

# Deacons

AUST. COMPETITION &  
CONSUMER COMMISSION  
MELBOURNE

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21 November 2005

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Singapore  
Taiwan  
Thailand  
Vietnam

Our Ref: 2572435

FILE No:
DOC:
MARS/PRISM:

Dear Sir/Madam

#### Notification – Exclusive Dealing

We act for Grill'd Franchising Pty Ltd (ACN 116 019 231) (**Grill'd**).

We enclose a notification under section 93(1) of the *Trade Practices Act 1974*.

We also enclose a cheque for \$100, being the relevant fee for lodging a notification by a proprietary company in relation to conduct under section 47 of the Act.

Please do not hesitate to contact Greg Hipwell on 8686 6682 if you have any queries in relation to the enclosed notification.

Yours faithfully

  
Greg Hipwell  
Partner  
Deacons  
Direct line: 8686 6682  
Email: greg.hipwell@deacons.com.au

Encls

## Regulation 9

## FORM G

## COMMONWEALTH OF AUSTRALIA

*Trade Practices Act 1974 - Sub-section 93(1)*

## EXCLUSIVE DEALING

## NOTIFICATION

To the Australian Competition & Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(2), (3), (4), (5), (6) or (7) or paragraph 47(8)(a), (b) or (c) or (9)(a), (b), (c) or (d) of that Act in which the person giving notice engaged or proposes to engage.

(PLEASE READ DIRECTIONS AND NOTICE AT END OF FORM)

1. (a) **Name of person giving notice**

Grill'd Franchising Pty Ltd ACN 116 019 231 (**Grill'd**).

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

Grill'd intends to operate a business as franchisor to a network of franchisees which will operate businesses involving:

- (i) the preparation and retail sale of high quality low-fat burgers using fresh and healthy ingredients; and
- (ii) the retail sale of pre-packaged products, beverages and merchandise,

for consumption on and off premises (**Products**) under the Grill'd system and brand (**Grill'd Franchise**).

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

c/- Greg Hipwell, Partner, Deacons, Level 15, RACV Tower, 485 Bourke Street Melbourne VIC 3000

2. (a) **Description of the goods or services in relation to the supply or acquisition of which this notice relates**

The notification relates to the acquisition of certain Products which may incorporate or bear the distinctive "Grill'd" brand (**Grill'd Products**) which Grill'd requires the franchisee to purchase in order to operate a Grill'd franchised business. For example, the types of Grill'd Products may include beef and vegetable burger patties, burger buns and a range of relishes, sauces, mayonnaises and other condiments (including pre-packaged condiments).

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

**Background**

Simon Crowe, founded and developed the Grill'd concept and incorporated Grill'd Pty Ltd (ABN 17 106 297 394), a related entity of the franchisor, to open and operate the first Grill'd store in Hawthorn, Victoria 3122 in March 2004. Simon Crowe is the sole director and a shareholder of Grill'd Pty Ltd.

Assisted by Geoff Bainbridge and Simon McNamara who both have an interest in Grill'd Pty Ltd, Simon Crowe has developed a clearly defined format for the preparation and sale of the burgers and other menu items in a brightly coloured, contemporary and innovative store environment. The Grill'd concept is targeted primarily at a demographic of people aged 20 to 40 years who are health conscious and seek a healthier alternative to fast food products.

Grill'd Pty Ltd currently deals with specific designated suppliers in relation to the purchase of certain key products required for the preparation and sale of the burgers and other menu items (eg beef, lamb, chicken and vegetable burger patties, burger buns and a range of relishes, sauces, mayonnaises and other condiments). These supply arrangements are a crucial part of the Grill'd system in order to ensure that the stores deliver healthy burgers and associated products with a low-fat promise to customers.

In certain cases, the suppliers have been authorised by Grill'd Pty Ltd to use certain formats or processes devised by Grill'd Pty Ltd which may incorporate the "Grill'd" brand to manufacture and supply the burger products and other menu items (eg recipes to prepare the patties, bottled condiments etc).

Grill'd Pty Ltd currently operates a network of 4 Grill'd stores in Victoria. In addition to the store in Hawthorn, there are stores in Malvern, St Kilda and Windsor.

The franchisor entity, Grill'd, proposes to develop a network of Grill'd franchisees throughout Victoria and other States of Australia, each operating under the Grill'd brand and in accordance with the Grill'd system.

**Proposed conduct**

It is proposed that franchisees will pay an upfront fee of \$50,000 to Grill'd upon execution of the franchise agreement in return for which they:

- (i) are granted a Grill'd Franchise;
- (ii) receive access to quality Products at competitive prices from both Grill'd and nominated suppliers approved by Grill'd (**Approved Suppliers**) who supply certain types of Products that have been approved by Grill'd (**Approved Products**);

- (iii) receive access to quality Grill'd Products at competitive prices from nominated suppliers which have been licensed by Grill'd (or a related entity of Grill'd) to manufacture and supply the Grill'd Products (**Licensed Suppliers**); and
- (iii) receive initial training from Grill'd in relation to the operation of a Grill'd franchised business.

