

Form G

Commonwealth of Australia

Competition and Consumer Act 2010 (Cth) — 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 (Cth)*, 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)

N96527 Degani Australia Pty Ltd ACN 161 068 462 (**Degani**).

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

Degani is the licensor of a network of licensees (**Licensees**) that operate "Degani Bakery Cafés" in Australia (**Degani Cafés**). Degani Cafés specialise in the preparation and retail sale of espresso coffee, as well as a range of café-style food and beverage products, such as pies, pasties, sausage rolls, arancini, hot and cold beverages and associated products.

Licensees operate Degani Cafés pursuant to a trademark licence with Degani (**Trademark Licence**). There are approximately 54 Degani Cafés located in Victoria, with another four located in Queensland. Related entities of Degani have an interest in four of these Degani Cafés.

Pursuant to the Trademark Licence, each Licensee is granted the conditional right to operate a Degani Café using the "Degani" brand and associated intellectual property.

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

Level 7, 100 Edward Street, Brisbane, Queensland 4000.

2 Notified arrangement

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

This notification relates to the acquisition by Licensees of goods approved or nominated, or which may be approved or nominated, by Degani, comprising:

- (i) food products, including both pre-prepared products and consumables;
- (ii) beverages;
- (iii) Degani branded products, such as food products, packaging, signage, loyalty cards, menus and other merchandise;
- (iv) point-of-sale software and hardware; and
- (v) other non-food products, such as crockery and cleaning products;

(Approved Products), from third party suppliers specified by Degani **(Approved Suppliers)**.

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

Degani will supply its services as licensor under the Trademark Licence on the condition that Licensees purchase or acquire Approved Products from Approved Suppliers.

The above conduct falls within the definition of exclusive dealing in sections 47(6) and (7) of the *Competition and Consumer Act 2010* (Cth), as Degani proposes to:

- (i) supply its services as licensor on the condition that Licensees acquire Approved Products from; and
- (ii) refuse to supply its services as licensor if Licensees do not acquire (or have not agreed to acquire) Approved Products from;

the relevant Approved Supplier. However, as outlined below, Degani maintains that the public benefits resulting from this conduct outweigh any public detriment.

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)

Licensees.

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

- (i) At present time: 54 Licensees
- (ii) **Estimated within the next year:** 64 Licensees
(Refer to direction 6)

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

Not applicable.

4 Public benefit claims

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

Refer to paragraph 4(b).

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

The purpose of the notified conduct is not to substantially lessen competition in any market. Rather, the notified conduct will enhance the capacity of Licensees, as small business owners, to compete with larger businesses and other competitors, and to deliver goods and services to consumers that represent value for money. This enhanced capacity is especially important in a market where there is intense competition, particularly from large coffee chains and competing specialty café based franchise networks (such as Gloria Jeans, McCafe, The Coffee Club, Hudsons, Jamaica Blue, Muffin Break and Starbucks).

Degani contends that the notified conduct will provide significant benefits to consumers, as set out below.

Competitive prices

Degani invests significant time and effort in its supplier relationships and to ensuring that the prices and supply terms it negotiates with Approved Suppliers constitute value for Licensees. In Degani's opinion, the prices that it negotiates are on average significantly less than Licensees could obtain independently, over any significant period. This is due to the volume of supply that a nominated supply chain provides.

Degani selects suppliers via a process akin to an informal tender, where a range of suppliers are considered. This process generally involves the consideration of factors such as: product consistency, product pricing model, product quality, logistical viability, references from other customers and ability to provide uninterrupted supply. Even where it has a long standing relationship with an Approved Supplier, Degani frequently re-negotiates the terms of supply and looks for alternative suppliers.

By enabling Licensees to acquire Approved Products (which comprise a large proportion of their total inventory requirements) at competitive rates, Licensees can:

- (i) maximise the profitability of their Degani Cafes; and
- (ii) provide value for money to their customers.

Business efficiency

It is very difficult for a person without extensive knowledge of the food and beverage retailing industry to identify the type of good or service that he or she requires, or the credentials of the relevant provider. Degani has the necessary expertise to do this, and as part of the notified conduct, carries out this task on behalf of Licensees. Degani considers that most individual Licensees do not have the expertise, inclination or time to conduct such investigations, in order to ensure that they procure the Approved Products which best suit their needs and offer value for money.

Accordingly, the notified conduct is likely to foster business efficiency as Licensees minimise the administrative burden associated with operating a Degani Café by:

- (iii) relieving Licensees from the burden of sourcing suppliers of products, investigating their capacity to provide high quality products on a consistent basis, and monitoring the supplier's ongoing performance; and
- (iv) providing Licensees with greater certainty in connection with input costs, which fosters improved business planning.

As a consequence of this efficiency and opportunity to obtain operational savings, Licensees can operate more profitable business, and in turn offer lower and more competitive prices to consumers.

Product quality

The notified conduct allows Degani to monitor and control the quality of Approved Products supplied to the network. Product quality is obviously of critical importance to the success of Degani Cafes.

