr Rooney submits that SAF currently distributes supplies

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<sup>33</sup> Austwide, Submission regarding notifications, 24 January 2007, p. 1.

<sup>34</sup> SAF, Response to interested party submissions, 14 March 2007, p. 3.

<sup>35</sup> SAF, Further information regarding notifications, 11 December 2006, Document 4, p. 1.

<sup>36</sup> SAF, Further information regarding notifications, 11 December 2006, Document 4.

<sup>37</sup> *ibid.*, p. 2.

<sup>38</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, Document 4.

<sup>39</sup> SAF, Further information regarding notifications, 14 March 2007, p. 2.

from 8, 17-25 Greg Chappell Drive, Burleigh Heads, Queensland. The ACCC notes this is the address of Patrick Products according to its submission and price list.<sup>40</sup>

- 3.26 Patrick Products submits it has been supplying SAF with PVC extrusion and flexible magnet from October 2005.<sup>41</sup> Patrick Products indicates that sales to SAF make up about 20 per cent of its total sales, with the remaining sales being to other 'Fridge Seal Manufacturers around Australia.'<sup>42</sup>
- 3.27 Mr Rooney submits that potential suppliers would be encouraged to approach SAF with supply proposals through meetings, site visits, letters, email and telephone.<sup>43</sup>
- 3.28 Seal-A-Fridge (Darwin) submits that SAF has advised franchisees it is now proposing to purchase goods directly from a new manufacturer.<sup>44</sup>
- 3.29 Mr Rooney submits that SAF controls less than 10 per cent of 'any of the markets'. This implies SAF and Seal-A-Fridge franchisees purchase less than 10 per cent of the PVC extrusion, flexible magnet and ready-made seals sold in Australia.<sup>45</sup>
- 3.30 On 1 May 2006, RBM issued a revised price list in response to its loss of market share in the preceding 12 months.<sup>46</sup>

### **Minimum quality standards**

- 3.31 On 1 May 2006, Mr Rooney introduced minimum quality standards for the products used by Seal-A-Fridge franchisees in the manufacture of refrigeration seals.<sup>47</sup> A copy of the minimum quality standards (set out in the Seal-A-Fridge Operations Manual) is included at Appendix A.

### **Background**

- 3.32 Mr Rooney submits there has never been an Australian standard for refrigeration door seals.<sup>48</sup> Mr Rooney refers to an email from a research officer of SAI Global Ltd. SAI Global has an exclusive licence over the distribution and sale of Australian Standards. In the email, Mr Roe indicates that he was unable to locate references on any Australian standards that include information on refrigeration gaskets.<sup>49</sup>

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<sup>40</sup> SAF, Further information regarding notifications, 14 March 2007, p. 3; and Patrick Products, Submission regarding notifications, 17 January 2007, p. 1.

<sup>41</sup> Patrick Products, Submission regarding notifications, 17 January 2007, p. 1.

<sup>42</sup> *ibid.*

<sup>43</sup> SAF, Further information regarding notifications, 14 March 2007, p. 8.

<sup>44</sup> Seal-A-Fridge (Darwin), Submission regarding notifications, 30 January 2007, p. 1.

<sup>45</sup> SAF, Response to interested party submissions, 14 March 2007, p. 5; and SAF, Response to individual interested party submissions, 14 March 2007, p. 1.

<sup>46</sup> SAF, Further information regarding notifications, 14 March 2007, Document 5.

<sup>47</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 4.

<sup>48</sup> SAF, Further information regarding notifications, 14 March 2007, p. 4.

<sup>49</sup> *ibid.*

3.33 Mr Rooney submits that manufacturers of PVC extrusion and magnet set their own standards, or use the specifications set by refrigeration manufacturers.<sup>50</sup> Mr Rooney considers Austwide and RBM have been reducing the quality of their seals in recent years to save money. By way of example, Mr Rooney submits the manufacturers have been reducing the thickness of their seals to 0.3 and 0.4 mm, which increases the chance of the profile becoming torn or split under normal wear and tear.<sup>51</sup>

3.34 Mr Rooney submits that the minimum quality standards were introduced to ‘protect the value and image of the trademark and for the purpose of protecting the overall image and reputation of the Seal-A-Fridge Franchise System’.<sup>52</sup>

3.35 The relevant chapter of the Seal-A-Fridge Operations Manual states that:

Where a product is available that meets the minimum standards, a franchisee must purchase the product or products. If a product is not available that meets the minimum quality standards, then the franchisee may purchase that product with the prior consent of the franchisor, until such times that a product can be sourced that meets minimum quality standards.<sup>53</sup>

3.36 Mr Rooney informed franchisees of the requirement in a letter dated 13 April 2006.<sup>54</sup> Mr Rooney wrote:

the continued use of PVC extrusion and magnet that does not meet minimum quality standards without prior written consent of the Franchisor after the 1<sup>st</sup> of May 2006, will result in breach of Section 4C operating standards of the Franchise Agreement. Further continued breaches will result in breach of Section 6B(i) –Termination of Franchise by Franchisor for material breach of Franchise Agreement.<sup>55</sup>

3.37 Mr Rooney also submits that purchasing goods that do not meet the minimum quality standards would be a direct breach of clause 4A of the franchise agreement.<sup>56</sup>

3.38 Mr Rooney submits that in the case of a material breach by a franchisee:

The first procedure would be to notify the Franchisee to cease the conduct as detailed in Clause 6B h) and 6B i) the Franchisee will then have 21 days to cease or rectify the conduct.

If the Franchisee does not remedy the conduct after 21 days, then the Franchisor may terminate the agreement for Material Breach as detailed in Clause 6B.<sup>57</sup>

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<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*, pp. 6-7.

<sup>52</sup> SAF, Further information regarding notifications, 11 December 2006, Document 1.

<sup>53</sup> *ibid.*, p. 1.

<sup>54</sup> *ibid.*, Document 8.

<sup>55</sup> *ibid.*

<sup>56</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 9.

<sup>57</sup> *ibid.*

## Content of the standards

- 3.39 Mr Rooney submits that he developed the Seal-A-Fridge minimum quality standards based on world standards and standards existing in Australia, such as Austwide's product specifications.<sup>58</sup>
- 3.40 The minimum quality standards for PVC extrusion require among other things:
- International Organization for Standardization (ISO) 9002 certification
  - a minimum profile thickness of 0.5 mm
  - a high quality smooth finish extrusion, free of any line or streak marks on the outside of the extrusion.
- 3.41 The minimum standards for flexible magnet products require, among other things:
- ISO 9002 certification
  - that the magnet not break when folded in half
  - that the magnet have a minimum of three poles
  - that the magnet has minimum lifting force of 100 grams pa/inch with an air gap of 0.4 mm.
- 3.42 The ISO is a non-government network of the national standards institutes of 157 countries (including Australia).<sup>59</sup> Standards are developed by technical committees and the ISO has published more than 16,000 (voluntary) International Standards.
- 3.43 The ACCC understands ISO 9002 has been replaced by ISO 9001:2000. The ISO 9001:2000 certification is a generic management system standard which may be applied to organisations regardless of size, type, industry, product or service. The certification sets out the requirements for a 'quality management system aimed at helping organisations achieve customer satisfaction and continual improvement.'<sup>60</sup> The ACCC notes the standard does not focus on PVC extrusion or flexible magnet products, but rather on the management processes of organisations.

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<sup>58</sup> SAF, Further information regarding notifications, 14 March 2007, pp. 4-5.

<sup>59</sup> ISO, Overview of the ISO system, viewed 12 January 2007, <<http://www.iso.org/iso/en/aboutiso/introduction/index.html?printable=true>>; and ISO, 'Member bodies', viewed 1 March 2007, <<http://www.iso.org/iso/en/aboutiso/isomembers/MemberList.MemberSummary?MEMBERCODE=10>>.

<sup>60</sup> ISO, Press Release No. 865 – ISO 9000 Compendium, viewed 1 March 2007, <<http://www.iso.org/iso/en/commcentre/pressreleases/archives/2003/Ref865.html>>.

## Adherence to the standards

- 3.44 Mr Rooney submits that SAF is responsible for assessing the relevant products against the minimum quality standards.<sup>61</sup> He indicates that some of the standards are easily proven through visual or measurement tests, while others may be the subject of an independent testing report.<sup>62</sup>
- 3.45 Attached to SAF's letter to franchisees of 13 April 2006 was a list of suppliers that meet SAF's minimum quality standards. The document indicates that each of the products supplied by SAF meets the minimum standards, while each of the products supplied by Austwide and RBM do not.<sup>63</sup>
- 3.46 In his submission of 11 December 2006, Mr Rooney made the following observations regarding the quality of the products of Austwide and RBM:
- Austwide's PVC extrusion does not have ISO quality certification, has lines down it rather than a smooth finish, has medium resistance to mould bacteria and is under the thickness required by SAF's minimum quality standards.
  - Austwide's magnet products do not have ISO quality certification.
  - RBM's PVC extrusion is not to the size required by the minimum quality standards and is under the thickness required by the standards.
  - RBM's flexible magnet does not have ISO quality certification, breaks when folded in half, is only a two pole magnet and does not have enough lifting force to meet SAF's minimum quality standards.<sup>64</sup>
- 3.47 Mr Rooney's letter to franchisees indicates that certain profiles which do not meet the minimum quality standards, may be used until such time as a profile is found that meets the minimum standards.<sup>65</sup> In addition, as noted above, if franchisees are unable to source products that meet the minimum quality standards, they may acquire goods from other suppliers with the prior written consent of SAF.<sup>66</sup> Mr Rooney expects the approval process should not take longer than seven days.<sup>67</sup>

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<sup>61</sup> SAF, Further information regarding notifications, 14 March 2007, p. 8.

<sup>62</sup> *ibid.*

<sup>63</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 8.

<sup>64</sup> *ibid.*, pp. 7-8 and Document 8, p. 3.

<sup>65</sup> These products are Austwide's C1, C2, C3, ELX1-5, IG1, PL6, W7, W8, MC1 and SHP1 and RBM's KW142, 192 and 2205.

<sup>66</sup> SAF, Further information regarding notifications, 11 December, Annexure A, p. 8.

