

# MONAHAN + ROWELL

LAWYERS

22 September 2009

FILE No:	
DOC:	
MARS/PRISM:	

The General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
PO Box 1199  
DIXON ACT 2602

Dear Sir/Madam,

**RE: Notification of Exclusive Dealing**

**Our Ref: MLE/080911**

Please find enclosed completed "Form G – Notification of Exclusive Dealing" pursuant to section 93(1) of the *Trade Practices Act 1974* ("the Act") to be lodged on behalf of the Zoological Parks & Gardens Board ('Zoo Board') and cheque in the sum of \$100.00, being the lodgement fee.

## **Request for Restriction of Publication**

Pursuant to Regulation 24(1) of the *Trade Practices Regulations*, we wish to formally request that Attachment A to the enclosed Form G be excluded from the Public Register. Attachment A consists of eight (8) separate documents, all of which are of a commercially sensitive nature. The front page of each of these documents has been marked in red with the words "RESTRICTION OF PUBLICATION CLAIMED". The remainder of the Form G including Attachment B may be publicly released.

## **Reasons in Support of Request for Restriction of Publication**

The Zoo Board has provided the Australian Competition and Consumer Commission ("ACCC") with the full text of the following relevant documents, all of which collectively form Attachment A ("Attachment A Documents"):

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080911/erb/527380/1

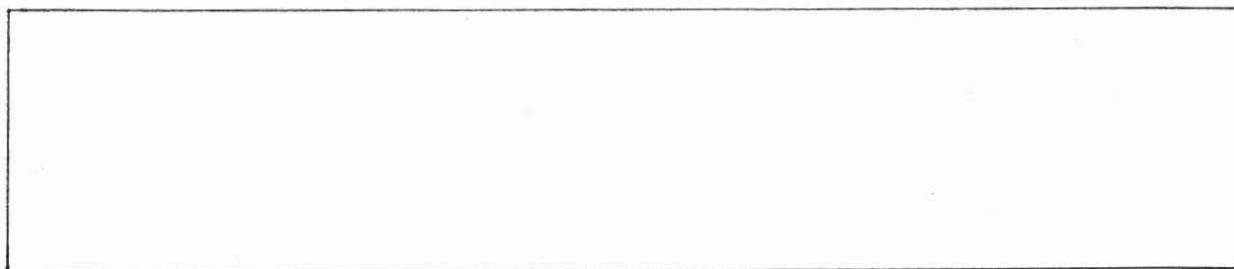
In association with Collin Biggers & Paisley - Sydney

AUST. COMPETITION & CONSUMER COMMISSION CANBERRA
29 SEP 2009

Partners Patrick Monahan + Bruce Butler + Mark Attard + Andrew Probert + Alison Grice  
Mark White + Justin Griffin + Mary Edquist + Rita Zammit + Vanessa Kemp

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The Attachment A Documents have been provided to assist the ACCC in exercising its discretion under section 93 of the Act. Notwithstanding, the Zoo Board submits that the Attachment A Documents should be excluded from the Public Register for the following reasons:-

The Attachment A Documents are commercially sensitive to the Zoo Board;

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- The Zoo Board's ability to negotiate future sponsorship agreements with other sponsors may be hindered if the contents of the Attachment A Documents are released to the public.
- All other related parties [redacted] consider the Attachment A Documents (respectively) to be of a commercially sensitive nature and accordingly support the Zoo Board's request that the Attachment A Documents be excluded from the Public Register.

We note that immunity provided by the Notification will come into effect within 14 days of this Form G (and accompanying lodgement fee) being received by the ACCC, unless a draft Notice is received from the ACCC within that 14 days.

If we can be of any further assistance, or if you require any further information, please feel free to contact either Mary Edquist or Victoria Cahill of this office.

Yours faithfully,

**Mary Edquist**

**Partner**

**MONAHAN + ROWELL**

Encl.

**Partner**  
**Phone:**  
**Email:**

**Mary Edquist**  
**(61-3) 8624 2011**  
**medquist@mrlaw.com.au**

# INDEX

NO	DOCUMENT
	<b>Form G Notification of Exclusive Dealing</b>
<b>A.</b>	<b>Attachment A (1 - 8 Restriction of Publication Claimed)</b>
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7.	
8.	
<b>B.</b>	<b>Attachment B</b>
1.	Zoos Victoria Annual Report 07-08
2.	Zoos Victoria Financial Report 07-08

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## 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.

