

19 December 2008

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General Manager  
Adjudication Branch  
Australian Competition & Consumer Commission  
GPO Box 3131  
CANBERRA ACT 2601



Dear Sir

**Notification of third line forcing conduct**

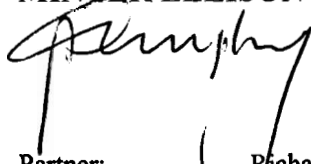
We act on behalf of Miele Australia Pty Ltd (**Miele**).

We enclose:

- notification under section 93(1) of the *Trade Practices Act* 1974 (**TPA**) and supporting submission; and
- a cheque in the amount of \$100 as payment of the required fees.

If you have any questions in relation to this notification or require any further information, please do not hesitate to contact Richard Murphy of our office.

Yours faithfully  
**MINTER ELLISON**



**Partner:** Richard Murphy Direct phone: +61 3 8608 2682 Direct fax: +61 3 8608 1145  
**Email:** richard.murphy@minterellison.com  
**Our reference:** RDM 30-5710439

enclosures

**Form G**

Commonwealth of Australia

*Trade Practices Act 1974 - sub-section 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.

**1. Applicant**

(a) Name of person giving notice:

*Miele Australia Pty Ltd ABN 96 005 635 398 (Miele).* N93725

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

*Miele distributes imported Miele-branded domestic appliances and whitegoods (Miele products). Miele operates a Chartered Agency System in Australia under which Miele products are sold by Miele to customers, through specifically appointed Miele chartered agents (agents).*

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

*C/- Richard Murphy  
Minter Ellison Lawyers  
525 Collins Street  
MELBOURNE VIC 3000*

**2. Notified arrangement**

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

*Consumer finance products and services (promoted and branded as 'Miele Finance') supplied by providers nominated by Miele (preferred Miele Finance Providers) and offered in conjunction with the sale of Miele products.*

(b) Description of the conduct or proposed conduct:

*Miele wishes to offer, through its agents, Miele Finance to its customers in conjunction with the sale of Miele products.*

All agents will be permitted to promote and offer Miele Finance to Miele's customers on Miele's behalf, but they will not be required to do so. Only if an agent wishes to promote and offer finance in conjunction with the sale of Miele products on Miele's behalf, will the agent then be required to offer only Miele Finance and no alternative finance. In order to offer Miele Finance, agents may need to enter into contractual arrangements with a preferred Miele Finance Provider.

Miele's proposed conduct may be characterised as Miele:

- supplying, or offering to supply services (being the conferral of the right on an agent to offer finance in conjunction with Miele products) on the condition that the agent will acquire services from a preferred Miele Finance Provider (being the right to offer finance on behalf of the preferred Miele Finance Provider); or
- refusing to supply services (being the conferral of the right on an agent to offer finance in conjunction with Miele products) for the reason that the agent has not acquired or not agreed to acquire services from a preferred Miele Finance Provider (being the right to offer finance on behalf of the preferred Miele Finance Provider).

Whilst Miele does not accept that this characterisation is correct, it recognises that the conduct is open to being characterised in this way, so out of an abundance of caution, and in order to eliminate any risk of contravention of sections 47(6) and (7), Miele wishes to notify the proposed conduct under section 93(1).

**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:

*New and existing agents*

- (b) Number of those persons:

- (i) At present time:

500

- (ii) Estimated within the next year:

520

- (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:

*We believe the notified conduct will generate a number of public benefits. Please refer to supporting submission.*

- (b) Facts and evidence relied upon in support of these claims:

*Please refer to supporting submission.*

**5. Market definition**

*Please refer to supporting submission.*

**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:

*We do not believe that the notified conduct causes any identifiable detriment to the public. Please refer to supporting submission.*

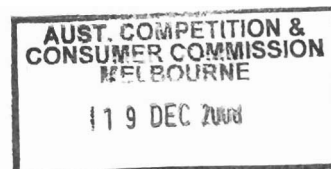
- (b) Facts and evidence relevant to these detriments:

*Not applicable*

**7. Further information**

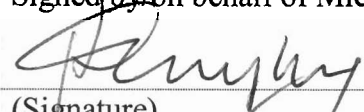

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

*Richard Murphy  
Minter Ellison Lawyers  
Level 23  
525 Collins Street  
MELBOURNE VIC 3000*



**Dated** 19 December 2008

Signed by/on behalf of Miele Australia Pty Ltd

  
\_\_\_\_\_  
(Signature)  
  
\_\_\_\_\_  
MINTER ELLISON

**Richard Murphy**  
**Partner**  
**Minter Ellison**

## Supporting submission

### 1. Background

#### *Miele and its chartered agency system*

- 1.1 Miele distributes imported Miele-branded domestic appliances and whitegoods (**Miele products**).
- .2 Miele operates a chartered agency system (**agency system**) in Australia under which Miele products are sold by Miele direct to customers, through specifically appointed appliance retailers acting as Miele chartered agents (**agents**). The agency system facilitates a direct relationship between customer and manufacturer and ensures better product knowledge and after sales services. Each agent enters into a Miele Chartered Agency agreement with Miele which sets out the requirements and obligations of both Miele (as principal) and the agent. Only those retailers who have signed the chartered agency agreement are authorised to sell Miele products on Miele's behalf.