<sup>67</sup> *ibid.*

## **4. Statutory tests**

- 4.1 Subsection 93(3A) of the Act provides that the ACCC may remove the immunity for conduct described in subsections 47(6) and (7) if it is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct.
- 4.2 This is the relevant test for third line forcing notifications N50197, N50198, N50199 and N92676.
- 4.3 Subsection 93(3) of the Act provides that the ACCC may remove the immunity for conduct described in subsections 47(2), (3), (4) or (5) if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition within the meaning of section 47 and that in all the circumstances:
- (a) the conduct is not likely to result in a benefit to the public; or
  - (b) any benefit to the public that is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition likely to result from the conduct.
- 4.4 This is the test to be applied to notification N50196.
- 4.5 Before revoking the immunity obtained by a notification, the ACCC must issue a draft notice of its intention (subsection 93A(1)) and give the notifying party and interested parties the opportunity to respond and to call a conference in relation to the draft notice (subsection 93A(2)).

## **5. Exclusive dealing in franchise arrangements generally**

- 5.1 Before considering the public benefit and detriment arguments put forward by Mr Rooney, it may be useful to identify the principles that the ACCC takes into account in considering exclusive dealing notifications lodged by franchisors generally.
- 5.2 It is not uncommon for franchisors to require franchisees to acquire stock or equipment from nominated suppliers. By their very nature, franchise agreements will impose restrictions on franchisees' freedom to choose with whom, in what or where they deal. If business operators seek complete independence as to how they operate their business, a franchise arrangement may not be the best business model for them.
- 5.3 Where franchisors propose to require franchisees to acquire stock or equipment from nominated third party suppliers, they are at risk of contravening the exclusive dealing provisions of the Act. A large number of franchisors therefore seek immunity for such conduct by lodging a notification with the ACCC. The general principles taken into account when the ACCC considers such notifications are set out below.

### **Public benefits from exclusive dealing by franchisors**

- 5.4 Franchisors often argue, and the ACCC has previously accepted, that a number of public benefits flow from exclusive dealing in franchise supply arrangements.
- 5.5 Franchisors often argue, for example, that restrictions over franchisees' supply arrangements are necessary to maintain the quality and consistency of the end product and to maintain the franchise's reputation. This makes sense in many franchise situations. However, franchisors should still be able to demonstrate these benefits by establishing a history of high standards, or presenting a business model which demonstrates the importance of developing and maintaining a certain quality and consistency between franchisees.
- 5.6 The ACCC notes there are also a variety of ways to maintain consistency and quality. For example, minimum quality standards can be set. Alternatively, where there are multiple suppliers of a suitable product, franchisees may be provided with a selection of suppliers from whom they can acquire goods.
- 5.7 A franchisor negotiating supply arrangements on behalf of its franchisees may create buying power which delivers cost savings to franchisees and result in more timely supply of goods. A franchisor run tender process may result in significant discounts for franchisees and improve the service level to the franchise group by virtue of their increased importance to the supplier.
- 5.8 However, franchisors should explain why similar benefits cannot be delivered through negotiating supply on the basis of voluntary supply agreements with individual franchisees. Franchisors may also be able to negotiate preferred

supplier arrangements which allow franchisees to source products from other suppliers if they offer greater value for money or better service.

- 5.9 Claims are also frequently made that restricted supply arrangements facilitate franchise systems. For example, the requirement to acquire compatible computer systems or to maintain common stock management processes assist in the administration of the franchise. Some evidence in support of such claims should be provided.
- 5.10 One indication of the benefits of exclusive dealing in franchise supply arrangements, particularly the franchise reputation and price benefits outlined above, is the level of franchisee support for the arrangements. If the arrangements genuinely deliver costs savings to franchisees, it could be expected that a large proportion of franchisees would support the arrangements. Conversely, where a large proportion of franchisees object to the notified conduct, it may be that the cost savings are illusory or not sufficient to outweigh the costs associated with exclusive dealing conduct.

### **Public detriments from exclusive dealing by franchisors**

- 5.11 Against the benefits that will generally be offered by exclusive dealing in a franchising context, the ACCC is required to weigh any associated detriments.
- 5.12 Requiring franchisees to acquire stock or equipment from nominated suppliers can reduce competition that might otherwise exist in two ways. First, franchisees are unable to source supplies based on their views regarding quality and price. This can reduce franchisees' ability to compete in downstream markets. Second, nominated suppliers may view the franchise as guaranteed custom, which limits their incentives to compete on price and quality.
- 5.13 Any reduction in competition from exclusive dealing in a franchise context will be more limited where:
- nominated suppliers are chosen through competitive means, for example through a tender process
  - the franchise supply arrangements are reviewed regularly
  - franchisors demonstrate an ongoing interest in maintaining the efficiency of franchisees and therefore an interest in ensuring nominated suppliers deliver value for money
  - franchisees may select from multiple suppliers, which allows for ongoing competitive tension between the suppliers and increases the likelihood of individual franchisee preferences being catered for
  - mechanisms are provided to allow exceptions to the rule, for example competitively priced equivalents may be purchased

- the products the subject of the restriction are a small proportion of the franchisees overall costs
  - franchisees comprise a small proportion of the market or markets in which they compete.
- 5.14 The manner in which franchisors implement supply restrictions will also be relevant to ACCC assessment of the arrangements. Restrictions should be consistent with franchise agreements and should be implemented with a high degree of transparency. Franchisees should be aware of the nature of the restrictions before entering into the franchise agreements (or treated fairly should the restrictions be later introduced), and restrictions should not be imposed or introduced in an unfair or unconscionable manner.

### **The ACCC's approach to exclusive dealing by franchisors generally**

- 5.15 As noted above, where franchisors propose to require franchisees to acquire stock or equipment from nominated third party suppliers, they are at risk of contravening the exclusive dealing provisions of the Act. Franchisors can seek immunity for the conduct through the notification process.
- 5.16 The ACCC will assess the public interest submissions made by franchisors having regard to, among other things, the principles discussed above.
- 5.17 The ACCC has rarely objected to franchise notifications. Provided sensible arguments are put forward and these appear to be supported by the information provided, the ACCC will take no further action at the time of lodgement and immunity for the notified conduct will continue.
- 5.18 In circumstances where franchisees raise concerns in relation to notified arrangements, the ACCC will consider those concerns and may choose to consult more broadly. If widespread concern is identified, the ACCC is likely to review a notification.
- 5.19 If the ACCC is satisfied that the tests outlined above are met, the ACCC will move to revoke the notification, thereby removing the immunity afforded by the lodging of the notification.

## **6. Submissions received**

- 6.1 Each of the submissions from interested parties in respect of the notifications opposed the notified conduct.
- 6.2 The ACCC received submissions opposing the notified conduct from eleven franchisees, as well as suppliers Austwide, Patrick Products and RBM.
- 6.3 The ACCC also received a submission opposing the conduct from franchisee consultant, Mr David Acheson. Mr Acheson is retained to advise some of the Seal-A-Fridge franchisees and the Seal-A-Fridge Franchisee Association. The Seal-A-Fridge Franchisee Association (formerly the SAF-Action Group) was formed on 17 January 2007, and has a steering committee made up of 11 franchisees.<sup>68</sup> It is not clear to what extent franchisees other than these 11 franchisees are involved in the association.
- 6.4 The views of the notifying parties and interested parties are outlined in this document where relevant. Copies of all public submissions and correspondence between Mr Rooney and the ACCC relating to the notifications are available on the ACCC's website <[www.accc.gov.au](http://www.accc.gov.au)>, by following the links to 'Public registers', 'Authorisations and notifications registers' and 'Exclusive dealing notifications register'.

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<sup>68</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 5.

## 7. Relevant markets

- 7.1 The first step in assessing the notifications is to consider the markets affected by the conduct.
- 7.2 One relevant area of competition to be considered is the supply of the products the subject of the notifications, PVC extrusion and flexible magnet. The suppliers of PVC extrusion and flexible magnet appear to supply a large number of diverse customers, including original equipment manufacturers, a range of businesses that repair refrigeration seals and the general public.
- 7.3 The suppliers sell the materials separately and as combined into ready-made seals. The two major suppliers, Austwide and RBM appear to supply both raw materials and ready-made seals, whereas Patrick Products and SAF seem to supply only the raw materials. Seal-A-Fridge franchisees, while purchasing primarily PVC extrusion and flexible magnet as raw materials, also purchase some ready-made seals.
- 7.4 The suppliers seem to supply goods around Australia, regardless of their location, which indicates a national market for the supply of the goods.
- 7.5 In terms of the repair of refrigeration seals, the relevant area of competition appears to include the broad range of businesses that repair refrigerator seals. Seal-A-Fridge is just one example of the type of business that competes in this market. Others include refrigeration and appliance mechanics, electricians and home handymen.
- 7.6 This area of competition seems to consist of a series of smaller geographic markets, as participants are confined to those customers within reasonably close geographic bounds—either close enough to travel to in order to repair the seal or close enough for the customer to bring the refrigerator in to have it repaired.
- 7.7 For the purpose of assessing these notifications, the ACCC considers the relevant areas of competition affected by the proposed conduct are:
- the Australian market for the wholesale supply of PVC extrusion and flexible magnet products used in the manufacture of refrigeration seals and ready-made seals (the products market)
  - the markets for the repair of refrigeration seals to households and businesses (the repair markets).

## **8. Assessment of notification N50196**

- 8.1 As noted above, the ACCC may only revoke notification N50196 if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

### **Purpose of the notified conduct**

- 8.2 Mr Rooney submits that the purpose of the exclusive dealing notifications is to enable notifying parties to partake in the conduct of exclusive dealing that would normally breach the Act were it not for the immunity afforded by the notification.<sup>69</sup>
- 8.3 He submits the proposed conduct is intended to reduce the cost of products to franchisees which can lead to a reduction in the price of the products to the public or at least to ensure that the price to the public does not rise for a period of time.<sup>70</sup> Mr Rooney also submits the proposed conduct is intended to ensure that SAF maintains quality control to protect the SAF trademark, brand image and system.<sup>71</sup>
- 8.4 While (as outlined below) the ACCC does not accept these explanations in full, the ACCC does not have before it any evidence to suggest a purpose of the conduct is to substantially lessen competition in any relevant market.

