

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)

N97376 The Hairhouse Warehouse Pty Ltd ABN 65 079 509 738 (**Hairhouse Warehouse**).
N97377

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

Hairhouse Warehouse is the franchisor of a network of franchisees (**Franchisees**) that operate "Hairhouse Warehouse" retail product and salon businesses in Australia (**Hairhouse Warehouse Stores**). Hairhouse Warehouse Stores specialise in the sale of hair and beauty products. Hairhouse Warehouse Stores also offer a range of services including traditional hairdressing services and, depending on the size of the store, beauty services including body piercing, nail services, hair removal and spray tanning.

Franchisees operate Hairhouse Warehouse Stores pursuant to a franchise agreement with Hairhouse Warehouse (**Franchise Agreement**). The table below shows the number of Hairhouse Warehouse Stores currently operating in Australia:

State/Territory	Number of existing franchisees
Victoria	58
New South Wales	28
Queensland	22
South Australia	10
Western Australia	7

In addition, Hairhouse Warehouse or related entities of Hairhouse Warehouse operate 13 company stores in Queensland.

Further, Hairhouse Warehouse operates:

- (i) an online business that sells a range of hair and beauty products from the website www.hairhousewarehouse.com.au; and
- (ii) a customer loyalty program, where customers of the Hairhouse Warehouse network may be provided with benefits by Hairhouse Warehouse, including reward points, products and access to special offers, in consideration of their patronage at retail Hairhouse Warehouse stores (whether company owned or franchised) (**Loyalty Program**).

Pursuant to the Franchise Agreement, each Franchisee is granted the right to operate a Hairhouse Warehouse Store using the "Hairhouse Warehouse" brand and associated intellectual property, subject to the terms of the Franchise Agreement.

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

Level 1, 605 Doncaster Road, Doncaster, Victoria 3108.

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 Franchisees of goods and services approved or nominated, or which may be approved or nominated, by Hairhouse Warehouse, comprising:

- (i) hair and beauty products including (but not limited to) electrical hair products, hair fascinators, hair care products, hair styling products, home colouring products, hair brushes, hair extensions, hair accessories, make-up, nail polish and skincare products;
- (ii) products and equipment incidental to the provision of hair and beauty services including (but not limited to) traditional hairdressing services, body piercing, nail services, hair removal and spray tanning;
- (iii) Hairhouse Warehouse branded merchandise and products, such as hair and beauty products, signage, catalogues, and other merchandise;
- (iv) point-of-sale software and hardware; and
- (v) other products and services unrelated to hair and beauty products and services,

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

It also relates to the provision of goods or services by Hairhouse Warehouse, or other benefits by Hairhouse Warehouse, which are conditional upon

customers' purchase of goods and services from franchised or company owned Hairhouse Warehouse businesses, as part of the Loyalty Program.

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

Hairhouse Warehouse will supply its services as franchisor under the Franchise Agreement on the condition that Franchisees purchase or acquire Approved Products from Approved Suppliers.

Hairhouse Warehouse will supply benefits to customers as part of the Loyalty Program on the condition that they purchase or acquire products or services from a Hairhouse Warehouse store (which may be franchised). 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:

- (i) Hairhouse Warehouse proposes to:
- (A) supply its services as franchisor on the condition that Franchisees acquire Approved Products from; and
 - (B) refuse to supply its services as franchisor if Franchisees do not acquire (or have not agreed to acquire) Approved Products from;

the relevant Approved Supplier; and

- (ii) Hairhouse Warehouse proposes to:
- (A) supply goods, services and other benefits to customers that are part of the Loyalty Program on the condition that the customers acquire goods and services from; and
 - (B) refuse to supply goods, services and other benefits to customers that are part of the Loyalty Program if customers do not acquire goods and services from;

a Hairhouse Warehouse retail store (which may be franchised).

However, as outlined below, Hairhouse Warehouse maintains that the public benefits resulting from this conduct outweigh any public detriment, which would be negligible or non-existent.

To date, Hairhouse Warehouse has notified the following exclusive dealing conduct in accordance with the *Competition and Consumer Act 2010* (Cth):

- (i) notification number N95238, dated 21 January 2011, in relation to the acquisition of hair extensions and brushes by Franchisees from a supplier specified by Hairhouse Warehouse; and
- (ii) notification number N94465, dated 12 February 2010, in relation to the acquisition of a point of sale software system by Franchisees from a supplier specified by Hairhouse Warehouse.

