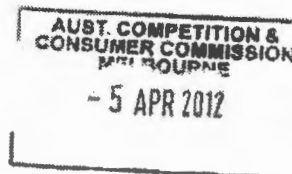


Our reference
MM/CCFOOD15527-9085003

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CHAMBERS
WESTGARTH**
lawyers

Sydney
Melbourne
Brisbane
Perth



5 April 2012

Richard Chadwick
General Manager
Adjudication Branch
Australian Competition and Consumer
Commission
Level 35, The Tower
360 Elizabeth Street
MELBOURNE VIC 3000

Contact
Cheryl Cai (03) 9672 3000
Email: cheryl.cai@corrs.com.au

Partner
Mark McCowan

Dear Dr Chadwick

Notification of exclusive dealing

We act for Foodco Group Pty Ltd and its subsidiary, Cookhouse Australia Pty Ltd (Cookhouse).

We **enclose** the following:

- 1 notification under section 93(1) of the *Competition and Consumer Act 2010* lodged by Cookhouse;
- 2 supporting submission which contains confidential information to be excluded from the public register;
- 3 supporting submission which omits confidential information and can be placed on the public register; and
- 4 a cheque for \$100 as payment of the lodgement fee.

Yours faithfully
Corrs Chambers Westgarth

A handwritten signature in black ink, appearing to be "Mark McCowan", written over a horizontal line.

Mark McCowan
Partner

Form G

Commonwealth of Australia
Competition and Consumer Act 2010 — 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 *Competition and Consumer Act 2010*, 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)

N95809 ***Cookhouse Australia Pty Ltd ACN 131 403 382 (“Cookhouse”)***

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

Cookhouse carries on a retail food and beverage business that trades under the name “Dreamy Donuts”. Cookhouse operates company-owned stores and also grants franchises to third party franchisees.

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

***Attention: Daphne Loizou
Foodco Group Pty Ltd
Level 1, 424 New South Head Road
Double Bay NSW 2028***

2. Notified arrangement

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

(i) The supply of franchise rights to third party franchisees to operate “Dreamy Donuts” stores.

(ii) The acquisition of food and beverage items including doughnuts, ingredients for doughnut toppings and fillings (such as confectionary and nuts), coffee, tea, milk, juices and soft drinks required for the supply of products by a Dreamy Donuts franchisee.

(iii) The acquisition of packaging items and miscellaneous items including boxes, paper bags and plastic cutlery required for the supply of products by a Dreamy Donuts franchisee.

- (b) Description of the conduct or proposed conduct:
(Refer to direction 4)

The conduct involves the grant of a Dreamy Donuts franchise on condition that the franchisee acquire the goods described in 2(a)(ii) and (iii) above from suppliers nominated by Cookhouse whether directly or through a third party distribution company nominated by Cookhouse. Further information is contained in the attached supporting submission.

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)

Current and future Dreamy Donuts franchisees.

- (b) Number of those persons:

- (i) At present time:

5

- (ii) Estimated within the next year:
(Refer to direction 6)

Unknown.

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

1. Dreamy Donuts Carousel - Kiosk 120 Westfield Carousel, 1382 Albany Highway, Cannington, WA 6107

2. Dreamy Donuts Rockingham - Kiosk K034, Rockingham City Shopping Centre, Read Street, Rockingham, WA 6168

3. Dreamy Donuts Garden City - Kiosk K39, Garden City Shopping Centre, 125 Riseley Street, Booragoon, WA 6154

4. Dreamy Donuts Elizabeth - Shop SK06, Elizabeth City Centre 50 Elizabeth Way, Elizabeth, SA 5112

5. Dreamy Donuts Adelaide Airport - Shop 30, Level 2, Terminal 1, Andy Thomas Circuit, Adelaide Airport, SA 5950

4. Public benefit claims

- (a) Arguments in support of notification:
(Refer to direction 7)

Refer to attached supporting submission.

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

Refer to attached supporting submission.

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 affected markets are the markets in Australia for the wholesale supply of the food and beverage and packaging items described at 2(a)(ii) and (iii). There are many potential suppliers and acquirers of these items in Australia.

There are no particular restrictions on the supply or acquisition of these items.

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)

Refer to attached supporting submission.

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

Refer to attached supporting submission.

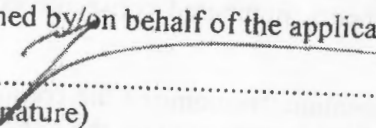
7. Further information

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

*Mark McCowan
Corrs Chambers Westgarth
Telephone: (03) 9672 3335
Level 36, 600 Bourke Street
Melbourne VIC 3000*

Dated 4 April 2012

Signed by/on behalf of the applicant


.....
(Signature)

Mark McCowan
(Full Name)

Corrs Chambers Westgarth
(Organisation)

Partner
(Position in Organisation)

AUST. COMPETITION &
CONSUMER COMMISSION
MELBOURNE
- 5 APR 2012

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 *Competition and Consumer Act 2010* 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.