### **Effect of the notified conduct**

- 8.5 To determine whether a substantial lessening of competition may occur, the effect of the exclusive dealing conduct on the overall market for the particular product and its substitutes must be analysed.
- 8.6 Generally speaking, exclusive dealing conduct will be more likely to have a substantial effect if it is engaged in by a significant market player across a wide section of the market, if there are limited substitute products available or if consumers are forced to buy a product to acquire a second product. It can also have a more detrimental effect on competition if the business engaging in the conduct has significant leverage in other markets or where the conduct impedes entry into a market.
- 8.7 In this case, the markets to be analysed are the products market and the repair markets as defined above.
- 8.8 Seal-A-Fridge franchisees constitute a small proportion of the entire products market. The proposed conduct is therefore unlikely to affect prices or the quality of goods in the products market overall.

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<sup>69</sup> SAF, Further information regarding notifications, 14 March 2007, p. 8.

<sup>70</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 10; and SAF, Further information regarding notifications, 14 March 2007, p. 8.

<sup>71</sup> *ibid.*

- 8.9 A significant factor in assessing whether the proposed conduct will substantially lessen competition in the repair markets is the fact that the price of the relevant goods constitutes less than 10 per cent of the total price charged to consumers. The ACCC does not consider the conduct will have significant influence on the price of Seal-A-Fridge services.
- 8.10 As noted below, while the ACCC considers the proposed conduct is likely to reduce competition in certain segments of the market for which Seal-a-Fridge franchisees will no longer be able to compete effectively, these customers form a very small part of the repair markets. The notified conduct therefore seems unlikely to substantially lessen competition in the repair markets.
- 8.11 The ACCC is not satisfied that the notified conduct is likely to substantially lessen competition in a relevant market.

### **Conclusion in respect of notification N50196**

- 8.12 The ACCC is not satisfied that the notified conduct has the purpose, effect or likely effect of substantial lessening of competition within the meaning of section 47 of the Act.
- 8.13 On the basis of the information before it and for the reasons outlined above, the ACCC does not intend to take any further action in respect of notification N50196 at this time. The ACCC may review an exclusive dealing notification at any time.
- 8.14 Legal immunity conferred by the notification commenced on 6 October 2006. The nature of the immunity is that the notified conduct shall not be taken (for the purposes of section 47 of the Act) to have the purpose, effect or likely effect, of substantially lessening competition in a relevant market.

## **9. Assessment of the third line forcing notifications**

- 9.1 As noted above, the ACCC may revoke each of the third line forcing notifications lodged by the franchisors if the likely benefit to the public from the proposed conduct will not outweigh the likely detriment.
- 9.2 However, having regard to the conclusion expressed in the previous chapter that the ACCC is not proposing to take any further action in respect of notification N50196, the conduct notified may be relevant to the analysis of the third line forcing notifications.

### **Counterfactual**

- 9.3 To identify and measure the effect of the notified conduct, the ACCC applies the ‘future with-and-without test’. Under this test, the ACCC compares the situation in the relevant markets in the future with the notified conduct in place with the situation in the relevant markets without the notified conduct. This requires the ACCC to predict how the relevant markets will react if the notifying parties do not engage in the proposed conduct. This prediction is referred to as the ‘counterfactual’.
- 9.4 In considering this matter it is necessary to consider first what the situation will be if the third line forcing conduct is not engaged in by the franchisors.
- 9.5 There appear to be three possible options in this regard. First, the status quo will be maintained and franchisees will acquire goods from a variety of sources. Second, SAF will use notification 50196 or the minimum quality standards to force franchisees to acquire from SAF. Third, the result will be a mixture of the first and second possibilities, depending on franchisees’ contractual arrangements with the franchisors.
- 9.6 The ACCC considers that full maintenance of the status quo is unlikely. In light of SAF’s contractual rights in respect of some franchisees, its apparent determination to require franchisees to purchase from it, and the presence of notification 50196, there is significant likelihood that where possible, the franchisors will require franchisees to acquire product from it.
- 9.7 However, the ACCC has doubts that the franchisors will be able to force product on all franchisees. These doubts arise because the minimum quality standards may not be enforceable and at least nine of the franchise agreements provides for choice between SAF and other suppliers. Further, notification 50196 will not protect Mr Rooney and Mr and Mrs Rooney as franchisors if they attempt to force SAF product.

- 9.8 It does not seem likely the franchisors would be able to rely on the current minimum quality standards to require their franchisees to purchase from SAF. The ACCC is not satisfied that the minimum quality standards were enacted for the sole purpose of improving the quality of refrigeration seals. The following factors suggest otherwise:
- there is no indication from franchisees that the quality of the goods supplied by Austwide and RBM is inferior to the goods that Mr Rooney submits meet the minimum quality standards
  - Patrick Products, a potential supplier of PVC extrusion and magnet, was not identified as meeting the minimum quality standards when it was the primary supplier of SAF
  - the franchisors have identified a number of PVC profiles which do not meet the minimum quality standards but which may be used by franchisees on an ongoing basis until a profile is found that meets the minimum standards.<sup>72</sup>
- 9.9 While it remains open to the franchisors to impose minimum quality standards, the ACCC considers that any genuine quality standards imposed by the franchisors in this industry would retain a significant degree of choice for franchisees. The ACCC considers that any attempts to use quality standards as a proxy for requiring franchisees to purchase the goods only from SAF or certain suppliers could well raise concerns under the unconscionable conduct provisions of the Act. In addition, the conduct may raise concerns under section 47 of the Act.
- 9.10 SAF's decision to supply products to franchisees may also be influenced by other factors. For example, it may find that supplying products to franchisees is unattractive as a result of the warranty and liability issues that may result.
- 9.11 Accordingly, the ACCC considers the likely situation without the notified third line forcing conduct is one in which many franchisees are free to acquire product from a variety of sources, but some may be required to acquire product from SAF.
- 9.12 If however the third line forcing conduct is engaged in, two significant differences will emerge.
- 9.13 First, Mr and Mrs Rooney will be able to force SAF product on their franchisees. Second, SAF will be able to force the product of nominated approved suppliers. This will probably occur in circumstances where franchisees require product lines which are not stocked by SAF and need to be acquired from third parties, or where SAF is unable to or chooses not to require franchisees to buy from it.

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<sup>72</sup>

SAF, Further information regarding notifications, 11 December 2006, Document 8.

## Public benefits

- 9.14 Under the tests to be applied to each of the notifications lodged, the public benefits from the proposed conduct must be sufficient to outweigh any detriment to the public from the conduct.
- 9.15 The public benefits claimed by Mr Rooney include:
- lower priced goods for franchisees
  - lower priced service for end customers
  - higher quality refrigeration seals
  - timely supply of goods
  - benefits from a standardised product
  - environmental benefits.
- 9.16 In making public benefit arguments in support of the proposed arrangements, Mr Rooney has not distinguished between the benefits arising from the conduct under each notification having regard to the slightly differing effects of each notification and differing impact on individual franchisees or geographic areas. In assessing the claims, the ACCC has adopted a similar approach. However, where the effect of each of the third line forcing notifications differs between individual notifications, this is reflected in the draft notices, which are included at Appendixes C, D, E and F.

## Lower priced goods for franchisees

### *Notifying parties' submissions*

- 9.17 Mr Rooney submits that if 'all 30 franchisees purchase in bulk we anticipate that a discount of between 5% - 15% will be achievable for franchisees.'<sup>73</sup> Mr Rooney provided a price list which would apply if all SAF franchisees purchase all lines of stock from SAF. This list is included at Appendix B.
- 9.18 For the most common profile of PVC extrusion (profile code 220), Mr Rooney anticipates a saving of between five and 15 cents per metre.<sup>74</sup>
- 9.19 In the case of flexible magnet, Mr Rooney submits the saving would equate to between four and eight cents per metre.<sup>75</sup>
- 9.20 Mr Rooney submits that franchisees do not have the bulk buying power to obtain adequate discounts.<sup>76</sup> He also submits that at this stage, SAF has little bargaining

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<sup>73</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 7.

<sup>74</sup> *ibid.*, p. 11.

<sup>75</sup> *ibid.*

<sup>76</sup> SAF, Further information regarding notifications, 14 March 2007, p. 3.

power with suppliers and will not have such bargaining power until a decision is made by the ACCC to take no further action in relation to the notifications.<sup>77</sup>

- 9.21 Mr Rooney suggests that some franchisees are able to purchase products at a lower price than others.<sup>78</sup> He submits that under the notified conduct, lower prices will be available to all franchisees, rather than just a few.<sup>79</sup>
- 9.22 Under the Seal-A-Fridge franchising arrangements, the cost of transporting raw materials is borne by the franchisees. As noted, SAF currently distributes from Burleigh Heads, Queensland.<sup>80</sup> Mr Rooney submits that 23 of the 30 Seal-A-Fridge franchisees are located in either New South Wales or Queensland and the majority of franchisees are located on the eastern seaboard within major transport links of SAF's distribution centre.<sup>81</sup>
- 9.23 Mr Rooney indicates that SAF has negotiated low rates of transport with NQX Freight System.<sup>82</sup> He submits that franchisees will have the option of arranging their own transport if they wish.<sup>83</sup> Mr Rooney also argues that what should be compared is the overall cost of supplies and transportation costs. He submits that the benefits of purchasing supplies in bulk and the cost savings achieved more than outweigh any extra transportation costs from Queensland to Victoria.<sup>84</sup>
- 9.24 Mr Rooney also submits that transportation is a 'minimal part of the cost of the supplies.'<sup>85</sup>

*Interested parties' submissions*

- 9.25 Three franchisees indicate that the prices offered by SAF are not lower than the prices they are offered by their current suppliers.<sup>86</sup> Another franchisee submits the prices offered are not 'much lower' as promised.<sup>87</sup>
- 9.26 Patrick Products submits that SAF will be able to negotiate lower prices with suppliers under the notified conduct because suppliers would have to compete even harder for business.<sup>88</sup>
- 9.27 Franchisee submissions indicate that the savings claimed by Mr Rooney would be between \$0.48 and \$1.65 per average refrigerator seal.<sup>89</sup> Seal-A-Fridge

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<sup>77</sup> *ibid.*, p. 4.

