

## 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:  
(Refer to direction 2)

Clark Rubber Franchising Pty Ltd ACN 065 708 723

- (b) Short description of business carried on by that person:  
(Refer to direction 3)

Clark Rubber Franchising Pty Ltd (**Clark Rubber**) is the franchisor of the “Clark Rubber” franchise network.

Clark Rubber franchised stores sell a range of products such as foam and foam products, rubber and rubber products, swimming pools, spas, pool chemicals and recreational items such as outdoor furniture and pool toys, predominantly to retail customers. Clark Rubber franchised stores may also operate mobile pool service vehicles.

Clark Rubber currently has 75 franchised stores. Each franchised store is operated by an independent operator (**Franchisee**) pursuant to a written franchise agreement (**Franchise Agreement**).

Clark Rubber does not have any corporate stores.

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

Administration Building, 254 Canterbury Road, Bayswater, Victoria 3153

#### 2. Notified arrangement

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

This notification relates to Clark Rubber’s requirement that Franchisees purchase specified goods and services from specified suppliers.

## Products

In order to ensure, among other things, consistency across the Clark Rubber network, Clark Rubber has identified a list of products to be stocked in Clark Rubber retail stores (**Products**). The list of Products has been determined by Clark Rubber after many years of research and consideration and is aimed at providing a quality, consistent product offering throughout the Clark Rubber network, regardless of where a store is located. The list of Products consists of a list of products considered necessary by Clark Rubber to operate a Clark Rubber franchised business. The list is very broad and includes foam and foam products, rubber and rubber products, pools, spas, pool chemicals and recreational items such as outdoor furniture and pool toys. Franchisees are not required to stock all Products, but must be able to supply customers with certain Products designated by the Franchisor as “Core Range” products.

## Approved Suppliers

Noting the importance of ensuring a consistent supply of products, Clark Rubber Franchising has broken the “Products” list into two categories – Class A Products and Class B Products. The Franchisee must not sell any product in its business that is not either a Class A Product or a Class B Product.

Franchisees must purchase all Class A Products directly from Clark Rubber. As at the date of this notification, there are no Class A Products, however it is anticipated that Clark Rubber may commence wholesale operations in the future at which time it will nominate Class A Products.

Franchisees must purchase all Class B Products only from suppliers that Clark Rubber has approved in writing (**Approved Suppliers**). Clark Rubber has identified a number of suppliers that are able to provide sufficient quantities of products that meet Clark Rubber’s specifications. In some instances, Clark Rubber has been able to negotiate favourable purchasing terms with such suppliers, due to the combined purchasing power of the group. This has, in some cases, resulted in lower overall costs to Franchisees or rebates to Clark Rubber, Franchisees or the system.

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

### Proposed conduct

Clark Rubber proposes to require all Franchisees to purchase all Class B Products from Approved Suppliers. While there is some scope in the Franchise Agreement for Franchisees to identify alternative suppliers, Clark Rubber proposes to have final say over all products and suppliers and desires to ensure that all Franchisees are required to stock Products and use Approved Suppliers unless otherwise agreed in writing by Clark Rubber.

## The Franchise Agreement

Under the terms of the current, standard form Franchise Agreement, Franchisees have various obligations. In particular, pursuant to:

- clause 6.9(b), franchisees must purchase all Class B Products only from such suppliers that have been first approved by Clark Rubber in writing;
- clause 6.9(d), franchisees must only sell and dispose of Class A Products and Class B Products in the operation of their business; and
- clause 6.9 (f), at any time during the term of the Franchise Agreement, franchisees must be able to supply “Core Range 1” Products and during the summer season, “Core Range 7” Products. “Core Range 1 Products” and “Core Range 7 Products” are specified by the Franchisor on the franchise point of sale system from time to time.

The full text of clause 6.9 is included as Annexure A to this notification.

All older style franchise agreements that are still in use in the Clark Rubber system also contain similar wording to the wording included in clause 6.9 of the current Franchise Agreement.

*(Refer to direction 4)*

### **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:  
*(Refer to direction 5)*

Clark Rubber Franchisees

Approved Suppliers

- (b) Number of those persons:

- (i) At present time:

Franchisees: 75

Approved Suppliers: 73

- (ii) Estimated within the next year:

Franchisees: 85

Approved Suppliers 75

*(Refer to direction 6)*

- (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:  
(Refer to direction 7)

The purpose of this arrangement is not to substantially lessen competition. Rather, the proposed arrangement will enhance the capacity of franchisees, as small businesses, to compete with larger businesses.

