

Our ref: RT:2201450

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Dear Anthony and Penny,

Bakers Delight Holdings Limited - Application for authorisation AA1000650 – Response to Submissions

1. We refer to the two submissions on the public register received from two interested parties both of whom are Bakers Delight franchisees.
2. This letter intends to address the concerns and issues raised in the submissions.
3. Bakers Delight reiterates its view that the public benefits gained by the Proposed Conduct with respect to consumers and in the competitive retail bread market outweigh the public detriment. This submission will not address these aspects again given that the submissions only raise concerns that are specific to franchisees.
4. Bakers Delight emphasises that its main objective in setting the price tiers is ensuring that the current pricing behaviours for Promotion Discounts remain unchanged, and that:
 - (a) Bakers Delight does not wish to engage in the Proposed Conduct, and the Proposed Conduct is only necessary to address a limitation in the new POS system. Bakers Delight does not take issue to franchisees selecting the price of Promotion Products and indeed Individual Products; and
 - (b) by maintaining the status quo of prices, there will be minimal changes to:
 - (i) the profit and sales of Bakers Delight Bakeries; and
 - (ii) the price of Promotion Discounts for consumers;
 - (c) in trying to maintain the status quo, Bakers Delight acknowledges that it will not accommodate every price deviation that currently exists. Promotion Discounts are deviated on average by 36 Bakers Delight Bakeries, with the highest recorded

number of deviations for a particular Promotion Discount being 121 deviations out of a total of 509 Bakers Delight Bakeries. The Proposed Conduct is intended to accommodate for price deviations, whilst balancing the need to minimise costs and disruption to the Bakers Delight Bakeries that do not price deviate and therefore do not directly benefit from the introduction of the price tiers.

5. Capitalised terms in this letter have the same meaning as in the Application.

Submission dated 25 September 2023

6. Franchisees retain the ability to select prices for Promotion Discounts, but will be limited when exercising their discretion. The Proposed Conduct is required because it is not cost-effective or practical to allow franchisees an unfettered discretion to select any price. The Proposed Conduct will be limiting the franchisees to a choice of five different tiers which will encompass approximately 80% of all current pricing deviations in the Bakers Delight Network of 509 Bakeries. In this sense, the status quo will be maintained.
7. This submission has misunderstood the Proposed Conduct that Bakers Delight is requesting Authorisation to engage in. The Proposed Conduct will involve:
- (a) the implementation of five price tiers for each Promotion Discount; and
 - (b) each franchisee selecting a price tier for each Promotion Discount.
8. It is not correct that franchisees will be selecting one price tier that will be applied across all Promotion Discounts as this submission has alleged.
9. Franchisees can select a price tier for each Promotion Discount that is similar to the current price of each Promotion Discount because the price tiers will encompass approximately 80% of existing price deviations.
10. An example of the Proposed Conduct is as follows:

	Price tier 1	Price tier 2	Price tier 3	Price tier 4	Price tier 5
Promotion Discount A	\$4.50	\$4.90	\$5.00	\$5.20	\$5.50
Promotion Discount B	\$7.00	\$7.20	\$7.50	\$7.80	\$8.00
Promotion Discount C	\$3.00	\$3.10	\$3.20	\$3.30	\$3.40

11. For clarification, the introduction and implementation of the new POS system has not been 'rushed out'. Bakers Delight has extensive experience in sourcing technology, including point of sale systems, and in negotiating supply arrangements with a variety of suppliers. Bakers Delight has a robust tender process that suppliers must go through in order to become approved suppliers or nominated suppliers. The process commenced 18 months ago and during this period Bakers Delight invested significant resources in assessing the options available in the relevant markets it operates. Bakers Delight is uniquely placed to assess the suitability of technology for the Bakers Delight Network on both a functional and economical basis. By way of background:
- (a) Bakers Delight initially completed a comprehensive review of all POS system vendors and identified more than 10 vendor products that were suitable;