<sup>78</sup> SAF, Response to interested party submissions, 14 March 2007, pp. 8 and 17.

<sup>79</sup> *ibid.*, p. 8.

<sup>80</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 2; and SAF, Further information regarding notifications, 14 March 2007, p. 3.

<sup>81</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 2.

<sup>82</sup> SAF, Further information regarding notifications, 14 March 2007, p. 3.

<sup>83</sup> *ibid.*

<sup>84</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 3.

<sup>85</sup> *ibid.*, p. 5.

<sup>86</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 3; Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, pp. 2-3; and Seal-A-Fridge (Southwest Victoria), Submission regarding notifications, 16 January 2007, p. 1.

<sup>87</sup> Seal-A-Fridge (Cairns), Submission regarding notifications, 2 January 2007, p. 2.

<sup>88</sup> Patrick Products, Submission regarding notifications, 17 January 2007, pp. 2-3.

(Perth North) notes that even if the likely savings claimed by the notifying parties eventuate, it is not a big saving.<sup>90</sup>

- 9.28 Six franchisees, as well as franchisee consultant Mr Acheson, raise concerns that even if there were initial savings as a result of the proposed conduct, these would be lost as SAF would increase prices if immunity for exclusive dealing continues.<sup>91</sup> Competing suppliers Austwide and RBM also submit that SAF would be in a position to raise prices in future under the notified conduct.<sup>92</sup>
- 9.29 In addition, three Victorian franchisees indicate that their costs of transporting the products would increase if they were forced to purchase from SAF.<sup>93</sup> Two of these franchisees indicate that they currently pick up most of the relevant stock from Austwide, which results in savings to their business.

#### *ACCC assessment*

- 9.30 If lower prices were achieved and maintained under the notified conduct, the ACCC notes that even a small saving per seal, when aggregated across all of the seals replaced by franchisees each year, may be material.
- 9.31 Mr Rooney has not made specific submissions about how an arrangement with third party nominated approved suppliers would result in lower prices to franchisees. Presumably, Mr Rooney expects to negotiate lower prices with approved suppliers. For the reasons outlined below (under ‘Reduced competition in the products market’), the ACCC does not consider a third party supply arrangement implemented by the franchisors would result in lower prices for franchisees.
- 9.32 If franchisees were forced to purchase from SAF, the ACCC considers that SAF would not be faced with competitive pressures to keep product prices to franchisees low in the future. The absence of such pressures may result in SAF failing to pass on any discounts achieved. While there appears to be some protection for franchisees in certain of the franchise agreements (namely that the prices charged by SAF will be no greater than the quoted wholesale prices of the manufacturers of the supply), the risk is that discounts gained through

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<sup>89</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 4; Seal-A-Fridge (Cairns), Submission regarding notifications, 2 January 2007, p. 2; Seal-A-Fridge (Darwin), Submission regarding notifications, 15 January 2007, p. 1; Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, p. 2; and Seal-A-Fridge (Perth North), Submission regarding notifications, 17 January 2007, p. 1.

<sup>90</sup> Seal-A-Fridge (Perth North), Submission regarding notifications, 17 January 2007, p. 1.

<sup>91</sup> Seal-A-Fridge (Darwin), Submission regarding notifications, 15 January 2007, p. 1; Seal-A-Fridge (North Coast NSW) Submission regarding notifications, 11 January 2007, p. 1; Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, p. 3; Seal-A-Fridge (South Eastern Melbourne), Submission regarding notifications, 22 January 2007, p. 2; Seal-A-Fridge (Southwest Victoria), Submission regarding notifications, 16 January 2007, p. 2; Submission regarding notifications, 15 January 2007, p. 2; and David Acheson, Submission regarding notifications, 27 January 2007, p. 5.

<sup>92</sup> Austwide, Submission regarding notifications, 24 January 2007, p. 3; and RBM, Submission regarding notifications, 15 January 2007, p. 3.

<sup>93</sup> Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, pp. 2-3; Seal-A-Fridge (South Eastern Melbourne), Submission regarding notifications, 22 January 2007, p. 1; and Seal-A-Fridge (Southwest Victoria), Submission regarding notifications, 16 January 2007, p. 1.

the franchise's increased purchasing power will not be passed on to franchisees. Such behaviour would erode any pricing benefit to the franchisees from the proposed conduct.

- 9.33 There are also two factors that limit the likelihood of SAF being in a position to offer overall lower prices as a result of the notified conduct. First, the price list provided by Mr Rooney shows the prices which would result if all franchisees purchase all lines of stock from SAF. As noted, the ability of the franchisors to require their franchisees to purchase from SAF may be limited. This is likely to result in a level of franchisee participation significantly below 100 per cent and consequently some price level above that outlined by Mr Rooney.
- 9.34 Second, the freight costs to franchisees need to be recognised. If franchisees are required to purchase goods from SAF, they are likely to be required to transport the goods from Burleigh Heads, Queensland. While SAF raises the possibility of suppliers from whom it purchases supplies warehousing the goods for Seal-a-Fridge franchisees, it does not seem likely SAF will purchase from Austwide or RBM. The chances of franchisees based in Victorian and New South Wales receiving stock from local suppliers, therefore, are minimal. In addition, protections for franchisees such as the clause that states the prices will be no greater than the quoted wholesale prices of the manufacturers, do not take into account any associated freight costs.
- 9.35 While it is not clear exactly which of the franchisees will be required to purchase from SAF under the notifications, the potentially affected franchisees are located in Victoria (6), New South Wales (13), Western Australia (2) and the Northern Territory (1), as well as Queensland (10). The notified conduct may therefore have significant transport cost implications for a large number of franchisees.
- 9.36 To the extent the price savings claimed by Mr Rooney eventuate, the savings may be achieved in other ways if the franchisors do not engage in the notified conduct. For example, SAF has the option of developing preferred supplier arrangements which can deliver cost savings without forcing franchisees to acquire from nominated suppliers. While this may seem unlikely to deliver the same level of discount as a well functioning central purchasing arrangement would, the voluntary nature of the arrangement maintains the competitive pressure on SAF that would be lost under the notified conduct. If SAF has to compete with other suppliers for franchisee business, the discounts it attains are more likely to be passed onto franchisees.
- 9.37 Further, franchisees may be able to engage in some form of joint negotiation with suppliers. Seal-A-Fridge (Brisbane North) submits for example that when properly formulated, the Seal-A-Fridge Franchisee Association may be able to approach suppliers on behalf of the Seal-A-Fridge franchisees and negotiate better prices.<sup>94</sup> The ACCC notes the association would be required to address any trade practices issues that may arise from the joint acquisition of goods by franchisees. Collective negotiation by certain franchisees, while perhaps not

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<sup>94</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 5.

resulting in the discounts possible under a single buying arrangement, removes the risk that the discounts will not be passed onto franchisees.

- 9.38 Finally, the significant opposition to the notified conduct by franchisees indicates that they do not expect the benefit of lower prices to franchisees claimed by Mr Rooney to result from the notified conduct. As the potential beneficiaries of such savings, it would be unusual for a significant proportion of franchisees to object to the arrangements if they truly ensured value for money.
- 9.39 The ACCC does not accept there will be any significant public benefit in the form of lower priced goods to franchisees.

### **Lower priced service for end customers**

#### *Notifying parties' submissions*

- 9.40 Mr Rooney submits that lower priced PVC extrusion and magnet for franchisees will result in lower prices to the public or will 'at least ensure that the price to the public does not rise for a period of time.'<sup>95</sup>

#### *Interested party submissions*

- 9.41 Seven franchisees submit that any savings gained by the notified conduct will be so small that it would not be passed on to consumers.<sup>96</sup> The submissions indicate that if the claimed price reductions eventuate, the savings would be between 48 cents and \$1.65 per domestic refrigerator. As noted, franchisee submissions also indicate that customers are charged upwards of \$120.00 for seal replacement and the cost of materials constitutes less than 10 per cent of the price charged to consumers.<sup>97</sup>

#### *ACCC assessment*

- 9.42 As noted above, the ACCC is not satisfied that the notified conduct will result in lower priced products for Seal-A-Fridge franchisees. Given this, the ACCC does not consider there is likely to be any benefit to the public in the form of lower prices paid by customers as a result of the notified conduct.

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<sup>95</sup> SAF, Further information regarding notifications, 11 December 2006, p. 10.

<sup>96</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, pp. 4-5; Seal-A-Fridge (Cairns), Submission regarding notifications, 2 January 2007, p. 2; Seal-A-Fridge (Darwin), 15 January 2007, pp. 1, 5 and 8; Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, p. 2; and Seal-A-Fridge (Perth North), Submission regarding notifications, 17 January 2007, pp. 1-2.

<sup>97</sup> See Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 4; Seal-A-Fridge (Cairns), Submission regarding notifications, 2 January 2007, p. 2; Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, p. 2; and Seal-A-Fridge (Perth North), Submission regarding notifications, 17 January 2007, pp. 1-2.

## Higher quality refrigeration seals

### *Notifying parties' submissions*

9.43 Mr Rooney submits that:

The minimum quality standards help protect the value and image of the trademark and the overall protection of the image and reputation of the Seal-A-Fridge Franchise System.<sup>98</sup>

9.44 Mr Rooney submits that the standards set by original equipment manufacturers are low.<sup>99</sup> He expresses the view that the manufacturers use seals only built to last around 10 years.<sup>100</sup>

9.45 Mr Rooney also submits that the quality of the PVC extrusion manufactured by existing suppliers has reduced in recent years as a cost saving measure. Mr Rooney submits that some manufacturers have reduced the thickness of their profiles to 0.4 and 0.3 mm (compared with the 0.5 mm minimum in SAF's standards), which could lead to more seals breaking over shorter periods of time.<sup>101</sup>

9.46 Mr Rooney submits that the two major suppliers in the market, Austwide and RBM, have had serious problems with quality control and continue to experience problems.<sup>102</sup> He submits this directly impacts on the brand, image and trademark of SAF.<sup>103</sup>

9.47 Since the implementation of SAF's minimum quality standards, Mr Rooney submits manufacturers of PVC extrusion and magnet have improved their standards.<sup>104</sup> He submits this has meant that customers other than Seal-A-Fridge franchisees have received higher quality products, which in turn has benefited the public at large.<sup>105</sup>

### *Interested party submissions*

9.48 RBM submits it has an SAI Global certificate of registration stating that it complies with the requirements of AS/NZS ISO 9001:2000 for the design and manufacture of extruded profiles and tubes from various polymers and the manufacture of flexible PVC compounds and coloured masterbatch for extrusion, moulding and electrical cable manufacturing.<sup>106</sup>

9.49 Further, RBM submits both the PVC extrusion and the magnetic strip manufactured and supplied by RBM are manufactured in accordance with the original equipment manufacturers' specifications, which are world wide

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<sup>98</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 5

<sup>99</sup> SAF, Further information regarding notifications, 11 December 2006, document 8, p. 3; and

SAF, Further information regarding notifications, 14 March 2007, p. 7.