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)

Franchisees, customers and potential customers.

- (b) **Number of those persons:**
- (i) **At present time:** 102 Franchisees
 - (ii) **Estimated within the next year:** up to 114 Franchisees
(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:**

Acquisition of Approved Products

The purpose of the notified conduct is not to substantially lessen competition in any market. Rather, the notified conduct will enhance the capacity of Franchisees, 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 from retailers, including large department stores, offering speciality hair and beauty products and services (such as Myer and David Jones, and other branded chains including Price Attack, Petra, Priceline, The Body Shop, Just Cuts and Toni & Guy Hairdressing).

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

Competitive prices

Hairhouse Warehouse invests significant time and effort in its supplier relationships and in ensuring that the prices and supply terms it negotiates with Approved Suppliers constitute value for Franchisees. The notified conduct will give Hairhouse Warehouse more bargaining power when negotiating prices with the Approved Suppliers and encourage competition amongst Approved Suppliers. In Hairhouse Warehouse's opinion, the prices that it negotiates are on average significantly less than Franchisees could obtain independently, over any significant period. This is due to the volume of supply that a nominated supply chain provides.

Hairhouse Warehouse 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, Hairhouse Warehouse frequently re-negotiates the terms of supply and looks for alternative suppliers.

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

- (i) maximise the profitability of their Hairhouse Warehouse Stores; and
- (ii) provide value for money to their customers.

Business efficiency

It is very difficult for a person without extensive knowledge of the hair and beauty retail and services industry to identify the type of goods or services that he or she requires, or the credentials of the relevant provider. Hairhouse Warehouse has the necessary expertise to do this, and as part of the notified conduct, carries out this task on behalf of Franchisees. Hairhouse Warehouse considers that most individual Franchisees 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 Franchisees minimise the administrative burden associated with operating a Hairhouse Warehouse Store by:

- (i) relieving Franchisees 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
- (ii) providing Franchisees 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, Franchisees can operate more profitable business, and in turn offer lower and more competitive prices to consumers.

The notified conduct also allows Approved Suppliers to have certainty of supply and quantities of supply, which may result in increased business efficiency as a consequence of cost savings in the management of their business.

Product quality

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

Hairhouse Warehouse has developed and manages a range of private label hair care products. In doing so, Hairhouse Warehouse has expended considerable time and effort to source, investigate and appoint or approve suitably qualified manufacturers and distributors, both in Australia and internationally. Wherever possible, Hairhouse Warehouse requires as a term of its supply arrangements, that distributors provide Franchisees, at no cost, with product training to ensure that product quality and knowledge across the Hairhouse Warehouse network is maintained at a consistently high standard.

By establishing a reliable and vetted supplier network:

- (i) Hairhouse Warehouse is able to ensure that consumers are provided with products of a consistent quality and standard expected of a speciality hair and beauty retail store and salon;
- (ii) Hairhouse Warehouse is able to manage the price of key inventory which in turn enables Franchisees to more easily provide, or to provide enhanced, value for money to customers;
- (iii) customers are able to visit Hairhouse Warehouse Stores and be supplied with the same high standard of quality products and services; and
- (iv) Franchisees can purchase Approved Products in the knowledge that the ability of the Approved Supplier to provide products manufactured to Hairhouse Warehouse's specifications has been investigated by Hairhouse Warehouse.

Protection of the Hairhouse Warehouse brand and system

Since the establishment of the first Hairhouse Warehouse Store in 1992, Hairhouse Warehouse has invested significant resources in developing a sustainable business model from the perspective of both Franchisees and the franchisor. A key component of the success of this model has been the reputation developed in the "Hairhouse Warehouse" brand as an indicator of quality products and services that represent quality and value for money, as well as a source of expertise and product knowledge for consumers.

Hairhouse Warehouse has been able to achieve the above by:

- (i) managing the pricing structure within its supply chain;
- (ii) controlling and monitoring the quality of key products supplied to Hairhouse Warehouse Stores;
- (iii) limiting the number of entities that it licences to use its trade marks (i.e. by only permitting the Approved Suppliers to use the trade marks designed and developed by Hairhouse Warehouse for the purpose of producing branded Approved Products for supply to Hairhouse Warehouse Stores); and
- (iv) working with suppliers to develop distinctive and high quality products such as hair straightener and drying electrical equipment, hair colouring and hair styling products used and sold in Hairhouse Warehouse Stores.