- (b) three POS systems were shortlisted. These systems underwent intense scrutiny and detailed costings analysis before it was decided that the new POS system vendor was the most suitable;
 - (c) there are significant benefits of the POS system, in particular, additional features and improvements including integrated payment gateway, more secure payment options, better layout and user interface and more customer support from the supplier;
 - (d) the limitation associated with Promotion Discounts was only discovered a few months after the contract was entered into by Bakers Delight and the new POS system vendor;
 - (e) Bakers Delight then considered what the most cost-effective solution would be after consulting with its legal advisers, including obtaining an opinion from a barrister, completing a cost-benefit analyses of the situation and then working alongside the ACCC in submitting this Application.
12. Franchisees previously raised issues about the current POS system on a number of occasions, and cited issues regarding the lack of integration with the loyalty program and performance reliability. The new POS system introduces a whole range of benefits compared to current POS system which are detailed in paragraph 8 of our submission letter titled 'Applicant's response to ACCC's request for information' dated 22 September 2023.
13. It is Bakers Delight's view that:
- (a) the benefits of this new POS system far outweigh:
 - (i) the detriment associated with the limitation in relation to the Promotion Discounts; and
 - (ii) the costs associated with terminating the contract with the new POS system vendor and finding a new POS system solution;
 - (b) the limitation associated with the Promotion Discounts will be addressed and minimised by way of the Proposed Conduct.

Submission dated 9 October 2023

Mandatory Promotion Discounts

14. Under the Franchise Agreement, Bakers Delight has sole discretion in determining the list of products which may be sold by a Bakers Delight Bakery ('Bakers Delight Menu') including what specific combinations of products will constitute a Promotion Discount. Bakers Delight is not required to consider feedback or input from franchisees when determining the Promotion Discounts.
15. In determining what constitutes a Promotion Discount (and the RRP of the Promotion Discount), Bakers Delight prioritises the combination of products that would likely increase revenue of Bakers Delight Bakeries. It is in the best interests of Bakers Delight and Bakers Delight Bakeries to ensure that Promotion Discounts will generate revenue because Bakers Delight receives royalties from Franchised Bakeries which are calculated on net sales.
16. Bakers Delight has no intention to arbitrarily introduce more mandatory Promotion Discounts, and views that this submission's concerns are unfounded.

17. Bakers Delight respectfully declines the submission's suggestion that all Promotion Discounts be made optional. The foundation and essence of the Bakers Delight System is the adherence by franchisees to Bakers Delight's standards and policies providing for the uniform operation of all Bakers Delight Bakeries, including but not limited to selling only those products on the Bakers Delight Menu and Promotion Discounts. Customers will have inconsistent shopping experiences with Bakers Delight if there is no uniformity in the Bakers Delight Menu and mandatory Promotion Discounts that are offered at every Bakers Delight Bakery.
18. Under the Proposed Conduct Franchisees can select whichever price tier that suits their needs. At price tier 5 the price will be high enough to effectively eliminate the discount that is offered by grouping the Individual Products (priced at the RRP) into the Promotion Discount.
19. Dispute resolution mechanisms already exist in the Bakers Delight franchise system. Franchisees who wish to raise their concerns may do so under:
 - (a) the dispute resolution process as set out in their franchise agreement; and
 - (b) Schedule 1, Part 4, Division 3 of the Franchising Code.
20. Furthermore, Bakers Delight will comply with good faith obligations under the Franchising Code in relation to all aspects of the transition to the Proposed Conduct, including the introduction of further mandatory Promotion Discounts and the pricing of the five price tiers.

