

RESTRICTION OF PUBLICATION CLAIMED



Hall & Spence Pty Ltd. ACN 109 792 903  
as Trustee for Hall Family Trust ABN 46 166 476  
798  
Trading as Price Attack Port Macquarie  
Price Attack Settlement City

[email.steven@hallys.net](mailto:email.steven@hallys.net)

Joanne Palisi  
Director Adjudication Branch  
Australian Competition & Consumer Commission

Monday, July 21, 2008

RE: Exclusive dealing (third line forcing) notifications lodged by Brabus PA Franchising Pty Ltd and Brabus Investments Pty Ltd - interested party consultation

Dear Joanne,

I wish to make a submission in respect to your letter of 1 July 08 calling for input from interested parties into the above matters. I have two Price Attack Franchise Stores which are affected by these notifications. I will first directly address your questions and then provide further comment.

I also apply for exclusion for this document being entered in the public register. It contains information surrounding the commercial relationship between myself, the Franchisor and supplier(s).

This copy of the document has those specific details omitted.

***In regards to PPS and Wella (N93433, N93347 and N93348)***

*Does your franchise agreement with Brabus Franchising or Brabus Investments allow for changes or additions to nominated suppliers? In what circumstances may such changes may be made?*

[REDACTED]

EXCLUDED FROM  
PUBLIC REGISTER

*Will the notified conduct result in lower priced supplies for franchisees due to favourable arrangements with suppliers (such as bulk or volume discounts) or as a result of rebates from suppliers?*

No, the notified conduct creates a 5% rebate for head office and this means that we are seeing a decrease in supplier competition and higher overall purchasing price at store level for the following reasons:

- The conduct creates an arrangement between the Supplier and the Franchisor which guarantees product placement irrespective of consumer demand for that product.
- The conduct removes the need for the Supplier to compete with other Suppliers for shelf space. Typically the Franchisee would see deals from suppliers to promote their products within their businesses. These deals lowered the cost of products by enabling the Franchisee to purchase packs of products and split the packs for lower average cost per product.

*Will the notified conduct result in lower prices to the public as a result of lower priced supplies for Franchisees?*

No, our Franchises generally sell products at recommended retail price. There will however be a reduction in the ability of the Franchisee acquire deals from the Supplier to address local market needs. Selling value packs and discounting individual products as a result of pack splitting will be affected.

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*Will the notified conduct assist in ensuring consistency of range and quality of products across all Price Attack stores?*

Consistency of range may be ensured. However, quality will be reduced as not all products in a range have the same quality. Previously, many Franchisees determined which products of a range had appropriate quality and function as driven by local consumer demand.

*Will the notified conduct assist in ensuring standardisation and efficiency in the operation of the Price Attack franchise network?*

No, the notified conduct in respect of these notifications has no bearing on the operation of the Price Attack Franchisee network. It is an arrangement for Franchisor rebates based upon guaranteed product placement.

*Franchisee Comments:*

The notifications with respect to Cosmetic Suppliers and PPS (Related Companies) are not necessarily detrimental to the Price Attack Business. However, anytime additional rebates are generated during the supply chain a presumption of public detriment based on higher consumer prices is created. This presumption is difficult to dispel as the conduct also involves a loss of retail area efficiency. Even though this loss of efficiency may be somewhat offset against improved consistency across the brand the presumption would still remain.

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*In regards to Salon Shortcuts and Telstra (N93428 and N93429)*

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Price Attack has used the notification process to gain indemnity from prosecution from ongoing conduct

It is my understanding that the intent of the notification process is:

*There are various penalties available for a breach of the exclusive dealing provisions of the Act. However, the Act provides processes for obtaining immunity for parties proposing to engage in exclusive dealing conduct that is in the public interest.<sup>1</sup>*

Notably the public benefit test should not apply for this conduct which has been occurring for a number of years prior to the lodgment of the notification.

*Third line forcing conduct is prohibited outright under the Act. That is, it is prohibited even if it does not substantially lessen competition.<sup>2</sup>*

The circumstance whereby a company that is in breach of the Act gains immunity from prosecution for that breach by the use of an ACCC administrative process is indeed serious, especially when a dispute over the conduct is underway.