<sup>100</sup> SAF, Further information regarding notifications, 14 March 2007, p. 7.

<sup>101</sup> *ibid.*, pp. 6-7.

<sup>102</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 10.

<sup>103</sup> *ibid.*

<sup>104</sup> SAF, Further information regarding notifications, 14 March 2007, p. 5.

<sup>105</sup> *ibid.*, p. 4.

<sup>106</sup> RBM, Submission in respect of notifications, 15 January 2007, p. 4.

specifications.<sup>107</sup> RBM submits it currently supplies Electrolux with its original equipment and spare parts.<sup>108</sup>

- 9.50 RBM indicates it manufactures a range of both PVC extrusion and magnetic strip profiles, depending on the manufacturer's specifications and conforms to the specifications called for in the SAF product sheet.<sup>109</sup>
- 9.51 Austwide submits that it has supplied seals for over 20 years and in all that time has never had any major complaints regarding its materials.<sup>110</sup>
- 9.52 Seal-A-Fridge (North Coast NSW) submits that the quality of SAF's products is of a high standard.<sup>111</sup> Another franchisee submits that the magnet supplied by SAF is the best out of all suppliers.<sup>112</sup> However, the franchisee prefers to use Austwide or RBM PVC extrusion, because the seals are more malleable and have more tensile strength.<sup>113</sup>
- 9.53 Seal-A-Fridge (NE Melb) submits that the weld strength of Patrick Products' extrusion supplied by SAF is markedly inferior.<sup>114</sup> The franchisee submits it has experienced multiple joint failures when fitting SAF supplied commercial extrusion.<sup>115</sup>
- 9.54 Three franchisees submit that SAF has not provided any evidence that it can supply goods that meet the minimum quality standards set out by SAF.<sup>116</sup>
- 9.55 Six franchisees endorse the quality of the products of Austwide and RBM.<sup>117</sup> In particular, franchisees observe very low recall rates.
- 9.56 Seal-A-Fridge (Brisbane North) also submits that for eight years the franchise group has done very well with the current suppliers and notes SAF is comfortable enough with the other suppliers' standards when it cannot supply the relevant stock.<sup>118</sup>

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<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*, p. 5.

<sup>109</sup> *ibid.*, p. 6.

<sup>110</sup> Austwide, Submission regarding notifications, 24 January 2007, p. 1.

<sup>111</sup> Seal-A-Fridge (North Coast NSW), Submission regarding notifications, 11 January 2007, p. 1.

<sup>112</sup> Submission regarding notifications, 22 January 2007, p. 1.

<sup>113</sup> *ibid.*

<sup>114</sup> Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, p. 4.

<sup>115</sup> *ibid.*

<sup>116</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 1; Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, p. 1; and Seal-A-Fridge (South Eastern Victoria), Submission regarding notifications, 22 January 2007, p. 2.

<sup>117</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, pp. 1, 6, 7; Seal-A-Fridge (Darwin), Submission regarding notifications, 15 January 2007, p. 2; Seal-A-Fridge (NE Melb), Submissions regarding notifications, 15 January 2007, pp. 3-4; Seal-A-Fridge (South Eastern Melbourne), Submission regarding notifications, 22 January 2007, p. 2; and Seal-A-Fridge (Southwest Victoria), Submission regarding notifications, 16 January 2007, p. 1.

<sup>118</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 7.

### *ACCC assessment*

- 9.57 Interested party submissions do not indicate the quality standards of PVC extrusion or flexible magnet products available in Australia are, or have been, unacceptably low. The ACCC notes that franchisees are likely to be in a strong position to observe the quality of the products, as they work with the materials and are required to respond to customer recalls. As the costs of responding to recalls, and in the interests of maintaining the reputation of their businesses, franchisees have incentives to deliver a quality end product. Franchisees can be expected to ensure the raw materials they acquire allow them to meet their customers' expectations.
- 9.58 Further, Mr Rooney submits that the seals used by manufacturers are built to last around 10 years. The ACCC notes 10 years may in fact be a satisfactory product life for a number of seal replacement customers.
- 9.59 The ACCC is not satisfied that the notified conduct will give rise to a benefit in the form of higher quality refrigeration seals.

### **Timely supply of goods**

#### *Notifying parties' submission*

- 9.60 Mr Rooney submits there is public benefit from the notified conduct because if SAF has control over the source of supplies it will help to ensure prompt and consistent delivery of supplies to franchisees, who will in turn be able to offer the public better service.<sup>119</sup>
- 9.61 Further, as noted above, Mr Rooney indicates the franchisors will allow franchisees to purchase stock from alternative suppliers if required within seven days of receiving a request.

#### *Interested party submissions*

- 9.62 Austwide submits it provides 'short run next day service' which SAF does not provide.<sup>120</sup> Austwide indicates local manufacturers are able to respond quickly to any requests from customers for product or advice.
- 9.63 SAF (Southwest Victoria) submits it is able to purchase and pick up stock on the same day.<sup>121</sup>
- 9.64 SAF (Brisbane North) submits it is harder to maintain quality and supply when a shipment arrives from overseas and the whole batch is unacceptable.<sup>122</sup> The franchisee submits that SAF has had disruptions in supply and was out of

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<sup>119</sup> SAF, Submission in support of notification N50196, 6 October 2006, p. 4; SAF, Submission in support of notification N50197, 6 October 2006, p. 4; Nigel and Linda Rooney, Submission in support of notifications N50198 and N92676, 25 October 2006, p. 4; Nigel Rooney, Submission in support of notification N50199, 6 October 2006, p. 3; and SAF, Response to interested party submissions, 14 March 2007, p. 4.

<sup>120</sup> Austwide, Submission regarding notifications, 24 January 2007, p. 2.

<sup>121</sup> SAF (Southwest Victoria), Submission regarding notifications, 16 January 2007, p. 1.

<sup>122</sup> SAF (Brisbane North), Submission regarding notifications, 22 January 2007, pp. 5-6.

major stock items in the lead up to Christmas.<sup>123</sup> SAF (Brisbane North) contrasts this with their current supplier Austwide, which it submits has never been out of stock. The franchisee also notes that in some cases it received product from a supplier in Melbourne quicker than it received product via Patricks Products on the Gold Coast.<sup>124</sup>

- 9.65 One franchisee submits that at present, a direct phone call to a supplier has the required component at its disposal within three to five days, which allows the job to be completed within a shorter time span than if the goods were ordered from SAF.<sup>125</sup>

#### *ACCC assessment*

- 9.66 The ability of franchisees to acquire input products in a timely manner is important to allow them to meet customer expectations.
- 9.67 On the information before the ACCC, it appears that the suppliers currently used by Seal-A-Fridge franchisees deliver goods in a timely fashion. Any restrictions on franchisees' supply arrangements prevent franchisees from choosing suppliers who are in a position to, and in practice do, supply goods in a timely fashion.
- 9.68 There are also signs that in some cases, the provision of goods by SAF may be less timely than the provision of goods by other suppliers. Further, even if the seven day limit highlighted by Mr Rooney is met, this is unlikely to be satisfactory to franchisees, who may lose business as a result of such delays.
- 9.69 Again, if any such benefit were to exist, the ACCC would expect franchisees to support the arrangements.
- 9.70 The ACCC does not accept the proposed arrangements will give rise to a benefit in the form of timely supply of goods. In fact, the ACCC considers if franchisees are required to purchase from SAF or nominated approved suppliers, it is likely to give rise to a small detriment from less timely supply.

#### **Benefits from a standardised product**

##### *Notifying parties' submission*

- 9.71 Mr Rooney submits that if supplies are standardised across Seal-A-Fridge franchises, a national warranty program can be implemented to give the public greater protection.<sup>126</sup>

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<sup>123</sup> *ibid.*, p. 6.

<sup>124</sup> *ibid.*

<sup>125</sup> Submission regarding notification, 15 January 2007, p. 2.

<sup>126</sup> SAF, Submission in support of notification N50196, p. 5; SAF, Submission in support of notification N50197, p. 5; Nigel and Linda Rooney, Submission in support of notification N50198 and N92676, p. 4; Nigel Rooney, Submission in support of notification N50199, p. 3; SAF, Response to interested party submissions, 14 March 2007, p. 4; and SAF, Response to individual interested party submissions, pp. 9 and 26.

- 9.72 Further, Mr Rooney submits that a standardised product will allow any product recalls to be activated and initiated quickly, providing additional protection to the public.<sup>127</sup> Mr Rooney also submits that there would be fewer recalls because the product supplied would be of a higher quality.<sup>128</sup>

*Interested party submissions*

- 9.73 A number of franchisees submit that they currently offer customers a warranty.<sup>129</sup>
- 9.74 In addition, Seal-A-Fridge (Brisbane North) submits that the benefits of a standardised product in general are minimal. The franchisee suggests there is not much variance in product quality in the industry and consumers would not perceive the differences, in contrast with a franchise hamburger for example.<sup>130</sup>

*ACCC assessment*

- 9.75 It is not clear that, under the notified conduct, a guarantee given by one franchise would be honoured by other franchises. For example, if the product had to be replaced due to poor workmanship, it is not clear that other Seal-A-Fridge franchisees would be willing, or required under their franchise agreements, to honour such a warranty. The ACCC does not accept a national warranty would result from the notified conduct because of the difficulty of implementing one. The ACCC notes warranties are already offered by each of the Seal-A-Fridge franchisees.
- 9.76 In respect of product recalls, the ACCC does not accept these will be implemented more quickly if SAF controls the supply. Rather, there may be delay if manufacturers contact SAF, rather than individual franchisees.
- 9.77 Unlike many franchise arrangements, the ACCC does not consider consistency in the products offered by Seal-A-Fridge franchisees will be perceived by, or impact on consumers. Any differences in the products used in the manufacture of refrigerator seals are only likely to be observed by the technicians fitting the seal. Provided the seals function properly once fitted, consumers will be satisfied. This is illustrated by the successful establishment of the Seal-A-Fridge franchise without restrictions on franchisees' supply arrangements.
- 9.78 The ACCC does not consider there will be any public benefits as a result of a standardised Seal-A-Fridge product.