The conduct to which this notification specifically relates is the proposed supply arrangements with the Licensed Suppliers. It will be a condition of the standard Grill'd franchise agreement that franchisees acquire the Grill'd Products only from specified Licensed Suppliers. As noted above, Licensed Suppliers will be those suppliers that have been licensed by Grill'd or a related entity of Grill'd to manufacture and supply the Grill'd Products in Australia.

In addition, franchisees will be prohibited from using in the preparation of any item from the menu a Product that substitutes a Grill'd Product without the prior written approval of Grill'd.

Grill'd will provide its franchisees with the flexibility to seek the prior written consent of Grill'd to use and sell a Product that is not an Approved Product or a Product from a supplier who is not Grill'd or an Approved Supplier. Grill'd may not unreasonably withhold its consent if the franchisee complies with Grill'd's prescribed procedure for alternative Products and suppliers and satisfies Grill'd that the supplier and/or Product meets Grill'd's criteria. However, if the franchisee is seeking to use and sell a particular Product which is substitutable for a Grill'd Product, then Grill'd may withhold its consent in its absolute discretion.

These requirements are a critical part of the Grill'd system and format.

#### **Trade Practices Act: Exclusive Dealing**

Section 47(1) of the *Trade Practices Act 1974* (Cth) (**Act**) prohibits exclusive dealing. Section 47 outlines a number of proscribed practices which amount to exclusive dealing.

- (i) Sections 47(6) and 46(7)

It is arguable that the proposed conduct of Grill'd in requiring a franchisee to:

- (A) enter into a franchise agreement; and
- (B) acquire the Grill'd Products only from Licensed Suppliers,

would prima facie constitute exclusive dealing within the meaning of either sections 47(6) or 47(7) of the Act and, accordingly, would be prohibited under section 47(1) of the Act.

(ii) Sections 47(2)(d) and (47)(3)(d)

The proposed conduct may also prima facie constitute exclusive dealing within sections 47(2)(d) and (47)(3)(d) of the Act.

However, the purpose of the proposed conduct is not to substantially lessen competition within the relevant markets identified below.

Further, Grill'd maintains, as outlined below, that the proposed obligation to require franchisees to purchase and use Grill'd Products for the preparation and sale of burgers and other menu items is an integral part of the Grill'd format and contends that it will have a negligible effect on competition within the relevant markets.

Section 93 of the Act deals with the procedure by which corporations are entitled to obtain statutory protection in relation to exclusive dealing conduct which may otherwise contravene the prohibition in section 47.

In order for the immunity to be revoked, the Australian Competition and Consumer Commission (**Commission**), the Commission must be satisfied that the likely benefit to the public will not outweigh the likely detriment to the public as specified in section 93(3A) of the Act.

**Identification of the market**

The markets can be reasonably identified as:

- (i) the broad wholesale market for the sale of meat, meat products and meat substitute products in Australia;
- (ii) the broad wholesale market for the sale of bread and bread products in Australia;
- (iii) the broad wholesale market for the sale of condiments in Australia; and
- (iv) the broad retail market for the sale of takeaway fast food and fast food restaurants in Australia; and
- (v) the broad retail market for the sale of condiments in Australia.

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

**Public Benefits**

- (i) Franchisees and consumers

The proposed conduct is likely to have the benefits listed below for the Grill'd franchisees and end consumers:

- (A) Franchisees will have guaranteed access to Grill'd Products at competitive prices due to the established

supply relationships between Grill'd's related entity, Grill'd Pty Ltd, and the Licensed Suppliers. This will allow franchisees to offer favourable prices to the end consumer and establish a competitive advantage.

- (B) The proposed conduct is likely to foster business efficiency as franchisees are assured of access to a range of Grill'd Products of a consistent standard which gives them more time to focus on operating their business. This may provide a competitive advantage.
- (C) The proposed conduct will give Grill'd more bargaining power when negotiating prices with the Licensed Suppliers which will have a flow-on effect to franchisees and the end consumer.
- (D) The proposed conduct will allow Grill'd to focus on controlling quality which ensures that end consumers are provided with products of a consistent standard that meet the promise of Grill'd and the franchisees as to the content and quantity of the particular product. For example, the promise that the burgers are 95% fat free.
- (E) The proposed conduct ensures that franchisees (and ultimately the end consumers) are able to purchase genuine Licensed Products in the case where they are pre-packaged products (eg Grill'd branded bottled sauces).
- (F) The proposed conduct ensures that franchisees purchase the Licensed Products from the appropriately Licensed Suppliers and not from unlicensed manufacturers or suppliers.