#### 1. Applicant

(a) Name of person giving notice:

N94220 Zoological Parks and Gardens Board ("Zoos Board")

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

The Zoos Board is a statutory authority which was created under section 6 of the *Zoological Parks and Gardens Act 1995* (Vic) as the governing body of Victoria's three zoos: Melbourne Zoo, Healesville Sanctuary and Werribee Open Range Zoo. The primary role of the Zoos Board is to manage and promote the zoos and their roles in conservation, research and education. The functions of Zoos Board include providing services and facilities for visitors to the zoos.

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

C/- Monahan + Rowell  
Lawyers  
GPO Box 4542  
MELBOURNE VIC 3001  
Ref: MLE:080911 Att: Mary Edquist

#### 2. Notified arrangement

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

The exclusive right to provide catering services at one or more of the three zoos, including granting a lease or licence of land within the grounds of the zoo(s) to enable the catering services to be provided.

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

The exclusive right to provide catering services on the condition that:

- (i) the appointed caterer must acquire food and/or beverages supplied by appointed suppliers, being suppliers with whom the Zoos Board has entered into a sponsorship agreement; and
- (ii) the appointed caterer must not supply products or services that compete with those of the Zoo Board's appointed suppliers without first obtaining the consent of the Zoo Board.

("notified conduct").

See Attachment A for further confidential details.

See Attachment B for public version.

**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:**

The Zoos Board's appointed caterers, the Zoos Board's sponsors and, indirectly, all visitors to the zoos.

**(b) Number of those persons:**

**(i) At present time:**

- 2 caterers
- 2 sponsors
- Visitors to the Zoos

**(ii) Estimated within the next year:**

- 2 caterers
- 2 sponsors (however it is anticipated that a further 2 or 3 sponsors may become involved in exclusive supply arrangements with the Zoos Board in the next year).

**(c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:**

**Present Caterers:**

Melbourne Zoo and Werribee Open Range Zoo:

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Healesville Sanctuary:

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Present Sponsors:

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#### **4. Public benefit claims**

**(a) Arguments in support of notification:**

The notified conduct enables the Zoos Board to obtain additional funding from sponsors to carry out its functions. By performing its functions with this additional support, the Zoos Board benefits the public by:

- (a) conserving, protecting, managing and improving the three Zoos that educate and entertain a large volume of visitors (both locals and tourists);**
- (b) promoting and increasing public enjoyment of the three Zoos and their specimens;**
- (c) increasing public knowledge and awareness of the three Zoos and their collections through the exhibition of the Zoos' collections, publications, educational programmes, advisory services and other activities;**
- (d) carrying out and promoting zoological research, the conservation of wildlife and its natural habitat, and the maintenance of biodiversity; and**
- (e) conducting extensive programmes to educate patrons, particularly school-children, about conservation and environmental sustainability.**

The Zoos Board is partly funded by operating and capital grants provided by the State of Victoria, to reflect the 'public goods' that the Zoos Board provides<sup>1</sup>. Government funding covers 25% of Zoos Board's operating cost

<sup>1</sup> These are: intrinsic value, research and development, conservation, animal welfare, endangered species breeding programs and education, and support for tourism to -

over the past 5 years and 95% of capital costs (albeit with a large backlog of unperformed work). The Zoos Board also provides private goods, for which the public pays some fee – chiefly leisure value: entertainment and education. It supplements its government grant from entrance fees, which are prescribed by government regulation<sup>2</sup>, and consulting services, function and hire charges and commercial sponsorships and donations.

With the additional funding provided through sponsorship, the Zoos Board is able to enhance its primary functions and services. The degree of support provided by sponsors depends largely on the exclusivity afforded to a sponsor's product.

By granting exclusive catering agreements to the caterers, the Zoos Board can ensure that the catering services provided throughout the three zoos are of a high standard of quality, which in turn benefits the public.

The appointment of quality caterers also aids the Zoos by achieving sufficient returns to the Zoos Board to further benefit the public by the consequent enhancement of primary functions and services.