Promotion Discount Price Tiers

21. At the time of submitting the Application Bakers Delight had not finalised its guidelines as to how it would set the proposed price tiers. The proposed pricing tier attached to the October submission was a draft copy. Finalising the price tiers of all Promotion Discounts is a resource-intensive process.
22. Bakers Delight submits that the guidelines for setting the price tiers will be finalised shortly, and anticipates that the guidelines will be substantially the same as the information previously provided in the Application and in further responses to the ACCC, in that:
 - (a) there will be five price tiers:
 - (i) Tier 1 – a price below the RRP of the Promotion Discount;
 - (ii) Tier 2 – the RRP; and
 - (iii) Tiers 3 – 5 – three price tiers that are above the RRP.
 - (b) the overarching consideration will be that the five price tiers will reflect 80% of all existing Promotion Discount price deviations;
 - (c) to clarify, the spread of the price tiers will depend on current pricing patterns and therefore may not be in uniform or standard increments as this will not accurately reflect the pricing behaviour of Bakers Delight Bakeries;
 - (d) the spread of the price tiers will be determined based on the price of the RRP. Larger price increments (which may not be uniform increments) will apply where the RRP for a product is higher, and vice versa. For example, if the RRP is \$10.00 then there may be a spread of around \$1.00 between each price tier, and for a product with a RRP of \$4.00 there may be a spread of around \$0.25 between each price tier;

- (e) there is only a small percentage of price deviations below the RRP. Bakers Delight acknowledges the submission's comment that setting one price tier as the RRP and four price tiers above the RRP would be a more accurate representation of pricing behaviours, rather than to have one price tier below the RRP. Despite this, Bakers Delight intends to set a price tier below the RRP to enable Bakers Delight Bakeries to set a competitive price if it is appropriate in the circumstances.
23. Bakers Delight disagrees with the submission's claim that the Application does not disclose how many bakeries currently deviate prices. Schedule 4 of the Application contains de-identified data relating to Promotion Discounts including the number of Bakers Delight Bakeries that have deviated the price from the RRP of Promotion Discount and the actual deviation from the RRP. Per paragraph 4 above, it is in everyone's best interests that Bakers Delight selects price tiers that accurately reflects current pricing behaviour.
24. Paragraph 3.1(a)(iii) of the Application discloses the percentage of total sales of Promotion Discounts for an average Bakers Delight Bakery. This percentage is the total sales for the entire year, and accounts for key trading periods such as Christmas and Easter. The ACCC has therefore been provided with information as to the degree in which the Proposed Conduct will affect Bakers Delight Bakeries and consumers.
25. Bakers Delight does not agree with the suggestion that it should involve franchisees in setting the price tiers. This conduct will constitute cartel conduct under the CCA, in that there would be an understanding or agreement that the price of Promotion Products would be fixed, controlled or maintained.
- (a) Franchisees are reminded that they cannot discuss or come to an agreement with other Bakers Delight Bakeries about the price of Individual Products and Promotion Discounts.
- (b) Instead, Bakers Delight will set price tiers based on an analysis of the data on current pricing behaviours which is an objective approach which does not contain any element of collusion.
26. Bakers Delight acknowledges that the Proposed Conduct may limit the ability for a small amount of Bakers Delight Bakeries from achieving the largest possible profit. However, it does not view this to be the most compelling consideration because:
- (a) Bakers Delight is responsible for the interests of the Bakers Delight Network of which the majority does not deviate its prices;
- (b) due to a limitation to the new POS system, there is a positive correlation between the technology fees on-charged to all franchisees and allowing for greater discretion to deviate prices. It is therefore against the majority of franchisee's best economic interests to allow for complete freedom in pricing Promotion Discounts; and
- (c) the RRP is already set at a price that would allow for an average Bakers Delight Bakery to generate a profit, based on average sales of individual products and Promotion Discounts. Bakers Delight Bakeries can nonetheless select up to three price tiers above the RRP and can otherwise compete on factors other than the price of Promotion Products.

For the reasons above, it is Bakers Delight's view that the two submissions do not provide compelling reasons to disapprove of the Authorisation Application.

Please contact the writer if any further information is required or if you have any further queries.

Yours sincerely



Raynia Theodore

Principal

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