

6 May 2009

Richard Chadwick  
General Manager  
Australian Competition and Consumer  
Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

FILE No:	
DOC:	
MARS/PRISM:	

Dear Mr Chadwick

**Coles Supermarkets Australia Pty Ltd notification lodged under section 93 of the Trade Practices Act 1974**

We act for Coles Supermarkets Australia Pty Ltd (Coles)

We enclose a notification in respect of conduct which may raise issues under the third-line forcing provisions of the *Trade Practices Act* (1974) (Cth) (the **Act**).

We enclose:

- a completed Form G in respect of the notification; and
- a cheque for \$100 being the fee for lodgement of the notification of the third line forcing conduct.

Please note that confidentiality is claimed for the information provided in items 3(b)(i) and (ii) of the Form G on grounds that this information is commercially sensitive. We request that this information be excluded from the public register.

We note, for your information, that Coles Group entities have previously lodged third line forcing notifications in respect of similar conduct associated with the FlyBuys loyalty program, including those lodged on:

- 18 May 2005; and
- 13 October 2003.

These previous notifications related to the use of particular credit cards. This new notification simply relates to a Coles customer becoming a FlyBuys member (at no cost) in order to obtain associated loyalty benefits.

Please do not hesitate to contact us should you require any further information or if you have any queries about the notification.

Yours sincerely

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Freehills

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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.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

### 1. Applicant

(a) **Name of person giving notice:**

N93975 Coles Supermarkets Australia Pty Ltd (**Coles**) (ABN 45 004 189 708)

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

Operation of retail supermarkets throughout Australia.

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

c/- Chris Jose  
Partner  
Freehills  
101 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:**

This notice concerns:

Loyalty program services to any person (a 'customer'). The loyalty program services will include:

- (1) (a) awarding loyalty points to a customer related to eligible transactions made by a customer;  
(b) notifying Loyalty Pacific Pty Ltd (**Loyalty Pacific**) of loyalty points earned by a customer; and  
(c) issuing periodic loyalty points statements to customers.
- (2) Bonus loyalty points offered or awarded to customers as a result of promotional or incentive programs initiated from time to time.
- (3) Additional benefits or privileges including gift cards, discount vouchers, discounts, other rewards and the ability to participate in competitions, offered or awarded to customers as a result of promotional or incentive programs initiated from time to time.

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

The proposed conduct involves Coles supplying, or offering to supply, some or all of the loyalty program services to customers on condition that customers become members of the FlyBuys program operated by Loyalty Pacific.

Attached to this form is a promotional flyer providing further details of the conduct.

*(See Direction 4 on the back of this Form)*

**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:**

Persons who are or who may become members of the FlyBuys loyalty program.

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

**(i) At present time:**

Confidential.

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

Confidential.

**(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:**

See Attachment A – section 2.

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

See Attachment A – section 2.

**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):

The services described at 2(a) will be supplied in the context of the market(s) for:

- the supply of goods to retail customers in Australia.
- the supply of loyalty program services and rewards to retail customers in Australia.

**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:**

See Attachment A – section 2.

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

See Attachment A – section 2.

**7. Further information**

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

c/- Chris Jose  
Partner  
Freehills  
101 Collins Street  
Melbourne VIC 3000

Dated.....6 May 2009.....

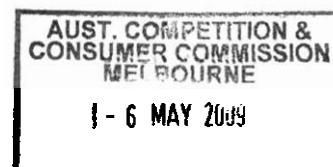
Signed by/on behalf of the applicant

.....  
(Signature)

.....  
(Full Name)

.....  
(Organisation)

.....  
(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.

# **Attachment A**

## **1 Background**

The possible third line forcing conduct of Coles arises out of loyalty arrangements pursuant to which Coles customers who become FlyBuys members will be offered a variety of promotional benefits or privileges including gift cards, discount vouchers, discounts, other rewards and the ability to enter into competitions.