As the Zoos Board activities are not profit-generating and are therefore supported by taxpayers, sponsorships and the catering agreements provide direct public benefit by reducing the cost burden on taxpayers.

Sponsorship further provides the Zoos Board with additional opportunities to leverage relationships with major corporate entities. This in turn has the potential to encourage additional corporate philanthropy for conservation projects, endangered species breeding programs and educational programs.

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

Under section 6 of the *Zoological Parks and Gardens Act 1936 Victoria*, the Zoos Board is a statutory corporation. The objectives and functions of Zoos Victoria as set out in section 10 of the Act include:

- Exhibition of zoological specimens to the public;
- Scientific study of zoological specimens;
- Instruction and entertainment of the public;
- Protection, preservation, management and care of wildlife; and
- Protection or preservation of wildlife habitat including native parks and trees.

Provision of services and facilities for visitors to the zoos.

At present, the Zoos Board derives its operating revenue (approximately \$45 million in 2007-2008) as follows:

Government grant: 37%

Private sources: 63%. This comprises:

- Admissions: 61%
- Commercial: 24%
- Donations / sponsorship/Others: 15%.

## 5. Market definition

The relevant markets in this case are:

- The market for the provision of catering services throughout the three Zoos;
- The market for the supply of certain food and beverages for sale and use by the appointed caterers; and
- The market for the purchase of certain food and beverages by patrons of the three Zoos.

### *Market for catering services*

The Zoos Board periodically conducts a competitive tender for the provision of catering services at the Zoos. Since September 7, 2005 the Zoos Board has appointed a single caterer to undertake all catering services throughout the three Zoos, including direct food sales for the function catering service. However, earlier this year by agreement, it was decided that [redacted] would relinquish its rights to provide catering services at Healesville Sanctuary only. Following a competitive tender the Zoos Board appointed a second caterer to take over the catering services at Healesville Sanctuary. The successful caterer was [redacted], a local caterer associated with various highly regarded Healesville establishments including the [redacted]. [redacted] commenced as catering operator of Healesville Sanctuary on 18 May 2009. Whilst the market for the provision of catering services throughout the three Zoos is a relevant market, the effect of the third line forcing conduct on competition within the market itself is likely to be modest.

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*Market for supply of certain food and beverages to appointed caterers*

The notified conduct requires the appointed caterers to acquire the products of the Zoos Board's nominated sponsors for resale at the zoos. The notified conduct is concerned only with the caterer's activities at the zoos. The relevant products are carbonated non-alcoholic drinks (soft drinks) (supplied by [REDACTED]) and ice cream products (supplied by [REDACTED]).

Aspects of the market for the supply of food and beverages for sale and use by caterers such as the soft drink market and the ice-cream/confectionery market, are dominated by a few major suppliers. In the ordinary course, the caterers at the Zoos, in the same way as caterers at other major entertainment venues, enter into supply arrangements which favour one or other of the dominant suppliers. These arrangements occur because of forces within the market. Thus, even without the notified conduct, the caterer will take its soft drinks from one supplier and its ice cream and confectionary from one supplier (that is, engage in similar conduct voluntarily). In this case, the notified conduct compels the caterers to enter into arrangement with [REDACTED] rather than [REDACTED] competitors for soft drinks and [REDACTED] for ice cream.

*Market for supply of certain food and beverages to zoo visitors*

With respect to the market for the purchase of food and beverages by patrons throughout the Zoos, the market is predominantly constrained by the Zoos' Board's policy of allowing patrons to bring food and beverages into the three Zoos as they wish and consume it in the zoos' grounds. The Zoos have well-established reputations as picnic sites.

It should be noted that, as already noted, due to factors within the market for the supply of carbonated beverages and ice-cream/confectionery, the caterers at the zoos will ordinarily supply the products of only one of the dominant suppliers in each respective market.

The substitutes for the goods are goods brought from home or from outside vendors.

Thus, there is little overall impact on the market for the consumption of soft drinks and ice-cream in greater metropolitan Melbourne.

## **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:

The notified conduct has the effect of limiting the choice of certain food and beverages that patrons can purchase throughout the three Zoos. However, due to the Zoo Board's policy of allowing patrons to bring food and drink into the Zoos and consume it at the Zoos, the food and beverages consumed by many patrons are not actually purchased within the grounds. In fact, patrons are encouraged to utilise the barbecue and picnic facilities available.