#### *Miele Finance*

- 1.3 Miele wishes to be able to promote and offer consumer finance products and services (promoted and branded as 'Miele Finance') (**Miele Finance**) to customers in conjunction with the sale of its Miele products.
- 1.4 By reason of its agency system, Miele is only able to promote and offer Miele Finance to its customers in conjunction with the sale of Miele products *through* its agents. While it is proposed that all agents will be able to promote and offer Miele Finance to Miele's customers on Miele's behalf, they will not be *required* to do so. Only if an agent wishes to promote and offer finance in conjunction with the sale of Miele products on Miele's behalf, will the agent then be *required* to offer only Miele Finance and no alternative finance. As seller of Miele products, Miele is entitled to determine the basis upon which its products are sold (including as to payment) and, as such, has determined that only Miele Finance should be offered in conjunction with Miele products.

#### *Arrangements with HSBC*

- 1.5 To facilitate the introduction of Miele Finance, Miele entered into arrangements with HSBC under which HSBC consumer finance products (promoted and branded as 'Miele Finance') would be offered to Miele's customers in conjunction with the sale of Miele products.
- 1.6 In order for agents to be able to promote and offer Miele Finance (supplied by HSBC) in conjunction with the sale of Miele products, agents needed to enter into contractual arrangements with HSBC. Accordingly, Miele proposed to require that agents who wish to promote and offer Miele Finance enter into such contractual arrangements with HSBC under which HSBC grants the agent the right to offer such finance.
- 1.7 Miele does not consider that this conduct constitutes third line forcing, since agents would at all times retain the right to act as Miele agents irrespective of whether or not they choose to offer Miele Finance. The supply by Miele of the right to act as Miele's agent is not contingent upon any acquisition by the agent of services from HSBC – it

was simply that if an agent decided in its discretion to promote and offer finance in conjunction with Miele products (and they would not need to do so), then the agent would be required to promote and offer Miele Finance and, in order to do so, would need to enter into an agreement with HSBC. However, Miele appreciates that the conduct could potentially be characterised in an alternative way which could technically contravene sections 47(6) and (7) of the TPA. Specifically, it could be characterised as:

- (a) Miele supplying services (being the conferral of the right to offer finance in conjunction with Miele products) to the agents on the condition that the agent will acquire services from HSBC, or
- (b) Miele refusing to supply such services to agents for the reason that the agent has not acquired or not agreed to acquire services from HSBC.

1.8 Out of an abundance of caution, and in order to eliminate any risk of contravening sections 47(6) and (7), in January 2008, Miele lodged a notification with the Commission (see N93280) in relation to these arrangements.

*Proposed conduct*

1.9 Since this previous notification was lodged with the Commission, Miele has become aware of a number of commercial relationships between its agents and other providers of consumer finance products and services. This may lead to the situation whereby agents wishing to offer Miele Finance (as supplied by HSBC) in conjunction with the sale of Miele products are precluded from doing so by reason of their arrangement with the other finance provider. In order to accommodate these commercial arrangements and allow agents greater flexibility in relation to offering finance in conjunction with the sale of Miele products, Miele proposes to broaden the number of providers from whom consumer finance products and services branded as 'Miele Finance' may be offered and promoted (through agents) in conjunction with the sale of Miele products. Specifically, Miele is proposing to broaden the range of providers to include HSBC, GE Money and other providers as nominated by Miele from time to time (together, the **preferred Miele Finance Providers**).

1.10 It follows that, in order for agents to be able to promote and offer Miele Finance, agents may need to enter into contractual or other arrangements with a preferred Miele Finance Provider. Miele is proposing that agents who wish to promote and offer Miele Finance in conjunction with the sale of Miele products enter into arrangements with a preferred Miele Finance Provider, under which the relevant preferred Miele Finance Provider grants the agent the right to offer such finance on behalf of the provider. More specifically, to accommodate the commercial arrangements described above, Miele is proposing (in the first instance) that:

- (a) agents forming part of the Harvey Norman / Domayne group enter into arrangements with GE Money under which GE Money (as a preferred Miele Finance Provider) grants such agents the right to offer Miele Finance on behalf of GE Money; and
- (b) other agents enter into arrangements with HSBC under which HSBC (as a preferred Miele Finance Provider) grants these agents the right to offer Miele Finance on behalf of HSBC.