To allow this conduct to go unchecked would create a precedent where notifications become a retrospective activity to gain immunity from prosecution.

#### Public Benefit

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Considering the notification on its merits and without regard to the above context in which it was submitted I submit the following in respect of the claimed public benefits:

*2(b) The Computer System is tailored to the Price Attack business*

The Shortcuts system operates in around 4000 sites globally. The system when trialed within the Price Attack network demonstrated shortcomings. As a result, the process of rectifying the shortcomings has resulted in some modification of the system. To describe the system as Tailored to the Price Attack business gives an incorrect impression.

Conversations I had with the previous Franchisor stated that the original intention was not to modify the system. Shortcuts at the time did not intend to support separate development branches of its software.

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<sup>1</sup> ACCC Guide to exclusive Dealing Notifications

<sup>2</sup> Ibid

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I propose more correct description of the position would be, the system lacked business case at the time of the initial decision. Consequently the system failed to meet Price Attack's needs. This has resulted in a number of changes.

*4(b) ensure that the franchisee's Computer System is compatible with Price Attack's Computer System;*

This conduct is unnecessary to achieve this outcome. In order for a system to be compatible with Price Attack's Computer System all that is required if for Price Attack to specify what system it has. Vendors then develop interfaces to achieve compatibility, this is common practice.

Currently other systems such as the in store ticketing system successfully exchange information with the Shortcuts Database.

*4(c) ensure that the franchisee's Computer System meets Price Attack's standards*

This is claim gives the impression that there was a standard to which this selection of system has been applied. The decision to purchase the system and the agreement with Shortcuts was made by the previous Franchisor Australian Pharmaceutical Industries (API). Strategic Management within API identified at the time that no business case existed to support the decision.

*4(d) ensure that confidential information is secured from unauthorized access or use.*

There has been no such guarantee given in regards to the Franchisee's business data. This system places the data from all Franchisees in the hands of Shortcuts and Brabus. Furthermore, Cosmetic Suppliers (Wella) have made a significant financial contribution towards the cost of the system.

There have been no assurances that Franchisees business data will not be turned over to suppliers such as Wella. In fact, given the investment by Wella in the system, the presumption exists that it will occur.

*4(e) Provide all franchisees with improved and consistent support levels;*

The Franchisees maintenance contract with Shortcuts for the support of the system is at a significantly higher rate than previous maintenance agreements with vendors such as Salon Ezy. This is an extra cost to borne by the Franchisees and passed onto the consumer.

The maintenance contract also contains a clause that says *"Should it be determined that the helpdesk cannot achieve the desired outcome for a users questions or incidents, support may be suspended until adequate training has been achieved"*.

In light of this term of the maintenance contract, it is difficult to support the contention that there will be improved and more consistent levels of support.

*4(f) standardise franchisee training and staff training thereby lowering the training costs and as a result decrease costs to the consumers.*

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Franchisee and staff training on the in store computer system is currently not an additional expense to the Franchisee. The new arrangement creates a significant specific expense in this area. Furthermore, the agreement with Shortcuts stipulates that if the Franchisee logs too many calls to the help desk, Shortcuts can withdraw support until such time the Franchisee pays for and attends further training.

I am quite surprised lowering the cost of training was included as a justification in the notification.

### Generally

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This notification concerns a third line forcing arrangement that demonstratively increase expenses for franchisees in the following areas:

- Training
- Support
- Capital outlay

These expenses are actual and not potential. Brabus claims it is in the public interest that this conduct be allowed due to the potential to decrease costs to the consumers. Without a business case showing the path to real savings it is a case of fact vs. fiction, and unlikely to be in the public interest.

Kind regards



Steven James Hall  
Director  
Hall & Spence Pty Ltd ATF The Hall Family Trust  
Price Attack Franchisee – Port Macquarie  
Price Attack Franchisee – Settlement City

Email: [steven@hallys.net](mailto:steven@hallys.net)  
Ph: +971 50 9764201