

BANKI HADDOCK FIORA

LAWYERS

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ABN 32 057 052 600

24 August 2007

The Adjudication Department
ACCC
GPO Box 3131
Canberra ACT 2601

FILE No:	
DOC:	
W-CD-PRISM	

Dear Sirs

NOTIFICATION OF EXCLUSIVE DEALING

We act for Nestlé Australia Limited.

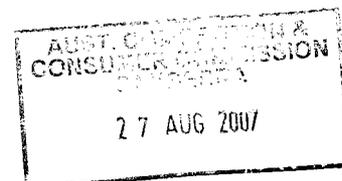
We enclose for consideration our client's Form G and associated documents, in connection with its proposed Antica Gelateria Del Corso franchise.

Please do not hesitate to contact me if I can provide any further information.

Yours sincerely



Kate Haddock
Partner
Direct line: 9266 3412
email: haddock@bhf.com.au



Form G

Commonwealth of Australia

Trade Practices Act 1974 — subsection 93 (1)

NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of person giving notice:
(Refer to direction 2)

Nestlé Australia Limited (NAL) N93103

- (b) Short description of business carried on by that person:
(Refer to direction 3)

Manufacturer and supplier of foods and beverages, and franchisor of Antica Gelateria Del Corso business

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

Banki Haddock Fiora

Level 10, 179 Elizabeth Street

Sydney NSW 2000 .

2. Notified arrangement

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

Various gelato and other food/beverage products to be sold by the Franchisees. See Annexure A for more detail.

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

The Franchise Agreement requires the Franchisee to acquire specified products from NAL and from nominated suppliers. See Annexure B, which is a copy of the relevant clause of the Franchise Agreement.

(Refer to direction 4)

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

- (a) Class or classes of persons to which the conduct relates:
(Refer to direction 5)
Franchisees of the business
- (b) Number of those persons:
 - (i) At present time:
None
 - (ii) Estimated within the next year:
(Refer to direction 6)
Approximately 12-15
- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:
Not applicable

4. Public benefit claims

- (a) Arguments in support of notification:
(Refer to direction 7)
See Annexure A.
- (b) Facts and evidence relied upon in support of these claims:
See Annexure A.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 8)

See Annexure A.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:
(Refer to direction 9)
See Annexure A.
- (b) Facts and evidence relevant to these detriments:
See Annexure A.

7. **Further information**

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

Kate Haddock
Banki Haddock Fiora
Level 10, 179 Elizabeth Street,
Sydney NSW 2000
Tel: 09266 3400

Dated 24 August 2007

Signed by/on behalf of the applicant

Katherine

(Signature)

KATHERINE AMY HADDOCK

(Full Name)

BANKI HADDOCK FIORA

(Organisation)

PARTNER

(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.

Annexure A

Background

1. Nestlé Australia Limited (**NAL**) is the exclusive licensee in Australia of the system of franchising the business known as Antica Gelateria Del Corso (**AGDC**). NAL's entitlement to franchise the business includes the right to license the system, the trade mark and the insignia, colour schemes, signs and promotional materials associated with the business.
2. AGDC is a café business modelled on a rustic Italian gelato bar. It will serve primarily gelato, but will also sell coffee and other similar beverages, as well as cakes and pastries. Customers will be able to dine in or take away.
3. NAL's principal business is the manufacture and supply of household and commercial food and beverage products, including ice cream.
4. AGDC is a franchise operating throughout Europe, and is widely known in Italy. The European franchisor is NAL's parent company Société des Produits Nestlé SA (**SPN**).
5. The Franchise Agreement that Franchisees will be required to sign will require acquisition of products from specified suppliers. The AGDC brand gelato that is to be sold by the franchisees is to be provided by NAL, via its exclusive arrangements with SPN.

The Franchise Agreement

6. Each franchisee will be required to sign a Franchise Agreement with NAL. A copy of clause 7 of the Franchise Agreement is Annexure B.
7. Clause 7.1 of the Agreement requires the franchisee to maintain products of a range and in such quantities as NAL may reasonably specify. Clause 7.2 requires the franchisee to acquire products from NAL on NAL's then current terms. As stated above, NAL is the exclusive distributor in Australia of AGDC gelato, and accordingly will supply that product to the franchisees.
8. A list of the other products and their respective approved suppliers is Annexure C.
9. The approved suppliers have in each case been selected on the basis of:
 - (a) first, the fact that the product they supply is a premium product appropriate for sale in an AGDC franchise;
 - (b) secondly, their ability to ensure efficient supply of the relevant products to all franchisees; and
 - (c) their ability to provide attractive pricing models for AGDC franchisees.
10. Of primary importance to NAL is that the AGDC experience is consistent for consumers. That is, not only must the products available at each AGDC franchise be of the same type and range, they must in fact be of identical quality and taste. This ensures consistency across the franchise operation, which is critical to the success of each franchise business.
11. Thus, for example, coffee purchased at an AGDC franchise must be of premium quality, but it must also look and taste the same as coffee purchased at another AGDC