- 1.11 Agents remain free to offer any other form of finance in conjunction with the supply of any other products and customers remain free to use other forms of payment such as credit cards, personal loans, cash or cheque. Customers are *not* required to use Miele Finance when purchasing a Miele product from Miele.

## 2. Notified Conduct

- 2.1 As was discussed in the previous notification, our client does not consider that the proposed conduct (described above) is correctly characterised as third line forcing. It believes that it is not accurate to characterise the conduct as Miele supplying the agent with the right to act as Miele's agent *on condition* that the agent acquire services from a preferred Miele Finance Provider because the agent retains the right to act as Miele's agent *irrespective* of whether or not the agent chooses to offer Miele Finance. The supply by Miele of the right to act as Miele's agent is not contingent upon any acquisition by the agent of services from a preferred Miele Finance Provider – it is simply that, *if* the agent promotes and offers finance in conjunction with Miele products (and they do not need to do so), the agent must only promote and offer Miele Finance and, in order to offer Miele Finance, they need to enter into an arrangement with a preferred Miele Finance Provider. On this basis, our client considers that the proposed conduct does not constitute third line forcing.

- 2.2 However, our client understands that the proposed conduct could potentially be characterised in an alternative way which could technically contravene sections 47(6) and (7) of the TPA. Specifically, it could be characterised as Miele supplying services (being the conferral of the right to offer finance in conjunction with Miele products) to the agents on the condition that the agent will acquire services from a preferred Miele Finance Provider, or as Miele refusing to supply such services to agents for the reason that the agent has not acquired or not agreed to acquire services from a preferred Miele Finance Provider. Although this an incorrect characterisation of the proposed conduct in our client's view, our client wishes to eliminate any risk of contravening sections 47(6) and (7) by notifying this alternative characterisation of the conduct under section 93(1) of the TPA.

- 2.3 Please see Form G (**attached**) for a full description of the relevant conduct being notified.

## 3. Competition Issues

- 3.1 We submit on behalf of our client that the Commission should not serve a notice under section 93(3A) of the TPA because the conduct in question:

- (a) will not adversely affect competition in any relevant market; and
- (b) will result in public benefits and no identifiable public detriment.

- 3.2 We do not believe that the notified conduct can have any adverse effect on competition in the relevant markets. We consider the relevant markets for assessing this notification are the market for provision of consumer finance products and services in Australia, and the market for the supply of domestic appliances. These markets are highly competitive. There are a significant number of alternative consumer finance providers which include:

- (a) banks such as National Australia Bank, ANZ, Commonwealth Bank and Westpac;
- (b) non-bank financial institutions such as Wizard and Aussie; and
- (c) credit card providers such as Visa, MasterCard and American Express.

All these finance providers compete in relation to a broad range of product dimensions including card fees, interest rates, interest free or deferred payment periods, transaction fees, members services and reward/loyalty programs. There are also a significant number of alternative providers of domestic appliances and whitegoods, including Bosch, Ilve, Westinghouse, Fisher & Paykel, Blanco, LG and Whirlpool amongst others.

- 3.3 The maximum impact of the conduct should be considered in relation to Miele's proportional share of the market for the supply of domestic appliances which is approximately 4.5%. Accordingly, we do not consider that the conduct will create barriers to entry or otherwise harm competition in the relevant markets. Further information in relation to these markets can be provided to the Commission, if requested.
- 3.4 We believe the notified conduct is pro-competitive and will generate a number of public benefits, as it will:
- (a) enable Miele and its agents to offer Miele Finance in conjunction with the sale of Miele products (sold by the agent on Miele's behalf) and, in turn, offer more competitive products, thereby fostering business efficiency;
  - (b) enable agents to offer Miele Finance who would otherwise be unable to source and offer cost-effective finance in conjunction with the sale of Miele products;
  - (c) benefit agents by way of additional commissions accruing from additional sales generated as a result of Miele Finance being offered to customers through agents;
  - (d) provide Miele customers with the opportunity to obtain competitive consumer finance in conjunction with their purchase of a Miele product; and
  - (e) encourage competitors of Miele to offer similar benefits and therefore promote competition in the relevant markets.
- 3.5 We also do not believe that the notified conduct causes any identifiable detriment to the public. The conduct in no way limits the choice of consumers in choosing whether to acquire any goods or services (including Miele-branded goods or services) or whether to obtain consumer finance from a preferred Miele Finance Provider.



#### **4. Conclusion**

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- 4.1 For the reasons set out above, we do not believe the Commission should serve a notice under section 93(3A) of the TPA in respect of the attached notifications. This is because the notified conduct will cause little, if any, identifiable detriment and will generate public benefits.