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<sup>127</sup> SAF, Submission in support of notification N50196, 6 October 2006, p. 5; SAF, Submission in support of notification N50197, 6 October 2006, p. 5; Nigel and Linda Rooney, Submission in support of notification N50198 and N92676, 25 October 2006, p. 4; and Nigel Rooney, Submission in support of notification N50199, 6 October 2006, p. 4.

<sup>128</sup> SAF, Response to interested party submissions, 14 March 2007, p. 4.

<sup>129</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p 8; Seal-A-Fridge (Southwest Victoria), Submission regarding notifications, 16 January 2007, p. 1; Seal-A-Fridge (Darwin), Submission regarding notifications, 15 January 2007, p. 2; Seal-A-Fridge (West Melbourne), Submission regarding notifications, 22 January 2007, p. 5; and Submission regarding notifications, 22 January 2007, p. 1.

<sup>130</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p 8.

## **Environmental benefits**

### *Notifying parties' submissions*

- 9.79 The franchisors claim that by ensuring the franchisee's service remains a cost effective alternative to purchasing a new refrigerator, the notified conduct will give rise to the following environmental benefits:
- resources saved on the production and acquisition of new refrigerators
  - improved refrigerator efficiency, which means lower greenhouse gas emissions.<sup>131</sup>

### *Interested party submissions*

- 9.80 Seal-A-Fridge (Brisbane North) submits it fails to see how the notified conduct will provide environmental benefits in addition to those that have arisen since the public was made more aware that refrigeration seals could be replaced.<sup>132</sup>

### *ACCC assessment*

- 9.81 This claimed benefit flows directly from Mr Rooney's submission that under the notified conduct the franchisors would be able to supply franchisees lower priced goods, which would result in lower priced goods to end consumers.
- 9.82 As noted above, the ACCC does not consider the proposed conduct will result in lower prices to the end customer and therefore would not increase the number of customers replacing their refrigerator seals.
- 9.83 The notified conduct is not likely to result in any significant environmental benefits.

## **Public detriments**

- 9.84 The potential public detriments from the notified conduct result from:
- reduced competition in the products market
  - reduced competition in the repair markets
  - increased franchisor bargaining power.
- 9.85 In assessing the public detriments from the notified conduct, the ACCC has taken care not to take into account detriments that do not apply to the particular notification under consideration having regard to the slightly

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<sup>131</sup> SAF, Submission in support of notification N50196, 6 October 2006, p. 5; SAF, Submission in support of notification N50197, 6 October 2006, p. 5; Nigel and Linda Rooney, Submission in support of notification N50198 and N92676, 25 October 2006, p. 5; Mr Rooney, Submission in support of notification N50199, 6 October 2006, p. 4; and SAF, Response to interested party submissions, 14 March 2007, p. 4.

<sup>132</sup> Seal-A-Fridge (Brisbane North), Submission regarding notifications, 22 January 2007, p. 9.

differing effects of each notification and differing impact on individual franchisees or geographic areas. However, each notification is lodged for conduct proposing to restrict the suppliers with whom franchisees can deal. The detriments are dealt with below in general terms and any differences in their application to particular notifications are reflected in the draft notices at Appendixes C, D, E and F.

## **Reduced competition in the products market**

### *Interested party submissions*

- 9.86 Austwide and RBM submit that competition to supply Seal-A-Fridge franchisees will be reduced under the proposed arrangements as franchisees will no longer be able to change suppliers as price and quality indicate this is desirable.<sup>133</sup>
- 9.87 Austwide submits it is highly unlikely that Mr Rooney will negotiate with it and indicates that Mr Rooney has not been in contact with Austwide for 12 years.<sup>134</sup> A number of franchisees also note the difficult relationship between SAF and both Austwide and RBM.<sup>135</sup>
- 9.88 Eight franchisees also express concern that there would be less competition between suppliers under the notified conduct and some indicate this would have a detrimental impact on the price and quality of the goods.<sup>136</sup>

### *Notifying parties' submissions*

- 9.89 Mr Rooney submits that the wholesale market for PVC extrusion and flexible magnet products is much bigger than Seal-A-Fridge and the conduct would have little effect on this market.<sup>137</sup>
- 9.90 As noted above, Mr Rooney also indicates that SAF will purchase goods from any business or company that can provide supplies that meet its minimum quality standards at a low price.<sup>138</sup>

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<sup>133</sup> Austwide, Submission regarding notifications, 24 January 2007, p. 3; and RBM, Submission regarding notifications, 15 January 2007, p. 3.

<sup>134</sup> Austwide, Submission regarding notifications, 24 January 2007, p. 3.

<sup>135</sup> Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, pp. 4 and 5; and Seal-A-Fridge (South Eastern Melbourne), Submission regarding notifications, 22 January 2007, p. 1.

<sup>136</sup> Seal-A-Fridge (Darwin), Submission regarding notifications, 15 January 2007, p. 9; Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, pp. 2 and 5; Seal-A-Fridge (Perth North), Submission regarding notifications, 17 January 2007, p. 2; Seal-A-Fridge (South Eastern Melbourne), Submission regarding notifications, 22 January 2007, pp. 1-2; Seal-A-Fridge (Southwest Victoria), 16 January 2007, p. 2; Seal-A-Fridge (West Melbourne), Submission regarding notifications 20 January 2007, p. 1; Submission regarding notifications, 15 January 2007, p. 4; and Submission regarding notifications 22 January 2007, p. 1.

<sup>137</sup> SAF, Response to interested party submissions, 14 March 2007, p. 4.

<sup>138</sup> SAF, Further information regarding notifications, 11 December 2006, Annexure A, p. 1.

### *ACCC assessment*

- 9.91 If franchisees are required to purchase from nominated approved suppliers, the ability of franchisees to choose suppliers based on value for money is diminished and competition between suppliers will be limited to competition between those suppliers that are approved. Currently, this is likely to exclude the two largest suppliers in the products market, Austwide and RBM.
- 9.92 The ACCC notes that because Seal-A-Fridge franchisees constitute a small proportion of the products market, the proposed conduct is unlikely to affect prices or quality of goods in the products market overall.
- 9.93 In the case of franchisees who are required to purchase goods from SAF, the ACCC considers SAF is unlikely to acquire its more popular product lines from Austwide or RBM. This is evident from SAF's statement that the companies' goods do not meet its minimum quality standards and submissions from interested parties that suggest a strained relationship between SAF and both Austwide and RBM.
- 9.94 This would limit the ability of the two main suppliers of PVC extrusion and flexible magnet in Australia to compete to supply Seal-A-Fridge franchisees and consequently would significantly reduce competition to supply Seal-A-Fridge franchisees. By limiting competition in such a way, the usual benefits of central purchasing through a tender process will be lost.
- 9.95 Further, competition to supply Seal-A-Fridge franchisees may be reduced because of reduced sensitivity of the purchaser (SAF) to changes in price and quality. Franchisees have an incentive to acquire input products of a satisfactory quality. If the seals fitted by franchisees are of a substandard quality, it may result in costly recalls. In addition to the (relatively small) cost of a new seal, the franchisee incurs other costs associated with replacing the seal, including labour, fuel and the time taken to revisit the customer and risks damaging the reputation of their business. Franchisees also have an incentive to acquire satisfactory goods at the lowest possible price.
- 9.96 Again, because suppliers in the products market supply original equipment manufacturers as well as participants in the repair markets, the proposed conduct is unlikely to affect prices or the quality of goods in the products market overall.
- 9.97 The ACCC therefore considers there is likely to be a small detriment from reduced competition to supply Seal-A-Fridge franchisees under the notified conduct.

### **Reduced competition in the repair markets**

#### *Interested party submissions*

- 9.98 Several franchisees raised concerns that they would be disadvantaged and less competitive under the notified conduct as a result of reduced stock options and reduced technical support.

### Limited product range

- 9.99 Austwide submits it supplies a more diverse range of materials than SAF. It submits that it markets 50 seal profiles while SAF and Patrick Products offer only about 10 of the most common profiles.<sup>139</sup>
- 9.100 Seal-A-Fridge (Cairns) submits that if franchisees cannot purchase the specialised lines supplied by Austwide, they may be severely disadvantaged.<sup>140</sup> Seal-A-Fridge (NE Melb) raises similar concerns.<sup>141</sup>
- 9.101 Two franchisees submit that the franchisors will not respond speedily to any request to use suppliers other than SAF or nominated approved suppliers.<sup>142</sup> Further, even if the seven day period identified by the franchisor is met, one franchisee submits this may be too long a period to meet customers' needs or improve their satisfaction with the service offered by Seal-A-Fridge, particularly in light of the time taken to order and receive the product after approval is received.<sup>143</sup>
- 9.102 Seal-A-Fridge (Brisbane North) submits that such a lack of responsiveness will cause problems across a broad range of profiles and customers if there is a disruption to the supply of goods to SAF.<sup>144</sup>
- 9.103 Seal-A-Fridge (NE Melb) raises concerns that franchisees may not be able to use the products they believe are best suited for a particular job because of the limited stock lines held by SAF.<sup>145</sup>

### Reduced technical support

- 9.104 Six franchisees are concerned that if they were forced to acquire the relevant goods from SAF, they would lose the technical support that they have been provided with free of charge from their current suppliers.<sup>146</sup>
- 9.105 While the submissions indicate Austwide and RBM provide technical advice and assistance, for example in relation to welding problems, franchisees express doubt as to whether a similar service would be offered by SAF. Seal-A-Fridge (Southwest Victoria) submits that it has called SAF only to 'get an answering machine and possibly a call two days later, by this time my customer has gone elsewhere'.<sup>147</sup>

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<sup>139</sup> Austwide, Submission regarding notifications, 24 January 2007, p. 2.