franchise. This can only be ensured by the stipulation of particular brands of each relevant product. In some cases, the stipulations will be more than merely as to brand, and so for example, Coke is the stipulated brand of cola flavoured drink to be sold, and it will be required to be sold in a particular size and style of bottle.

12. In each case, the stipulated product currently is only available from the supplier indicted in Annexure C.

Competition analysis

13. It is arguable that the proposed conduct contravenes sections 47(6) and (7) of the Act. NAL submits that the likely benefit to the public from the proposed conduct will outweigh any detriment to the public from the conduct.
14. The relevant markets to be considered for the purposes of this notification are the markets for the supply of the products listed in Annexure C. NAL believes that those markets will not be affected by the proposed conduct. The markets are for the supply of food products that are commonly sold in hospitality venues not limited to gelato bars.
15. AGDC is a unique concept for a franchise operation. Its close competitor in the supply of gelato in a retail setting is the Gelatissimo franchise; however the AGDC franchises will also compete with chain cafes in the supply of coffee and similar beverages, and cakes and pastry items. Examples of such cafes would be Gloria Jean's and Starbucks. AGDC will also compete with independent cafes that sell gelato. NAL submits that the relevant market is not the niche gelato bar market, but the market for the supply of cafes generally, particularly Italian style cafes.
16. The purpose of the proposed arrangements is to ensure as far as possible that the AGDC franchises deliver a consistent flavour profile and standard of product at the lowest possible price. By requiring franchisees to purchase from approved suppliers, franchisees will have access to cheaper products which will result in cheaper prices for consumers.
17. The range and quality of product provided by AGDC franchisees will be consistent which will reduce the opportunity for consumers to be misled about the type and quality of products sold by AGDC franchises.
18. Business efficiency will be enhanced because franchisees will not have to source and negotiate regarding products individually.
19. The value of the business name will be increased because of the consistently high standard of products available.
20. Without the proposed conduct, NAL franchisees would be able to acquire products from suppliers of their choosing, and suppliers could compete for the business of supplying franchisees individually. NAL does not consider that this would significantly increase the level of competition in the relevant market, however it would tend to cause disparity between the products available from different franchisees. Of course, suppliers are always able to negotiate with NAL to become approved suppliers.
21. It is expected that Antica will face strong competition from other gelato bars (including Gelatissimo) and from chain cafes that sell coffee and dessert (including Gloria Jean's and Starbucks), as well as competition from numerous independent cafes and gelato bars.

22. Accordingly, there is a very large part of the market that is available to be accessed by suppliers who are not approved suppliers of NAL.

Conclusion

23. NAL submits that the notified proposed conduct has minimal public detriment, but that it will lead to a range of public benefits. The public benefits likely to arise out of the notified conduct outweigh the public detriments, if any.

Annexure B

Clause 7, Franchise Agreement

7. Products

7.1 Obligations

The Franchisee must maintain for the Business Products of a range and in such quantities as NAL may reasonably specify.

7.2 Purchase from NAL

The Franchisee acknowledges that, for the purposes of clause 7.1, it must as required by NAL acquire Products from NAL on NAL's then current terms.

7.3 Purchase from Approved Suppliers

The Franchisee must, for the purposes of clause 7.1, as required by NAL acquire Products from Approved Suppliers on the Approved Suppliers' then current terms.

7.4 Recommended prices

NAL may recommend a maximum price which the Franchisee may charge for Products.

