



Australian
Competition &
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Commission

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Our Ref: N31363
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<Address>

Dear <Salutation>

Third line forcing notifications lodged by The Cheesecake Shop (N31363, N94106, N94154 and N94155)

I refer to your concerns regarding the exclusive dealing (third line forcing) notifications relating to The Cheesecake Shop (TCS) franchise system.

The notified conduct

In March 2005 TCS lodged a notification for third line forcing conduct whereby it will supply franchisees with a franchise on condition that the prospective franchisees purchase readymade products and ingredients for the manufacture of self-baked products from United Network Suppliers (UNS), QFD Pty Ltd (QFD) or Statewide Pty Ltd (Statewide).

In September 2009 M.R.M Pty Ltd lodged a notification for third line forcing whereby it will require TCS sub-franchisees located within their respective Master Franchise Territory to only use authorised ingredients to bake authorised products, and to only buy those authorised ingredients and ready-made products from the UNS.

Concerns raised

You have raised a number of concerns with the ACCC both in writing and in a meeting attended by ACCC staff. In particular, the concerns raised are as follows:

- The price of the products supplied by the UNS is inflated and does not represent the market price.
- The price of UNS products is inflated in order to provide a return to TCS.

The relationship between TCS and the UNS.

- UNS products are essentially branded products which have been repackaged with its own brand. Equivalent products can be purchased from alternate suppliers at a cheaper price, however, TCS is not willing to approve alternate suppliers.
- TCS changes the authorised ingredients from time to time without notifying franchisees.
- The UNS offers only one delivery per week with no back up service.

Response from TCS

As you are aware, the ACCC sought further information from TCS about the notified conduct. A copy of TCS's response is available from the ACCC's public register. In particular:

TCS advises that its prices are competitive and provided confidential data supporting its claim that a basket of goods purchased from the UNS is comparative to the same basket of goods purchased from a competing supplier. TCS submits that the prices must be looked at in conjunction with other aspects of the franchise system including continuity of supply and maintaining quality and safety standards across the network.

TCS is concerned with the long term viability of the franchise system and considers that a strong contractual relationship with its supplier ensures reliability and stability for all franchisees.

The notified conduct allows TCS to control product quality and safety ensuring consistency in the end product across the franchise system. TCS advises that it undertakes extensive lab testing of specific products and acquiring products from multiple suppliers would result in inefficiencies particularly with respect to the lab testing process, and it would be difficult for TCS to adequately monitor product specifications.

- TCS advises that its senior management regularly reviews its supply arrangements and has established a process for franchisees to lodge product complaints about a specific product. TCS advise that while they will not generally approve alternate third party suppliers, TCS will approve alternate suppliers in urgent situations so as not to disadvantage its franchisees while it investigates specific concerns with supply arrangements. TCS has provided examples of where it has approved alternate suppliers on a short term basis.

TCS's stock ordering and deliver system provides consistency and efficiencies for franchisees.

- The UNS is effectively run as part of the TCS system.

Outcome of the review of the notifications

The ACCC may revoke a third line forcing notification if it is satisfied that the likely benefit to the public from the conduct does not outweigh the likely detriment to the public from the conduct.

The ACCC accepts that third line forcing notifications lodged in respect of franchise arrangements will restrict the franchisees' freedom to choose with whom, in what or where they deal. However, third line forcing in franchise situations may give rise to a number of benefits, including maintaining the quality and consistency of the end product, and delivering cost savings to franchisees.

The ACCC accepts that while individual franchisees may be able to source some products from alternate suppliers at a cheaper price than the nominated supplier, the use of nominated suppliers in franchise systems can enable the negotiation of a cheaper overall price for a basket of goods. Further, the use of nominated suppliers can maintain consistency and quality of end product and provide an efficient ordering system.

Therefore on balance, the ACCC is satisfied that the public benefits from the arrangements continue to outweigh the public detriments.

The ACCC does not intend to take any further action in relation to the notifications at this stage. However, please note that, as with any notification, the ACCC may act to remove the immunity afforded by the notifications at a later stage if it is satisfied that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct.

I note that you have raised some specific concerns about your commercial relationship with TCS. You may wish to raise these specific concerns directly with TCS in writing. Information provided by TCS suggests that it does receive, and respond to, specific concerns raised by individual franchisees. Otherwise, you may wish to consider utilising the dispute resolution process provided for in the Franchising Code of Conduct. More information can be found on the ACCC's website at <http://www.accc.gov.au/content/index.phtml?itemId=865542>.

If you wish to discuss any aspect of this matter, please do not hesitate to contact Monica Bourke on (02) 6243 1351.

Yours sincerely



Dr Richard Chadwick
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Adjudication Branch