It is the Zoo Board's submission that it is likely that there will be no effect on consumer choice due to the notified conduct as the caterers would choose a single provider of carbonated beverages and ice-cream in any event.

Further, the notified conduct is subject to a competition test for price and quality. The caterer is only required to purchase products from a Zoo sponsor to the extent that the products are supplied *"under trading terms and conditions that are competitive for alternative products, and that the items of food and/or beverages are leading brands in their field"*.

The impact on competition in the Greater Melbourne market for the sponsors' products (soft drinks and ice-cream) is likely to be negligible. These are everyday consumer items which are very widely available: there should be little impact on competition as a whole from there being only one supplier available at the Zoos.

In addition (relevant to soft drinks and ice creams) the Zoos do not prevent visitors from bringing in their own food and drinks, so that there is no monopoly created. Any anti-competitive detriment is significantly reduced by these factors.

Accordingly, the Zoos Board does not consider that the notified conduct will lead to any unjustified increase in prices for food and/or beverages sold throughout the three Zoos.

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

The Zoo Board's caterers are appointed by way of competitive tender. Consequently, competition between different suppliers and service providers has occurred at that time. As the time periods of such contracts are limited, there is further opportunity for competition at the end of the tender.

The exclusivity of the caterer's appointment is qualified by an express term that:

**"Members of the public and Board staff may bring food and beverages into the [zoo] Property for their own personal use"**

The caterer's obligation in respect of the notified conduct placed upon the caterers is qualified, as follows:

**"Where the Board has entered into a sponsorship agreement with a supplier of items of food and/or beverages, the Caterer will, to the maximum extent permitted by law:**

- (a) not sell at the Properties items of food and/or beverages manufactured or supplied by a competitor of the sponsor; and;**
- (b) where in the opinion of the Caterer it is appropriate for the specified purpose, sell at the Properties the items of food and/or beverages of the sponsor, provided that the items of food and/or beverages are supplied to the Caterer under trading terms and conditions which are competitive with alternative products and that the items of food and/or beverages are leading brands in their field."**

The Zoos attract approximately 1,200,000 visitors per annum. In 2008, independent surveys were conducted for the Zoos Board of visitor behaviour, including of purchases of food and beverages:

- At the Melbourne Zoo (approx 750,000 visitors pa), 70% of surveyed visitors were observed having either a meal or a snack at the zoo in the course of their visit. These were especially visitors with families and for visits longer than 3 hours. 29% of these visitors (predominantly families) brought food from outside the zoo. The average expenditure per visitor on food and beverage was \$13.60, covering many items which are not the subject of the notified conduct.<sup>3</sup>
- At Healesville sanctuary (approx 300,5000 visitors pa), 64% of surveyed visitors were observed having either a meal or a snack at the zoo in the course of their visit. Approximately 39% of these visitors brought food from outside the zoo. The average expenditure on food and beverage per visitor was \$9.02.<sup>4</sup>

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<sup>3</sup> Survey, July 2008, conducted by Merchantwise Pty Ltd for Zoos Victoria.

<sup>4</sup> Survey, Oct 2008, conducted by Merchantwise Pty Ltd for Zoos Victoria.

**7. Further information**

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

**Lawrence Tai**

**Chief Financial Officer, Zoos Victoria**

**PO Box 74, Parkville Vic 3052**

**Telephone: (03) 9285 9313**

**Beverley Beer**

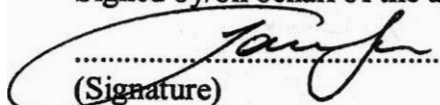
**Catering Contracts Coordinator, Zoos Victoria**

**PO Box 74, Parkville Vic 3052**

**Telephone: (03) 9285 9313**

Dated..... 22 September 09 .....

Signed by/on behalf of the applicant

  
.....  
(Signature)

.....  
LAWRENCE TAI  
.....  
(Full Name)

.....  
ZOOLOGICAL PARKS & GARDENS BOARD .  
.....  
(Organisation)

.....  
CHIEF FINANCIAL OFFICER  
.....  
(Position in Organisation)