The proposed arrangement will be likely to have the following benefits:

Franchisees will have access to Class B Products at competitive prices due to the established supply relationships between Clark Rubber and the Approved Suppliers. This will allow Franchisees to offer favourable prices to the end consumer and establish a competitive advantage. It will also allow for a consistent retail image and product standard throughout the network of Clark Rubber businesses.

- The proposed conduct is likely to foster business efficiency as Franchisees have a defined source of access to a range of Products of a consistent standard which gives them more time to focus on operating their business. This may provide a competitive advantage.
- The proposed conduct will give Clark Rubber more bargaining power when negotiating prices with the Approved Suppliers which may have a flow-on effect to franchisees and the end consumer.
- The proposed conduct allows Clark Rubber to focus on controlling quality which ensures that end consumers are provided with products of a consistent standard that meet the promise of the Clark Rubber brand and the franchisees as to the content and quantity of the particular product. For instance, the proposed conduct allows Clark Rubber to only enter into arrangements with suppliers that provide sufficient warranties and who have products that comply with requisite standards. By ensuring minimum standards in its supply terms, Clark Rubber is able to minimise the likelihood of a franchisee having problems with products it has purchased.
- The proposed conduct ensures that franchisees purchase the Products from appropriately accredited Approved Suppliers and not from unapproved manufacturers or suppliers.
- Approved Suppliers will have certainty of supply and quantities of supply to franchisees which may result in:
  - cost savings in the management of their businesses;
  - increased business efficiency; and
  - promotion of competition among Approved Suppliers.

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

These benefits are self-evident. Clark Rubber has undertaken significant due diligence to identify and determine a list of Products and to determine suppliers that are able to provide such products in accordance with the Clark Rubber network's requirements. Clark Rubber believes that the Products best meet the requirements of the Clark Rubber network and that the Approved Suppliers are best able to provide such products so as to ensure consistency across the network and also to achieve desirable efficiencies and the best price (on the whole) for Franchisees.

**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): *(Refer to direction 8)*

The markets that could potentially be affected are quite broad, but can reasonably be identified as:

- The broad wholesale market for the sale of foam, foam products (including bedding), rubber and rubber products.
- The broad retail market for the sale of foam, foam products (including bedding), rubber and rubber products.
- The broad wholesale market for the sale of pools, spas and pool chemicals.
- The broad retail market for the sale of pools, spas and pool chemicals.
- The broad wholesale market for the sale of recreational items such as outdoor furniture and pool toys.
- The broad retail market for the sale of recreational items such as outdoor furniture and pool toys.

Each of the above markets is characterised by a relatively large number of participants at the relevant wholesale and retail levels.

## 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:  
(Refer to direction 9)

Clark Rubber contends that there are no substantial public detriments of the proposed arrangement. Any anti-competitive effects on suppliers of foam, foam products, rubber, rubber products, pools, spas, pool chemicals and recreational items will be minimal due to the number of potential purchasers of their products. Further, the Franchise Agreement provides scope for such suppliers to be listed as Approved Suppliers provided that their products meet certain standards and Clark Rubber can otherwise agree to trading terms.

The anti-competitive effect on the end consumer is negligible, as it will not ultimately prohibit consumers from comparing prices and products for the following reasons:

- retailers which offer foam, foam products, rubber, rubber products, pools, spas, pool chemicals and recreational items in the relevant retail markets are numerous in Australia; and
- there is a minimal (if any) barrier to entry at retail level because of the volume of retailers in Australia which offer the products in the relevant retail markets (e.g. hardware stores, department stores, soft furnishing stores, discount stores, bulky goods retailers).

Clark Rubber contends that the proposed arrangements will have a negligible effect on competition within the relevant markets and that the public benefits resulting from the proposed conduct outweigh any public detriments caused by the conduct.

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

Not relevant.

## 7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:  
Stephen Giles  
Norton Rose  
RACV Tower  
485 Bourke Street  
Melbourne VIC 3000  
(03) 8686 6000

Dated..... 22<sup>nd</sup> September 2010 .....

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.

EXCLUDED FROM  
PUBLIC REGISTER

**Annexure A - Confidential**