Annexure C

List of products and approved suppliers

Product/Service	Is there a specific approved supplier?	Can franchisees obtain from another supplier if quality is sufficient?	Is there a documented quality standard?	Discount of List Price	Free In Store Delivery \$	Payment Terms	Brand Names
Emma & Tom's Life Juices – Straight OJ, Green Power, Karmarama, Extreme C, Racial Action, Go Girl	G & K Fine Foods Pty Ltd Jessica White 03 9702 4166	Not currently available from other suppliers. Stores could obtain from other distributors if it were.	N/A	None	\$100 minimum delivery or 48 bottle minimum	7 days from invoice	Emma & Tom's
English Breakfast/Earl Grey/Chai Rocks/Pure Ginger Grass & Lemon/Pure Peppermint/Pure Camomile/Love Tea/Green and Jazzy/Gold Blend Coffee/Decaffeinated Blend Coffee/Syrups-Vanilla, Caramel, Irish Cream, Hazelnut, Macadamia, Cinnamon/Chai Tea Spice/Cappuccino Chocolate	Di Bella Coffee Mina Ali 07 3252 5858	Not currently available from other suppliers. Stores could obtain from other distributors if it were.	N/A	Chocolate Powder 5.50 ↓4.00 Sugar 16.00 ↓ 5.00 Syrups 12.00 ↓ 1.90 Tea 14.90 ↓ 8.00 (1 st \$ is wholesale 2 nd \$ is Antica)	Less than 5kg Coffee or no coffee – 7.50 Delivery charge	28 days	Teadrop Teas Da Vinci Syrups Di Bella Coffee Di Bella Chocolate Powder
Flat Top Sugar Cone / Natural Waffle Cone / Mini Flat Top Sugar Cones	Altimate Foods Pty Ltd Michael Rizzo 03 9357 0148	Not currently available from other suppliers. Stores could obtain from other distributors if it were.	N/A	Negotiated best price	\$500 minimum order - \$30 delivery charge metro Melbourne	14 days	Altimate
Panna Water / San Pelligrino – Mineral Water, Limonatta, Rossa, Chinotto, Arancita	No		N/A	Wholesale price	\$100 minimum delivery - \$10.50 delivery charge	30 days	Panna San Pelligrino
Bonsoy	Soulfresh Sonia Dyster 03 9416 7168	Not currently available from other suppliers. Stores could obtain from other distributors if it were.	N/A	Buy 10 get 1 free	No delivery charges for metropolitan area	7 days from invoice	Bonsoy
Procal Full Cream Milk / Procal Lite	Procal Dairies Pty Ltd 03 9689 2499	Not currently available from other suppliers. Stores could obtain from other distributors if it were.	N/A	Negotiated best price	1 crate minimum delivery	7 days from invoice	Procal

Product/Service	Is there a specific approved supplier?	Can franchisees obtain from another supplier if quality is sufficient?	Is there a documented quality standard?	Discount of List Price	Free In Store Delivery \$	Payment Terms	Brand Names
Bomboloni – Chocolate, Jam, Custard / Ciambella / Escargot / Danish – Fruit, Custard / Crossiant – Chocolate, Almond / Biscotti	Malatesta Corporation Pty Ltd t/a Landoffi Pastries Soo Ford 03 9903 4166	Not currently available from other suppliers. Stores could obtain from other distributors if it were.	N/A	Negotiated best price	Antica courier	30 days from invoice	
Campagnard Bloomer / Pane Toscano Loaf / Vinefruit rosemary Bloomer / Wholewheat Honey Bloomer / Plain Croissant / Fruit Muffin / Savoury Muffin	Phillippa's Bakery and Provisions Kayla Blackmore 03 9428 5363	Not currently available from other suppliers. Stores could obtain from other distributors if it were.	N/A	Wholesale price	\$35 absolute minimum order \$50 minimum order or else \$4 delivery charge	7 days from date of statement	
Tonchetta Capriccio / Tiramisu / Tartufo Panna / Tartufo Cacao / Mignon Cacao / Le Torte St Honroe / Affogato Al Café / Nocciolosa (Kinder) / Mecroche Plus (Ferrero) / Raffy (Raffaello) / Cookies / Coccornio (Bounty) / Dolce Latte (Honeycomb) / Panna Cotta (Crème Caramel) / Fiordiarancio (Jaffa) / Fig / Fiordilampone (Strawberries & Cream) / Whiskey Cream (Baileys) / Copertura Magnum (Banana Split)	Nestlé Ice Cream	Not currently available from other suppliers. Stores could obtain from other distributors if it were.	N/A		1. \$500 minimum order scheduled – Free in store 2. > \$500 scheduled - \$14 delivery fee 3. Non scheduled weekday < \$500 - \$14 delivery fee 4. Non scheduled weekday > \$500 - \$26 delivery fee 5. Non scheduled week end/public holiday - \$200 delivery fee	30 days from invoice	Nestlé
Trendy Gel Products / Gelato Spoons / Containers / MEC3 range / Toppings	Creative Ingredients Pty Ltd 03 9388 8999	Not currently available from other suppliers. Stores could obtain from other distributors if it were.	N/A	Negotiated best price	\$180 minimum order or else \$33 delivery charge	7 days from date of invoice	Trendy Gel / MEC