PUBLIC REGISTER VERSION

Cookhouse Australia Pty Ltd

Exclusive dealing notification

Supporting submission

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This submission is lodged by Cookhouse Australia Pty Ltd ACN 131 403 382 (**Cookhouse**) in support of its notification to the Australian Competition and Consumer Commission (**ACCC**) regarding third line forcing conduct.

1 Confidentiality

This public version of the supporting submission excludes information provided to the ACCC on a confidential basis.

2 Background

2.1 Dreamy Donuts

Cookhouse is a doughnut and beverage retail business that was established in 2006 and trades under the name "Dreamy Donuts". There are currently 11 Dreamy Donuts shops in Australia, comprised of six company-owned shops and five franchised shops.

Dreamy Donuts doughnuts are made from a unique yeast-raised recipe and feature high quality ingredients and special fillings and toppings. In addition to doughnuts, Dreamy Donuts stores also sell hot and cold beverages and milkshakes, and some Dreamy Donuts stores sell ice cream.

2.2 Foodco

Cookhouse is a wholly owned subsidiary of Foodco Group Pty Ltd ACN 007 145 057 (**Foodco**). Foodco owns and manages three key retail franchise businesses – Dreamy Donuts, Muffin Break and Jamaica Blue. Notifications in respect of the equivalent conditions in the Muffin Break and Jamaica Blue franchise arrangements have previously been made to the ACCC (see Notification number N91092, lodged 31 March 2003).

Foodco develops, implements and oversees certain mandatory specifications, standards and procedures which uphold Dreamy Donuts' reputation and high standards. These specifications, standards and procedures relate to (amongst other things):

- the quality, freshness and appearance of products;
- the safety, maintenance, cleanliness and appearance of Dreamy Donuts shops and equipment;
- the general appearance and demeanour of employees;
- the use of intellectual property including trade marks and recipes;
- the use of signs, posters, displays and similar items;
- the use of standard forms;
- display of advertising materials; and
- shop operating hours.

2.3 Franchise agreement

Each Dreamy Donuts franchisee enters into a standard franchise agreement with Cookhouse (**Franchise Agreement**). A copy of the Franchise Agreement is attached as [REDACTED]

3 Dreamy Donuts supply arrangements

Foodco conducts bulk negotiations with preferred suppliers of key food, beverage and packaging items used by Dreamy Doughnuts stores on behalf of franchisees. The main reasons Foodco negotiates with preferred suppliers on behalf of Dreamy Donuts franchisees are:

- by dealing with preferred suppliers, Foodco can ensure that there is quality and consistency in key features of Dreamy Donuts products such as the ingredients, taste and appearance;
- it is important that Dreamy Donuts packaging is consistent across franchisee shops. Much of the Dreamy Donuts packaging is labelled with the Dreamy Donuts trade mark. Customers associate the packaging, labelling and trade mark of Dreamy Donuts with characteristics of the Dreamy Donuts product such as quality and taste;
- by negotiating with preferred suppliers on behalf of franchisees, Foodco is able to aggregate purchase volumes and obtain more favourable terms for Dreamy Donuts franchisees, thus reducing their costs; and
- Foodco's bulk negotiations also provide efficiency benefits as franchisees save time in obtaining quotes from different suppliers and negotiating price and other terms with suppliers.

Some preferred suppliers supply items directly to Dreamy Donuts franchisees and some preferred suppliers supply items to Bidvest Australia Limited, ABN 33 000 228 231 (**Bidvest**), a third party distribution company that delivers various food and non-food items to Dreamy Donuts franchisees.

The key item categories in which Foodco strives for consistency and quality are:

- doughnuts;
- packaging (including paper bags, boxes, heat insulated cups, milkshake containers and plastic cutlery);
- coffee;
- milk; and
- miscellaneous pantry items (such as fruits, nuts and orange juice).

Dreamy Donuts also sells gourmet espresso coffee that is roasted to strict specifications by Jahnus Pty Ltd (**Jahnus**). Jahnus is a subsidiary of Foodco

that sources and roasts coffee according to Foodco's strict specifications. Dreamy Donuts franchisees order coffee from Jahnus.

Foodco's agreements with preferred suppliers are non-exclusive and of short- to medium-term duration. Many of Foodco's agreements with preferred suppliers are informal. Because Foodco is not locked into long-term exclusive contracts with its preferred suppliers, Foodco is open to negotiating agreements with new suppliers who offer quality products at reasonable prices.

Some of Foodco's current preferred suppliers are: Lombard's (paper packaging and crockery), Coca-Cola Amatil (packaged soft drinks and other non-alcoholic beverages), Lion (milk and other drinks), Dr. Smoothie (cold beverage bases) and Bisley (uniforms). Foodco is currently in negotiations with a third party for the supply of doughnuts.