(ii) **Suppliers**

The proposed conduct provides the Licensed Suppliers with certainty of supply and quantities of supply to franchisees which may result in:

- (A) cost savings in the management of their business;
- (B) increased business efficiency; and
- (C) promotion of competition among the Licensed Suppliers.

**Public Detriments**

(i) **Franchisees**

The proposed conduct prevents franchisees from selecting between suppliers on the normal commercial basis of product quality and price and whether or not to purchase other Products which are not Grill'd Products.

(ii) Consumers

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:

- (A) retailers which offer burgers and associated food products in the relevant retail markets are numerous in Australia which allows consumers to “shop around” easily; and
- (B) there is arguably no barrier to entry at retail level because of the volume of retailers in Australia which offer the Products in the relevant retail markets (eg fast food restaurants for the sale of burgers; delicatessens, supermarkets and department stores for the sale of bottled condiments).

(iii) Suppliers

The wholesale suppliers of the Products that are not nominated or licensed by Grill'd will not have access to Grill'd franchisees. However, the anti-competitive effect on such suppliers will be insignificant given the number of retailers in Australia to which suppliers may sell their Products.

**Conclusion**

To the extent that the proposed conduct contravenes section 47 of the Act, Grill'd contends that it is entitled to statutory immunity provided by section 93 of the Act as the public benefits resulting from the proposed conduct outweighs any public detriments caused by the conduct.

3. (a) **Class or classes of persons to which the conduct relates**

- (i) Grill'd franchisees; and
- (ii) Licensed Suppliers.

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

(i) **At present time**

- (A) There are currently no Grill'd franchisees; and
- (B) There are 2 Licensed Suppliers (which currently supply to Grill'd Pty Ltd for the operation of the company owned stores).

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

- (A) Grill'd franchisees: 15
- (B) Licensed Suppliers: 5

- (c) **Where number of persons stated in item 3(b)(i) is less than 50, their names and address**

**Delica Meat Co. Pty Ltd** (ABN 30 006 235 258)  
37-39 Greeves Street  
St Kilda VIC 3182

**Blue Lotus Foods Pty Ltd** (ABN 15 060 542 467)  
9/83 Canterbury Road  
Kilsyth VIC 3137

**Edlyn Foods Pty Ltd** (ABN 90 007 145 520)  
13 Lindaway Place  
Tullamarine VIC 3043

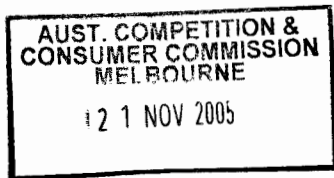
**Thoroughbread Pty Ltd** (ABN 13 093 912 871)  
52 Wilson Street  
South Yarra VIC 3141

**B.S.B. Packaging Pty Ltd** (ABN 35 006 993 031)  
5 Wadhurst Drive  
Boronia VIC 3155

4. **Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice**

Greg Hipwell, c/-Deacons, Level 15, RACV Tower, 485 Bourke Street, Melbourne, Victoria 3000

Dated 21/11/ 2005



Signed by/on behalf of the applicant

*Greg*  
-----  
(Signature)

GREGORY HUGH HIPWELL  
-----  
(Full name)

Partner - Deacons  
-----  
(Description)



## DIRECTIONS

1. If there is insufficient space on this form for the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the person giving the notice.
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. In item 1(b), describe that part of the business of the person giving the notice in the course of which the conduct is engaged in.
4. Where particulars of a condition or of a reason of the type referred to in sub-section 47(2),(3),(4),(5),(6),(7),(8) or (9) of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be furnished with the notice.
5. In item 3(a), describe the nature of the business carried on by the persons referred to in that item.
6. In item 3(b)(ii), state an estimate of the highest number of persons with whom the person giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.

## NOTICE

If this notification is in respect of conduct of a kind referred to in sub-section 47(6) or (7) or paragraph 47(8)(c) or (9)(d) of the *Trade Practices Act 1974* ("the Act"), it comes into force at the end of the of the period prescribed for the purposes of sub-section 93(7A) of the Act (the "prescribed period") unless the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, or this notification is withdrawn.

The prescribed period is 21 days (if this notification is given on or before 30 June 1996) or 14 days (if this notification is given after 30 June 1996), starting on the day when this notification is given.

If the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, this notification will not come into force unless the Commission, after completing the procedures in Section 93A of the Act decides not to give a notice under sub-section 93(3A) of the Act. The notification comes into force when that decision is made.

If this notification is in respect of conduct of a kind referred to in sub-section 47(2),(3),(4) or (5), or paragraph 47(8)(a) or (b) or (9)(a),(b) or (c) of the Act, it comes into force when it is given.