By establishing a reliable and vetted supplier network:

- (v) Degani is able to ensure that consumers are provided with products of a consistent quality that meet with the standards expected of menu items from a Degani Cafe;
- (vi) Degani is able to manage the price of key inventory which in turn enables Licensees to more easily provide, or to provide enhanced, value for money to customers;
- (vii) customers are able to visit Degani Cafes and be supplied with the same high standard of quality products; and
- (viii) Licensees can purchase Approved Products in the knowledge that the ability of the Approved Supplier to provide products manufactured to Degani's specifications has been investigated by Degani.

Protection of the Degani brand and system

Since the establishment of the first Degani Cafe in 2000, Degani has invested significant resources in developing a sustainable business model from the perspective of both Licensees and the licensor. A key component of the success of this model has been the reputation developed in the "Degani" brand as an indicator of quality products that represent quality and value for money.

Degani has been able to achieve the above by:

- (ix) managing the pricing structure within its supply chain;
- (x) controlling and monitoring the quality of key products supplied to Degani Cafes;
- (xi) limiting the number of entities that it licences to use its trade mark (i.e. by only permitting the Approved Suppliers to use the trade mark for the purpose of producing branded Approved Products for supply to Degani Cafes); and

- (xii) working with suppliers to develop a distinctive recipe for products such as the coffee beans used in Degani Cafes.

These measures are aimed at protecting the integrity and distinctiveness of the Degani brand and reducing the risk of customers being misled by “copy” products that may appear in the market. The measures also maintain the value in, and uniqueness of, the Degani business, enabling Degani Cafes to successfully compete in what is a highly populated and competitive environment.

Rebates

From time to time, Degani negotiates and receives rebates from Approved Suppliers in relation to Approved Products supplied to Licensees. The nature and amount of the fees and benefits vary depending on the commercial arrangements between Degani and the relevant Approved Supplier.

Although not directly shared with Licensees, some benefits are indirectly used by Degani to cover a range of costs, which ultimately benefit Degani and Licensees. For example, the rebates may be used:

- (i) to cover operational costs which benefit the network as a whole;
- (ii) for the benefit, promotion or service of the Degani brand generally, for example website and loyalty program development; and
- (iii) for the purpose of sponsoring Degani’s events, promotions or rewarding Licensees.

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 most relevant markets are the markets in which Licensees acquire Approved Products. Included in these markets are all suppliers and acquirers of the relevant goods and services, operating both within and (more significantly) outside of, the quick service and restaurant industries.

Degani considers these markets to be national and highly competitive. Degani submits that the relevant markets are characterised by a high degree of competition and by a large number of active participants.

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 paragraph 6(b).

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

Degani submits that any public detriment associated with the notified conduct is negligible, if such detriment exists at all. The possible detriments associated with the notified conduct, in Degani's view, are as set out below.

Licensees

As a consequence of the notified conduct, Licensees will be unable to choose the supplier from which they obtain their requirement of Approved Products. In some instances this may mean that Licensees are not able to take advantage of "one-off" discounting of products roughly equivalent to Approved Products available outside of the supply chain. However, Degani contends that prices available within the supply chain are and will continue to be lower over any sustained period.

Moreover, any such detriment will be outweighed by the benefits flowing from the conduct, including the availability of more competitive prices, and surety and quality of supply.

Degani controls the establishment and management of the supply chain on behalf, and for the benefit, of Licensees. If Degani did not do so, Licensees would be required to fulfil this role themselves, at a significant cost and time burden to their businesses.

Customers

In regard to customers, Degani does not consider that the notified conduct will cause any measurable detriment. Indeed in Degani's opinion, the conduct will benefit customers by enabling them to access a high quality menu offering, at a price that constitutes value for money. The notified conduct will not impact upon a customer's ability to "shop around" for alternative offerings, should it wish to do so.

Suppliers

Suppliers of Approved Products that have not been approved by Degani, and do not form part of the supply chain, will be impacted by the conduct to a limited extent. This is because they cannot supply their products to Degani Cafes.

However, Degani contends that the anti-competitive effect of the notified conduct is minimal, given that Degani effectively has an open door supplier policy and regularly re-evaluates the performance of its existing suppliers against the offerings of their competitors.

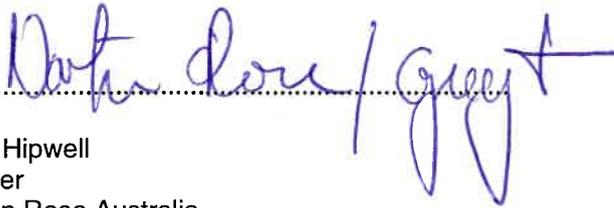
7 Further information

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

Greg Hipwell, Partner, Norton Rose Australia
Level 15, 485 Bourke Street, Melbourne, Victoria 3000
Direct line: (03) 8686 6682
Email: greg.hipwell@nortonrose.com

Dated: 18 January 2013

Signed on behalf of the applicant:



Greg Hipwell
Partner
Norton Rose Australia

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* (Cth) 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.