Foodco receives volume incentives from some of its preferred suppliers. The volume incentives are paid into a marketing fund and redistributed to franchisees via marketing activities. Foodco does not receive any other commissions or payments from its preferred suppliers.

Dreamy Donuts franchisees have a general obligation under clause 8.2.1 of the Franchise Agreement to purchase products, ingredients and materials used by the Dreamy Donuts store from preferred suppliers. However, this is subject to the proviso that franchisees are free to purchase products and materials other than coffee beans, doughnuts and product ingredients comprising a trade secret or special recipe of Dreamy Donuts from an alternative supplier if in Cookhouse's reasonable opinion, the item purchased from the alternative supplier is of at least equal quality and appearance, and lower in price, than the offering of the preferred supplier (clauses 8.2.2 and 8.2.3 of the Franchise Agreement).

4 Dreamy Donuts franchisee operations

4.1 Operating standards and policies

Under the Franchise Agreement, the Dreamy Donuts franchisee is licensed to operate a Dreamy Donuts store and occupy a franchise site. The Franchise Agreement imposes obligations on franchisees to adhere to the mandatory specifications, standards and operating procedures described at 2.2 above. These specifications, standards and procedures are contained in various documents provided to Dreamy Donuts franchisees including for example:

████████████████████

The specifications, standards and procedures provide a baseline level of quality and consistency which is critical to the competitiveness of the Dreamy Donuts business and the distinctiveness of its brand name.

4.2 Competitors of Dreamy Donuts

Competitors of Dreamy Donuts include retail chains that sell sweet baked goods, including Donut King, Krispy Kreme, Wendys and Pretzel World.

Individual stores selling primarily sweet baked goods that are not part of a retail chain may compete with Dreamy Donuts.

5 Notified conduct

The following conduct is notified under section 93 of the *Competition and Consumer Act 2010 (Act)* to the extent that it would constitute exclusive dealing in breach of sections 47(6) or 47(7) of the Act:

- The general obligation upon franchisees under the Dreamy Donuts Franchise Agreement to purchase certain key items used by Dreamy Donuts store from suppliers nominated by Cookhouse, whether directly or through a third party distribution company nominated by Cookhouse.

This obligation does not apply in respect of items (other than coffee beans, doughnuts and product ingredients comprising a trade secret or special recipe of Dreamy Donuts) where:

- the franchisee is able to purchase the item from another supplier; and
- in Cookhouse's reasonable opinion, the item is of at least equal quality and appearance, and has a lower price, than the item available from the nominated supplier.

6 Public benefits of notified conduct

The notified conduct enables Dreamy Donuts to ensure that its products are of consistently high quality and uniform appearance. This consistency and quality control ensures that customers feel confident that, whenever they purchase from a Dreamy Donuts store, they will receive the same quality product and service that they have come to associate with the Dreamy Donuts brand. This enables Dreamy Donuts to realise maximum returns from the substantial investment it has made in producing a unique product made from quality ingredients.

The notified conduct also benefits Dreamy Donuts franchisees by consolidating demand of individual franchisees to negotiate large volume purchases from preferred suppliers. Franchisees frequently have little bargaining power because of their small purchasing volumes. New entrant franchisees may have limited experience in negotiating supply agreements. Foodco is better placed to negotiate the combined supply requirements of Dreamy Donuts franchisees with large suppliers. These large suppliers frequently give volume discounts and prefer to deal with a single representative aggregating the demand of multiple small operators for the same products. Aggregating demand enables Foodco to obtain more favourable terms than franchisees negotiating individually would be able to obtain. This is important in the context of a highly competitive market that faces declining retail spending and increasing rental and product ingredient costs.

Collective negotiations also assist franchisees by reducing the time and cost they spend in obtaining quotes and negotiating supply terms with different suppliers. Collective negotiations with trusted, reputable suppliers frees up franchisees to concentrate on running a smooth and efficient operation that meets the standards of quality, presentation and service expected of Dreamy Donuts stores.

In the absence of the notified conduct, franchisees would be likely to face higher prices for key items and higher costs of negotiating supply agreements, which would likely to lead to higher costs for consumers.

7 No public detriment

Cookhouse submits that the notified conduct does not result in any public detriment. Franchisees can purchase certain items from alternative suppliers that can provide an item of equal quality and appearance at a lower price. In addition, any supplier is free to approach Foodco or Cookhouse and propose more favourable supply arrangements or superior products than are currently provided by Foodco's preferred suppliers. All such proposals will be considered on their merits.

The notified conduct will take place in highly competitive retail and input supply markets. The conduct will therefore not have any detrimental impact on competition in the input supply market, and will assist Dreamy Donuts franchisees in competing more vigorously in the food and beverage retail market.

8 Conclusion

Cookhouse submits that there are significant public benefits from the notified conduct in the form of efficiencies, cost savings and the protection of its investment in the Dreamy Donuts brand through ensuring consistently high product standards and uniform appearance and packaging. Cookhouse submits that there is no public detriment arising from the notified conduct.