<sup>140</sup> Seal-A-Fridge (Cairns), Submission regarding notifications 2 January 2007, p. 1.

<sup>141</sup> Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, pp. 4-5

<sup>142</sup> Seal-A-Fridge (Darwin), Submission regarding notifications, 15 January 2007, p. 7; and Seal-A-Fridge (NE Melb), 15 January 2007, p. 4.

<sup>143</sup> Submission regarding notifications, 15 January 2007, p. 2.

<sup>144</sup> Seal-A-Fridge (Brisbane North), 22 January 2007, p. 6.

<sup>145</sup> Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, p. 4.

<sup>146</sup> Seal-A-Fridge (Cairns), Submission regarding notifications, 2 January 2007, p. 1; Seal-A-Fridge (Darwin), 15 January 2007, p. 2; Seal-A-Fridge (NE Melb), 15 January 2007, pp. 2 and 4; Seal-A-Fridge (Perth North), 17 January 2007, p. 2; Seal-A-Fridge (South Eastern Melbourne), 22 January 2007, p. 2; and Seal-A-Fridge (Southwest Victoria), 16 January 2007, p. 2.

<sup>147</sup> Seal-A-Fridge (Southwest Victoria), Submission regarding notifications, 16 January 2007, p. 2.

*Notifying parties' submissions*

- 9.106 Mr Rooney submits that the interested party submissions do not provide any evidence that the repair markets would be affected by the conduct.<sup>148</sup> Mr Rooney also submits that the notified conduct will apply only to Seal-A-Fridge franchisees and if consumers do not like the higher quality products used by Seal-A-Fridge franchisees, they may choose another refrigeration seal repairer.<sup>149</sup>

Limited product range

- 9.107 Mr Rooney submits that if the notifications are not revoked, the range offered to franchisees will be greatly increased.<sup>150</sup>

Reduced technical support

- 9.108 Mr Rooney submits that suppliers will continue to provide free of charge support to franchisees because franchisees will still be able to purchase ready-made seals and SAF will continue to purchase products from all suppliers where they meet SAF standards.<sup>151</sup>
- 9.109 Mr Rooney also submits that SAF regularly helps franchisees that contact it for assistance.<sup>152</sup>

*ACCC assessment*

Limited product range

- 9.110 As the ACCC considers the franchisors are unlikely to identify Austwide and RBM as nominated approved suppliers, franchisees will be faced with a more limited product range under the notified conduct. The ACCC considers it is unlikely that nominated approved suppliers would supply all of the products used by Seal-A-Fridge franchisees.
- 9.111 The ACCC also considers that SAF is highly unlikely to supply seal profiles for all refrigerators and freezers serviced by Seal-A-Fridge franchisees. While SAF may increase its range if franchisees are forced to purchase goods from it and Seal-A-Fridge franchisees are likely to be granted written permission to purchase the more uncommon seals from alternative suppliers, problems may persist with the proposed arrangements.
- 9.112 First there will be delay while the request is considered by the franchisor. This may be minimised by pre-approving seals, as SAF has done with some of the seals SAF does not supply, but this is unlikely to cover all seals franchisees require.

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<sup>148</sup> SAF, Response to interested party submissions, 14 March 2007, p. 5.

<sup>149</sup> *ibid.*, p. 3.

<sup>150</sup> SAF, Further information regarding notifications, 14 March 2007, p. 2.

<sup>151</sup> SAF, Response to individual interested party submissions, 14 March 2007, pp. 4, 13 and 20.

<sup>152</sup> *ibid.*, p. 9.

- 9.113 Second, it is likely to be more expensive for franchisees to acquire ready-made seals on a one-off basis where they don't have an ongoing supply relationship with the relevant supplier for the majority of their seals.
- 9.114 The ACCC notes franchisees have individual preferences as to which products are better for particular jobs. This may be a function of working style and what franchisees are accustomed to working with. Under the notified conduct, there is a risk that franchisees will be prevented from using the product of their choice, which may impact on their ability to compete for particular types of jobs.
- 9.115 The notified conduct is therefore likely to give rise to a more limited product range.

#### Reduced technical support

- 9.116 The ACCC considers suppliers may be less forthcoming with such support if there is a less direct relationship with franchisees. The ACCC also notes that it is unlikely SAF would deal extensively with Austwide and RBM, which are the two businesses franchisees indicate provide technical advice and support currently.
- 9.117 The ACCC is also not satisfied SAF will be able to provide the level of service currently provided to franchisees by current suppliers.

#### Overall

- 9.118 The ACCC takes the view that, under the notified conduct, franchisees will find it more difficult and expensive to acquire less common and ready-made seals and will not have access to the same high level of technical support from their suppliers.
- 9.119 Franchisees are therefore unlikely to be able to provide the same level of service they previously have and are unlikely to be unable to effectively compete for as broad a range of customers. The ACCC considers there would be some detriment to the public as a result of this.

### **Increased franchisor power**

#### *Interested party submissions*

- 9.120 Austwide submits that if SAF was the sole supplier and/or the franchisors were the sole persons able to determine who was allowed to supply Seal-A-Fridge franchisees, it would give rise to an unprecedented power to cut off or threaten to cut off supplies to individual franchisees.<sup>153</sup>
- 9.121 Seal-A-Fridge (NE Melb) submits that SAF attempted to force franchisees to purchase stock from it by introducing minimum standards for PVC extrusion and flexible magnet, and that at the time threats were made for non-

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<sup>153</sup> Austwide, Submission regarding notifications, 24 January 2007, p. 3.

compliance.<sup>154</sup> The franchisee also comments that Mr Rooney is ‘more than happy to threaten franchises with material breach and cancellation of the franchise agreement’ and has used ‘heavy-handed and bullying tactics’ as well as ‘pedantic legal argument’.<sup>155</sup>

9.122 Mr Acheson submits that ‘[a]s part of his campaign to force franchisees to purchase product from him, Nigel Rooney has alleged breach of agreement by several of his franchisees.’<sup>156</sup>

9.123 Further, Mr Acheson submits that failing to remove the franchisors’ immunity from the exclusive dealing provisions of the Act would greatly increase their opportunities for unconscionable conduct.<sup>157</sup> In particular, Mr Acheson suggests Mr Rooney could cut off or threaten to cut off supplies of product. Mr Acheson notes that Mr Rooney already cuts off and threatens to cut off franchisees from the national Seal-A-Fridge telephone number.<sup>158</sup>

#### *Notifying party submissions*

9.124 Mr Rooney submits that the claims of Seal-A-Fridge (NE Melb) are without merit and questions why, if this was the case, the franchisee would remain part of the Seal-A-Fridge group since 1999.<sup>159</sup>

#### *ACCC assessment*

9.125 Franchisors are in a unique relationship of some power over their franchisees. In this case, the franchisors have control over the advertised central Seal-A-Fridge telephone number. Further, if SAF were to become the franchisees’ only source of raw materials, it seems to provide another avenue through which the franchisors are able to exert influence over franchisees, for example by interfering with supply to the franchisees.

9.126 The ACCC accepts that under the proposed arrangements, the franchisors would have an additional means by which they can impose new conditions on franchisees. Whether or not the franchisors exercise this power is not critical; the fact that such a threat exists may be sufficient to influence franchisee behaviour.

9.127 The ACCC notes that the franchisors are prohibited from acting in an unconscionable manner to the extent it is prohibited by section 51AC of the Act.

9.128 As disclosed in a number of submissions, certain franchisees have raised concerns with the ACCC over SAF’s dealings with franchisees. The ACCC continues to consider these concerns separately to the assessment of the exclusive dealing notifications.

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<sup>154</sup> Seal-A-Fridge (NE Melb), Submission regarding notifications, 15 January 2007, p. 1.

<sup>155</sup> *ibid.*, pp. 5-6.

<sup>156</sup> David Acheson, Submission regarding notifications, 27 January 2007, p. 3.

<sup>157</sup> *ibid.*, p. 5

<sup>158</sup> *ibid.*

<sup>159</sup> SAF, Response to individual interested party submissions, 14 March 2007, p. 21.

- 9.129 While the ACCC has not formed a view in relation to the matters raised, in an environment where concerns have been raised, any increase in franchisor power vis-à-vis franchisees may be of concern.

### **Conclusion in respect of third line forcing notifications**

- 9.130 The ACCC accepts that franchisors may require their franchisees to deal exclusively with particular suppliers for number of reasons, including in order to secure competitively priced supplies that are of a consistently high quality and which are supplied in a timely manner. In most cases, franchisees will support such arrangements because of the benefits they receive.
- 9.131 However, the ACCC considers there is little, if any, public benefit from the notified conduct in this instance. The ACCC is particularly concerned that the restriction is to be introduced well after the franchise agreements were entered into and a significant proportion of franchisees do not support the proposed conduct. It is not clear that the price of PVC extrusion and flexible magnet products (including transport costs) will be lower under the notified conduct than in the situation without the arrangements. Further, the ACCC is not satisfied there will be an increase in the quality of the end product to consumers or timeliness of supply or improved reputation of the Seal-A-Fridge brand as a result of the conduct.
- 9.132 Further, the ACCC considers there is likely to be a small public detriment from the conduct as it reduces competition between suppliers to supply PVC extrusion and flexible magnet products to Seal-A-Fridge franchisees. In the markets for the repair of refrigeration seals, the ACCC considers there is some detriment from the reduced ability of franchisees to choose suppliers based on value for money and to compete to provide services to certain customers. The ACCC notes there are other, less restrictive means of achieving the franchisors' goals.
- 9.133 Overall, the ACCC is satisfied that for each of the third line forcing notifications, the likely benefit to the public will not outweigh the likely detriment to the public. Therefore, draft notices proposing to revoke notifications N50197, N50198, N50199 and N92676 have been issued. These draft notices are included at Appendixes C, D, E and F.
- 9.134 If final notices are issued in respect of the third line forcing notifications, the ACCC notes that the franchisors will need to take care to ensure that any future supply restrictions do not amount to indirect third line forcing. Such conduct would not be protected from action under the third line forcing provisions of the Act by notification N50196.