The FlyBuys loyalty program is operated by Loyalty Pacific and it is free for consumers to join. Members of the FlyBuys program can redeem FlyBuys points for a wide variety of FlyBuys awards, including accommodation, tickets to shows, meals at restaurants, shopping vouchers and many other goods and services. Holders of a FlyBuys card will be awarded loyalty points related to eligible transactions where the FlyBuys card is presented and accepted.

During the promotional period presently contemplated by Coles (in addition to standard FlyBuys points) points or credits are to be allocated a monetary value and at the end of the promotional period that value is loaded on to a Coles gift card which can be used by the customer. Each eligible transaction also entitles the customer to entry into a game of chance in which they could win \$100,000 (this will be drawn weekly for a ten week period).

Eligible transactions for the purposes of the promotion are limited to transactions made at participating Coles Group outlets (being some of the stores of companies in the Coles retail group that currently participate in the FlyBuys program).

## **2 Public benefits**

Loyalty programs which award points to consumers associated with purchases at designated stores are widespread throughout Australia and around the world. We submit that the notified conduct is likely to result only in:

- benefits to Coles customers of the opportunity to earn and use FlyBuys points and potentially bonus FlyBuys points during eligible transactions; and
- benefits to Coles customers of the opportunity to receive periodic promotional benefits and privileges including gift vouchers, discount vouchers and entries to competitions.

We submit that, as with the conduct the subject of the existing notifications, there is no conceivable detriment to the public that is likely to result from the conduct. Consumers are completely free to choose whether or not to become a member of the FlyBuys program in order to accrue loyalty points and whether or not they wish to take advantage of the associated promotional benefits or privileges.

# Giant Gift Card Giveaway



Simply shop and you could earn a Coles Gift Card of \$5, \$10, \$20, \$50, \$100 or more!

**Earn** 1 Gift Card Credit for every \$1 spent, when you spend \$30 or more in one transaction. The more you shop, the more you earn.

the value of your Coles Gift Card when you buy products carrying this symbol.



**Register** at [coles.com.au/giveaway](http://coles.com.au/giveaway) or pick up a registration form in-store.

**Promotion period May 7 to July 31, 2009**

**Be part of the Giant Gift Card Giveaway.**

**Here's how:**



**Register now**

Register at [coles.com.au/giveaway](http://coles.com.au/giveaway) or pick up a registration form in-store.



**Go shopping**

Shop from May 7 to July 31, 2009 and earn credits towards a Coles Gift Card every time you spend \$30 or more in one transaction.



**Gift Card Boosters**

Look out for products carrying this symbol to boost the value of your Coles Gift Card.



**Show your FlyBuys card**

Present your card at the checkout.



**Earn a Coles Gift Card**

The more you shop, the greater the value of your Coles Gift Card. Cards will be mailed after July 31, 2009.

Giant Gift Card Giveaway Promotion 1. Promotion Conditions and exclusions apply. 2. Standard catalogue terms and conditions apply. 3. For full terms and conditions see [www.coles.com.au/giveaway](http://www.coles.com.au/giveaway). 4. Australian state residents (excl Tas) aged 18yrs and over may enter if a FlyBuys Member. 5. "Gift Card Credits" available on all transactions (excl tobacco & gift cards) over \$30 at all Coles, BI-LO, Pick 'n Pay, Coles Express, Liquorland, Liquorland Express stores and Coles Online (Eligible Purchase). 6. During the Promotion, participants may also be offered bonus "Gift Card Credits" on purchases in Coles, BI-LO, Liquorland, Liquorland Express and Pick 'n Pay stores. 7. Total "Gift Card Credits" loaded onto a Coles Gift Card at end of promotion and sent to FlyBuys Primary cardholder. 8. Total "Gift Card Credits" less than \$5 will not be awarded a Coles Gift Card. In addition, standard FlyBuys points apply. 9. Promotion period: from 02.00am (AEST) 07/05/09 to 11.59pm (AEST) 31/07/09. 10. "Gift Card Credits" and Coles Gift Cards are non transferable or exchangeable. 11. The Promoter is Coles Supermarkets Pty Ltd (ABN 45 004 189 708) of 800 Toorak Road, Tooronga, Victoria 3146. 12. Rainchecks not available for bonus "Gift Card Credits".