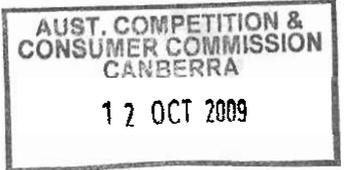


7 October 2009

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Mr Richard Chadwick  
General Manager  
Australian Competition and Consumer Commission  
GPO Box 3131  
CANBERRA ACT 2601



Dear Mr Chadwick

**Notification of provisions which raise third line forcing concerns**

We act on behalf of Subway Systems Australia Pty Ltd (SSA).

Please find **enclosed** a notification of potential third line forcing conduct relating to the acquisition and installation of point of sale software by franchisees of SSA.

**Enclosed is:**

- (a) Form G: Notification of Exclusive Dealing; and
- (b) a cheque in the amount of \$100 payable to the Australian Competition and Consumer Commission.

If you have any questions in relation to this notification or require any further information, please contact Kathryn Finlayson on (07) 3119 6380.

Yours faithfully  
**MINTER ELLISON**

Contact: Kathryn Finlayson Direct phone: +61 7 3119 6380 Direct fax: +61 7 3119 1380  
Email: kathryn.finlayson@minterellison.com  
Our reference: KEXF MAB 40-6090592

enclosure

**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:

N94253 Subway Systems Australia Pty Ltd (SSA)

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

SSA has a licence from Doctor's Associates Inc (DAI) to:

(i) use the SUBWAY® trade mark; and

(ii) offer restaurant franchises,

in Australia.

SSA offers qualified purchasers the right to establish and operate, from a single location, a retail establishment preparing and selling SUBWAY FOOT LONG® and SUBWAY SIX INCH® subs and specialty sandwiches, salads and other food items.

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

Margaret Brown  
Minter Ellison  
Waterfront Place  
1 Eagle Street  
BRISBANE QLD 4000

**2. Notified arrangement**

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

SUBWAY® Point of Sale (POS) software

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

SSA proposes to require franchisees to acquire SUBWAY® POS software, from DAI.

SSA has not yet determined a date by which Australian franchisees must comply with the new requirement. At this stage, it is considering a date in early to mid-2010.

**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:

Franchisees who own and operate a SUBWAY® store in Australia

- (b) Number of those persons:

- (i) At present time:

1,137 as at 28/04/09

- (ii) Estimated within the next year:

1,217

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

N/A.

**4. Public benefit claims**

- (a) Arguments in support of notification:

For the reasons set out below, the applicant submits that the notified conduct will result in benefit to the public by increasing efficiency and reducing costs for SUBWAY® franchisees as well as providing consistent data, thereby allowing SUBWAY® to be a more attractive and competitive participant in the food service industry.

- (i) The SUBWAY® POS software will provide numerous benefits for SUBWAY® franchisees including new front counter, back office, home office and reporting capabilities in local languages, worldwide. The software will also provide additional and improved functionality for front counter, back office and home office and has been designed to easily integrate with payroll and accounting packages to streamline franchisees' businesses;

- (ii) The SUBWAY® POS software is simple to install and will run on POS computer systems that have Windows XP Professional and therefore have the appropriate processor, and other hardware components. It will simplify training of new employees which will save franchisees' time and money and may help reduce employee turnover;
- (iii) The SUBWAY® POS software will assist franchisees to enhance their customer service by improving the speed and accuracy of the ordering process. The software has been specifically designed for the SUBWAY® order flow and includes features such as automatic Fresh Value Meals and promotions. The new interface is intuitive and easy to use with buttons that are larger and easier to read. Faster and more accurate throughput of orders will also minimise the loss of customers;
- (iv) The SUBWAY® POS software will also assist franchisee to improve scheduling of employees and standardise inventory to provide better controls on usage, improved ordering capabilities and tracking of transfers of stock. This will assist franchisees to better control costs and minimise waste;
- (v) The SUBWAY® POS software includes a Business Intelligence tool which will be able to run 'just in time' reports which will assist a franchisee in his/her decision making processes eg. to understand when he/she is over or understaffed during a shift and will allow a franchisee to track his/her store's performance against like stores and its market;
- (vi) The SUBWAY® POS software provides better theft prevention as the interface will eliminate many of the current opportunities for employee theft and introduces new alerts for franchisees;
- (vii) The SUBWAY® POS software will reduce the administrative burden on franchisees as Price Look Up codes (PLU) will be automatically downloaded and weekly reporting will be virtually eliminated. The software will permit franchisees to implement inventory, simple menu management and essential reports via back office and home office options. It will also give franchisees greater flexibility to manage their business from their home office including:
  - (A) ability to manage PLU pricing changes for menu changes;
  - (B) system configurations eg. to change a POS setting at one or more stores;
  - (C) ability for franchisees who own more than one store to manage the back office for each store through their home office; and
  - (D) ability for franchisees who own more than one store to combine and export data on all stores; and

- (viii) The SUBWAY® POS software will also make it easier for franchisees to:
  - (A) obtain menu updates and local market information such as local currencies, languages and taxation rules; and
  - (B) opt-into local and market-specific data elements such as pricing and promotion.

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

- (i) DAI is the licensor of the SUBWAY® trade mark and franchise system worldwide; and
- (ii) DAI has developed the SUBWAY® POS software to meet the needs of SUBWAY® franchisees, both multi-store and single store owners, on the basis of input obtained from more than 250 franchisees. A smaller group of franchisees are actively participating in developing the detailed requirements including two franchisees from Australia.

## **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):

The relevant market is the worldwide market for the supply and acquisition of POS software.

## **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:

The applicant submits that there is minimal, if any, public detriment. In practical terms, the SUBWAY® franchisee system could not easily accommodate the use of multiple POS software systems.

The notified conduct is not likely to have any effect on the price of POS software. The food service industry remains competitive, with a large number and variety of potential users of POS software systems. The use of the SUBWAY® POS software by SUBWAY® stores will not adversely affect competition in the relevant market.

The annual cost of the SUBWAY® POS software is still to be determined but is likely to be within the range of US\$ 300 – 400.

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

N/A.

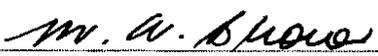
**7. Further information**

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

Margaret Brown  
Minter Ellison  
Waterfront Place  
1 Eagle Street  
BRISBANE QLD 4000

Dated 8 October 2009

Signed by/on behalf of the applicant

  
\_\_\_\_\_  
(Signature)

Margaret Alice Brown  
\_\_\_\_\_  
(Full Name)

Minter Ellison Lawyers  
\_\_\_\_\_  
(Organisation)

Consultant  
\_\_\_\_\_  
(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