### **Next steps**

- 9.135 The ACCC now seeks further submissions from interested parties in respect of the draft notices proposing to revoke the third line forcing notifications lodged by the franchisors.

9.136 In addition, Seal-A-Fridge Pty Ltd, Mr Rooney, Mr and Mrs Rooney or any interested party may request that the ACCC hold a conference in relation to any of the draft notices in accordance with section 93A of the Act.

# Appendix

## **A — Seal-A-Fridge minimum quality standards**

## PVC EXTRUSION MINIMUM STANDARDS

TEST NAME	SPECIFICATION
Specific gravity (density g/cc)	1.40 - 1.45
Hardness shore "A" at 25 ∇ 2EC	72 ∇ 2
Tensile strength Nfmm <sup>2</sup>	> 11 Nfmm <sup>2</sup> (moulded slab)
Elongation at break	> 300% (moulded slab)
Migration of plasticizer at 70EC for 6 hours	< 5 mg
Migration of plasticizer at 120EC for 6 hours	# 1%
Migration of plasticizer in contact with HIPS Sheet (refrigerator cabinet) at 70EC for 24 hours	# 0.5%
Fungicide material composition	Added to compound.
Tensile stress (100% modulus)	> 55 Kg f/Cm <sup>2</sup>
Congo red at 200EC	> 85 minutes
Oil resistance at 70EC for 48 hours	# 10%
Water resistance at 70EC for 48 hours	# 5%
Soap resistance at 70EC for 48 hours	# 5%
Hexane resistance at 25EC for 1 hour	# 5%
Variation in tensile strength at 120EC for 6 hours	∇ 15%
Variation in elongation at 120EC for 6 hours	∇ 15%
Effect of seal on painted panel at 70EC for 168 hours	Very minor.
Effect of gasket on painted panel or paint softening at 70EC for 168 hours	1 pencil hardness.
Colour guard UV resistance for 168 hours Sun lamp resistance for 2½ hours	Must be added # ♠ 1.5 # ♠ 1
Profile thickness (digital verniers)	Extrusion must be minimum thickness of 0.5 mm.
Visual appearance test	Extrusion must have a high quality smooth finish, free of any line or streak marks on the outside of the extrusion.

TEST NAME	SPECIFICATION
ISO 9002 certification	To ensure quality control, the manufacture of the products is to be an ISO 9002 certified company.

**FLEXIBLE MAGNET STANDARDS**

TEST NAME	SPECIFICATION
Physical test	Must not break when folded in half.
Green paper test	Must have a minimum of 3 poles.
Magnet size test (digital verniers)	Must have a minimum size of 9.8 mm x 3.2 mm ∇ 1 mm.
1 inch steel bar lifting test	Must have a minimum lifting force of 100 grms pa/inch with an air gap of 0.4 mm.
Shore "A" hardness test	Must have a minimum shore "A" hardness of 95.
Visual	Must have a minimum of one identity line marks on the non-magnetised side of the magnet.

<b>TEST NAME</b>	<b>SPECIFICATION</b>
Visual	Must have a smooth appearance to the surface.
Laboratory binding test	Must have a strong binding compound to bind the ferrite powder together to ensure that it does not stain the extrusion.
ISO 9002 certification	Quality Control - to ensure quality control, the manufacturers of the products are to be ISO 9002 certified companies.

**B — Seal-A-Fridge Pty Ltd proposed price list**



**SEAL-A-FRIDGE**

**13 14 79**

Manufacturers & Suppliers of Refrigeration Seals

**SEAL-A-FRIDGE PTY LTD,  
P.O. BOX 12029, GEORGE ST,  
BRISBANE, QLD, 4003  
PH: 0418 250 240  
FAX: 07 5562 1112  
EMAIL: [orders@seal.com.au](mailto:orders@seal.com.au)**

**6<sup>th</sup> January, 2007**

Price List if ACCC Notification is successful and all SAF Franchisees purchase all the lines of stock from Seal-A-Fridge Pty Ltd.

PROFILE CODE	STOCK COLOURS	PRICE WHITE	PRICE COLOUR
S146	White/grey/brown	0.89c	0.89c
S220	White/grey/brown	0.89c	0.89c
S193	White/grey/brown	0.89c	0.89c
S206	White/black	0.89c	0.89c
S188	White/Black	0.79c	0.79c
SF & P2	Grey	1.61c	1.61c
S159	White/Black	0.89c	0.89c
S007	White/Black	0.89c	0.89c
S001	White/Black	0.89c	0.89c
S008	White/grey./brown	0.89c	0.89c
Magnet	S9832 (premium) 350m roll	0.63c	

## **C — Draft notice in respect of notification N50197**

- C.1 Notification N50197 was lodged by Seal-A-Fridge Pty Ltd on 6 October 2006 for third line forcing conduct in respect of current and future Seal-A-Fridge franchisees.
- C.2 The ACCC considers notification N50197 will give rise to little, if any, public benefit. The ACCC is particularly concerned that the restriction is to be introduced well after the franchise agreements were entered into and is not supported by a significant proportion of franchisees. It is not clear that the price of PVC extrusion and flexible magnet (including transport costs) will be lower under the notified conduct. Further, the ACCC is not satisfied there will be an increase in the quality of the end product to consumers or timeliness of supply or improved reputation of the Seal-A-Fridge brand as a result of the conduct.
- C.3 The ACCC considers there is likely to be public detriment from the conduct as it reduces competition in each of the products and repair markets. In the products market, the ACCC considers there is likely to be a small detriment from reduced competition to supply Seal-A-Fridge franchisees. In the repair markets, the ACCC considers there is some detriment from the reduced ability of franchisees to compete to provide services to certain customers.
- C.4 The ACCC is satisfied that the likely benefit to the public from notification N50197 will not outweigh the likely detriment to the public.
- C.5 Accordingly, the ACCC gives notice under section 93A of the Act that it proposes to issue a notice under section 93(3A) of the Act in respect of notification N50197. Such a notice would remove the immunity provided by the notification 31 days after the date it is issued.

## **D — Draft notice in respect of notification N50198**

- D.1 Notification N50198 was lodged by Mr Nigel Rooney on 6 October 2006 for third line forcing conduct in respect of the Seal-A-Fridge franchisee that has entered into a franchise agreement with Mr Nigel and Mrs Linda Rooney.
- D.2 The ACCC considers notification N50198 will give rise to little, if any, public benefit. The ACCC is particularly concerned that the restriction is to be introduced well after the franchise agreement was entered into. It is not clear that the price of PVC extrusion and flexible magnet (including transport costs) will be lower under the notified conduct. Further, the ACCC is not satisfied there will be an increase in the quality of the end product to consumers or timeliness of supply or improved reputation of the Seal-A-Fridge brand as a result of the conduct.
- D.3 The ACCC considers there is likely to be public detriment from the conduct as it reduces competition in each of the products and repair markets. In the products market, the ACCC considers there is likely to be a small detriment from reduced competition to supply the franchisee. In the repair markets, the ACCC considers there is some detriment from the reduced ability of the franchisee to compete to provide services to certain customers.
- D.4 The ACCC is satisfied that the likely benefit to the public from notification N50198 will not outweigh the likely detriment to the public.
- D.5 Accordingly, the ACCC gives notice under section 93A of the Act that it proposes to issue a notice under section 93(3A) of the Act in respect of notification N50198. Such a notice would remove the immunity provided by the notifications 31 days after the date it is issued.

## **E — Draft notice in respect of notification N50199**

- E.1 Notification N50199 was lodged by Mr Nigel Rooney on 6 October 2006 for third line forcing conduct in respect of the Seal-A-Fridge franchisee that has entered into a franchise agreement with him.
- E.2 The ACCC considers notification N50199 will give rise to little, if any, public benefit. The ACCC is particularly concerned that the restriction is to be introduced well after the franchise agreement was entered into and the franchisee does not support the proposed conduct. It is not clear that the price of PVC extrusion and flexible magnet (including transport costs) will be lower under the notified conduct. Further, the ACCC is not satisfied there will be an increase in the quality of the end product to consumers or timeliness of supply or improved reputation of the Seal-A-Fridge brand as a result of the conduct.
- E.3 The ACCC considers there is likely to be public detriment from the conduct as it reduces competition in each of the products and repair markets. In the products market, the ACCC considers there is likely to be a small detriment from reduced competition to supply the franchisee. In the repair markets, the ACCC considers there is some detriment from the reduced ability of the franchisee to compete to provide services to certain customers.
- E.4 The ACCC is satisfied that the likely benefit to the public from notification N50199 will not outweigh the likely detriment to the public.
- E.5 Accordingly, the ACCC gives notice under section 93A of the Act that it proposes to issue a notice under section 93(3A) of the Act in respect of notification N50199. Such a notice would remove the immunity provided by the notification 31 days after the date it is issued.

## **F — Draft notice in respect of notification N92676**

- F.1 Notification N92676 was lodged by Mrs Linda Rooney on 25 October 2006 for third line forcing conduct in respect of the Seal-A-Fridge franchisee that has entered into a franchise agreement with Mr Nigel and Mrs Linda Rooney.
- F.2 The ACCC considers notification N92676 will give rise to little, if any, public benefit. The ACCC is particularly concerned that the restriction is to be introduced well after the franchise agreement was entered into. It is not clear that the price of PVC extrusion and flexible magnet (including transport costs) will be lower under the notified conduct. Further, the ACCC is not satisfied there will be an increase in the quality of the end product to consumers or timeliness of supply or improved reputation of the Seal-A-Fridge brand as a result of the conduct.
- F.3 The ACCC considers there is likely to be public detriment from the conduct as it reduces competition in the products and repair markets. In the products market, the ACCC considers there is likely to be a small detriment from reduced competition to supply the franchisee. In the repair markets, the ACCC considers there is some detriment from the reduced ability of the franchisee to compete to provide services to certain customers.
- F.4 The ACCC is satisfied that the likely benefit to the public from notification N92676 will not outweigh the likely detriment to the public.
- F.5 Accordingly, the ACCC gives notice under section 93A of the Act that it proposes to issue a notice under section 93(3A) of the Act in respect of notification N92676. Such a notice would remove the immunity provided by the notifications 31 days after the date it is issued.