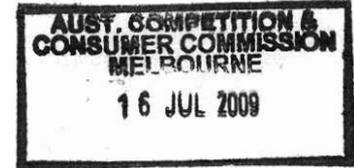


16 July 2009

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BY HAND

Dr Richard Chadwick
General Manager – Adjudication Branch
Australian Competition & Consumer Commission
GPO Box 3131
Canberra ACT 2601



Dear Sir

Notification of third line forcing conduct

FILE No:
DOC:
MARS/PRISM:

We act on behalf of Fonterra Brands Australia Pty Ltd (ABN 80 095 181 669) (**Fonterra**).

We enclose:

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

In order to minimise the risk of contravening sections 47(6) and (7), and out of an abundance of caution, our client wishes to notify conduct under section 93(1) of the TPA. The conduct is set out in the attached Form G.

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

Yours faithfully
MINTER ELLISON



Geoff Carter
Partner

Contact: Simone Cooper Direct phone: +61 3 8608 2137 Direct fax: +61 3 8608 1017
Email: simone.cooper@minterellison.com
Partner responsible: Geoff Carter Direct phone: +61 3 8608 2168
Our reference: SDC GRC 30-6155210

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:

N94044 *Fonterra Brands (Australia) Pty Ltd (ABN 80 095 181 669) (Fonterra)*

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

Fonterra is a manufacturer and distributor of dairy products, including dairy spreads. Fonterra's brands include Mainland, Bega, Western Star, Brownes, Perfect Italiano, Anlene and Connoisseur.

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

*C/- Geoff Carter
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:

The supply of Fonterra's 'Western Star Original' dairy spread through distributor Metcash Trading Limited (Metcash), and George Weston's Tip Top muffins to Ritchies Supermarkets in Victoria.

(b) Description of the conduct or proposed conduct:

For two non-consecutive weeks (in August and/or September 2009) (Promotion Period) Fonterra will supply or offer to supply its 'Western Star original' 375g spreadable dairy spread to Ritchies Supermarkets (through Metcash) and offer Ritchies Supermarkets a 'redemption' for all consumer purchases of bundled 'Western Star original' 375g spreadable dairy spread and George Weston English Breakfast Tip Top muffins.

This conduct might be characterised as Fonterra:

- *giving or offering to give or allow, a rebate or credit in relation to the supply or proposed supply of 'Western Star original' to Ritchies Supermarkets (through Metcash) on the condition that Ritchies Supermarkets will acquire English Breakfast Tip Top muffins from George Weston; or*
- *refusing to give or offer to give a rebate or credit in relation to the supply or proposed supply of 'Western Star original' to Ritchies Supermarkets (through Metcash) for the reason that Ritchies Supermarkets has not acquired or not agreed to acquire English Breakfast Tip Top muffins from George Weston.*

Fonterra appreciates that the conduct described above could potentially be construed as falling within the prohibitions contained in section 47(6) and 47(7) of the Trade Practices Act 1974 (Cth) (TPA). Accordingly, it wishes to notify the conduct under section 93(1) of the TPA

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:

(i) *Metcash;*

(ii) *Ritchies Supermarkets in Victoria;*

(there are 35 stores in Victoria)

(iii) *consumers who purchase Western Star original*

(b) Number of those persons:

(i) At present time:

substantially in excess of 50

(ii) Estimated within the next year:

Not applicable

(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 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 will not adversely affect competition in any relevant market and the conduct in question will result in public benefits and no identifiable public detriment.

The notified conduct comprises the offer of benefits on the optional acquisition of goods from Fonterra to Metcash on behalf of Ritchies Supermarkets who wish to

take part in the consumer promotion. The conduct in no way limits the genuine choice of Metcash or Ritchies Supermarkets in choosing whether to acquire any goods from Fonterra, or end consumers choice of dairy spreads. By retaining the genuine choice of consumers, the conduct is not inherently anti-competitive.

Moreover, the notified conduct is pro-competitive and will generate a number of public benefits, as:

- end consumers acquiring the bundled 'Western Star original' and English Breakfast Tip Top muffins during the Promotion Period will do so at a discounted price; and*
- it will encourage other dairy distributors and manufacturers to offer similar value-added benefits, thereby encouraging competition in the relevant markets.*

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

See above

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):

Adopting a conservative approach to market definition, we consider the relevant markets to be for the wholesale supply and distribution of dairy spreads in Victoria and the retail supply of dairy spreads in Victoria. We consider the effect of the notified conduct on competition in each of these markets in turn.

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 proposed conduct will have any adverse effect on competition in any relevant market. There will be no detriment in any of the relevant markets. The conditional supply to Metcash on behalf of Ritchies Supermarkets with rebates for Western Star Original dairy spread is for a limited duration – the Promotion Period. Ritchies will receive rebates on the basis of store scan data of end consumers purchases of the bundled Western Star Original dairy spread and George Weston's Tip Top English muffins during the Promotion Period.

During the Promotion Period end consumers will be able to purchase the bundled goods for a low price. Consumers remain free to purchase the Western Star original and the Tip Top English muffins separately (ie not bundled). Further, consumers remain free to purchase Fonterra's Western Star Original dairy spread

and George Weston's Tip Top English muffins from other retail stores (ie non Ritchies Supermarkets).

There is no restriction on Ritchies Supermarkets offering benefits, discounts or any other incentives to consumers purchasing dairy spreads, whether Fonterra products or otherwise. Overall, the effect of the conduct, discussed above, in the relevant markets is of net public benefit.

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

Not applicable

7. Further information

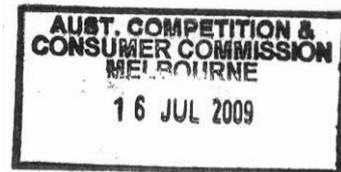
- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

*C/- Geoff Carter
Minter Ellison Lawyers
525 Collins Street
MELBOURNE VIC 3000*

Dated 16 July 2009

Signed by/on behalf of the applicant


(Signature)
Geoff Carter <i>Geoff Carter</i>
(Full Name)
Minter Ellison Lawyers
(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