These measures are aimed at protecting the integrity and distinctiveness of the Hairhouse Warehouse brand and reducing the risk of customers being misled by "copy" products that may appear in the market which are particularly widespread in the hair and beauty product industry. The measures also maintain the value in, and uniqueness of, the Hairhouse Warehouse business, enabling Hairhouse Warehouse Stores to successfully compete in what is a highly populated and competitive environment.

Rebates and Marketing Fund

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

In the case of one Approved Supplier, Hairhouse Warehouse provides a portion of rebates received from that Approved Supplier to Franchisees subject to the quarterly submission by Franchisees of their financial statements. All other rebates received from Approved Suppliers in relation to Approved Products supplied to Franchisees are paid directly to Franchisees by the Approved Supplier.

Additionally, Hairhouse Warehouse often requires that suppliers contribute a portion of their profits to a "business marketing fund" operated by Hairhouse Warehouse. Hairhouse Warehouse uses the business marketing fund to develop and conduct advertising, promotional and other marketing campaigns and programs in relation to the Hairhouse Warehouse network and the relevant product, for the benefit of Franchisees, the supplier and Hairhouse Warehouse. Suppliers also often attend the Hairhouse Warehouse national conference, where they educate Franchisees about the products they supply.

Any portion of rebates not shared with Franchisees or contributed to the marketing fund is indirectly used by Hairhouse Warehouse to cover a range of costs, which ultimately benefit Hairhouse Warehouse and Franchisees. 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 Hairhouse Warehouse brand generally, for example website and product development; and
- (iii) for the purpose of sponsoring Hairhouse Warehouse's events, promotions or rewarding Franchisees.

Participation in Loyalty Program

The purpose of the notified conduct regarding the Loyalty Program is not to substantially lessen competition in any market. Rather, purpose of the conduct is to enhance customers' experience and to provide them with additional benefits and rewards for their loyalty. Customers are not compelled to be part of the Loyalty Program (which is entirely optional) and are not required to purchase any product from any particular Hairhouse Warehouse store. However, if they do so, and subject to the terms and conditions of the Loyalty Program, customers may be provided with products, services and other benefits by Hairhouse Warehouse in relation to hair and beauty products and services.

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 Franchisees acquire Approved Products. Included in these markets are all suppliers and acquirers of the relevant goods and services, operating both within and outside of, the hair and beauty products and services industries. The other relevant market is the market for the retail supply of hair and beauty products and services.

Hairhouse Warehouse considers these markets to be national and highly competitive. Hairhouse Warehouse submits that the relevant markets are characterised by a high

degree of competition and by a large number of active participants at both wholesale and retail levels.

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:**

Hairhouse Warehouse 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 Hairhouse Warehouse's view, are as set out below.

Franchisees

As a consequence of the notified conduct, Franchisees will be unable to choose the supplier from which they obtain their requirement of Approved Products. In some instances this may mean that Franchisees are not able to take advantage of "one-off" discounting of products roughly equivalent to Approved Products available outside of the supply chain. However, Hairhouse Warehouse 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.

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

Customers

In regard to customers, Hairhouse Warehouse does not consider that the notified conduct will cause any measurable detriment. Indeed in Hairhouse Warehouse's opinion, the conduct will benefit customers by enabling them to access consistently high quality hair and beauty products and services, offered 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.

Additionally, customers may be provided with goods, services and other benefits in relation to hair and beauty products and services, should they choose to participate in the Loyalty Program and subsequently purchase goods or services from a Hairhouse Warehouse store.

Suppliers

Suppliers of products that have not been approved by Hairhouse Warehouse, and do not form part of the supply chain, will be impacted by the conduct to a

limited extent. This is because they will not be supplying their products to Hairhouse Warehouse.

However, Hairhouse Warehouse contends that the anti-competitive effect of the notified conduct is minimal, given that Hairhouse Warehouse effectively has an open door supplier policy and regularly re-evaluates the performance of its existing suppliers against the offerings of their competitors. Additionally, there is arguably no barrier to entry for suppliers because of the volume of retailers in Australia which offer the products and services in the relevant retail markets (e.g. department stores, speciality hair and beauty stores and hair and beauty salons.)

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 Fulbright Australia
Level 15, 485 Bourke Street, Melbourne, Victoria 3000
Direct line: (03) 8686 6682
Email: greg.hipwell@nortonrosefulbright.com

Dated: 23 April 2014

Signed on behalf of the applicant:


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Greg Hipwell
Partner
Norton Rose Fulbright 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 substituted 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.