



# HOLDING REDLICH

FILE No:
DOC:
MARS/PRISM:

8 July 2014

Dr Richard Chadwick  
General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
CANBERRA ACT 2601

**Partner Philip Vickery**  
**Direct Line (07) 3135 0632**  
**Email philip.vickery@holdingredlich.com**  
**Our Ref PDV 14870013**

Dear Dr Chadwick

## Subway Systems Australia – Third Line Forcing Notification

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

Please find **enclosed** a Form G Notification of Exclusive Dealing in relation to the proposed third line forcing conduct by SSA.

We also **enclose** a cheque in the amount of \$100 payable to the Australian Competition and Consumer Commission in respect of the lodgement fee for the Form G Notification.

If you have any questions in relation to this notification or require any further information, please contact Philip Vickery on (07) 3135 0632.

Yours sincerely

**Holding Redlich**

**Enclosures: 2**



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ABN 15 364 527 724

# 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.

## 1. Applicant

(a) Name of person giving notice:

N97578 Subway Systems Australia Pty Ltd (ABN 79 009 277 034) (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 speciality sandwiches, salads and other food items.

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

Attention: Jocelyn Saint-Fryar, Corporate Counsel

Subway Systems Australia Pty Ltd

Level 1, 42 Amelia St

Fortitude Valley, QLD 4006

## 2. Notified arrangement

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

Software for use in SUBWAY® stores by SUBWAY® franchisees including but not limited to point of sale (POS) software, employee Time and Attendance software, business management software, loss prevention software and anti-virus software.

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

SUBWAY® franchisees are required to use certain software of the kind referred to in paragraph 2(a).

DAI has developed certain software specifically for use in SUBWAY® stores by SUBWAY® franchisees.

DAI has obtained a licence for the use of certain additional software from third parties for the benefit of the franchisees, to use in conjunction with the software that has been specifically developed for SUBWAY®. SUBWAY® franchisees are required to licence this software from DAI.

There is an existing requirement to maintain consistency and quality across the SUBWAY® system since the brand commenced in Australia in 1988. The software required will change from time to time based on the development of the SUBWAY® system. **Attached** as Annexure A is the current list of software which SSA requires its franchisees to use.

Franchisees are informed via SSA's operations manual and SSA's disclosure document that SSA may require the Franchisees to acquire all required goods and services used in a SUBWAY® Restaurant. Franchisees agree under SSA's Franchise Agreement to adhere to the quality and control standards prescribed by the franchise system.

## 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:

1,437 stores currently operating in Australia.

- (ii) Estimated within the next year:

1,500 stores operating in Australia.

- (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:

For the reasons set out below, SSA 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® 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® software is simple to install and will run on POS computer hardware certified by us that have Windows 7 or 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® 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® software will also assist franchisees 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® software includes a Business Intelligence tool which will be able to run 'just in time' reports which will assist a franchisee with optimising the number of employees who work each shift and to track his/her store's performance against like stores and its market;
- vi. The SUBWAY® 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® 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, for example, 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® software provides improved levels of support for franchisees. The software allows for improved remote access to trouble shooting issues. Additional software updates will be available for franchisees to download. This will allow franchisees to improve efficiency of operation of their store which will assist franchisees to maximise customer service performance.
- ix. The SUBWAY® software will make it easier for franchisees to:
- (A) obtain menu updates and local market information such as local currencies, languages and taxation rules;
  - (B) opt into local and market-specific data elements such as pricing and promotion; and
  - (C) receive remote access assistance and support for trouble shoot issues.
- x. The SUBWAY® software will:
- (A) assist SUBWAY® to satisfy and meet the expectations and demands of customers consistently in relation to the SUBWAY® brand throughout Australia;
  - (B) assist SUBWAY® Restaurants to provide high quality and consistent service to customers throughout Australia; and
  - (C) aid in valuing and improving the reputation of SUBWAY® Restaurants by maintaining the store premises and ensuring the products and services provided by SUBWAY® franchisees are consistent with standards and the image of the SUBWAY® System and SUBWAY® brand.
- xi. SSA intends that some additional improvements and enhancements to the software may be available in the future such as payment card integration and surveillance technology. This will assist franchisees to more efficiently operate their store and improve theft prevention.
- xii. The additional software that DAI licences from third parties and has integrated into the franchise system will assist franchisees in protecting their computer system from sophisticated software viruses and security threats.
- (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;
  - ii. DAI has developed the SUBWAY® software to meet the needs of the SUBWAY® franchisees, both multi-store and single store owners, on the basis of input obtained from more than 250 initial franchisees, including a

continuously growing group of franchisees that are actively using and participating in the development of the detailed requirements in Australia; and

- iii. In order to use the SUBWAY® software, a number of other pieces of software are required. DAI obtains a licence for this software from certain third party suppliers and each franchisee takes a licence from DAI to use the software. This enables SUBWAY® franchisees to obtain software products at competitive prices.

## 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 resulting from the notified conduct. The franchisees have been previously required to use some of the software, however the new Software represents a number of updates and improvements to the previously used software, as identified above.

The notified conduct is not likely to have any effect on the price of the Software. There is a large number and variety of potential users and suppliers of POS software.

SSA will require the franchisees to pay a fee for the maintenance and development of the Software (**Technology Enhancement Fee**). However, SSA asserts that the fee is reasonable considering the benefits of the Software. Further, SSA asserts that it has made the franchisees reasonably aware of the introduction of the Technology Enhancement Fee.

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

SSA will require all franchisees to pay a fee to cover the cost of developing, administering and licensing the software named in 2(a) above.

SSA estimates that this amount will be approximately \$1,500 US for each franchisee.

If franchisees have multiple POS terminals at their restaurant, they will be required to pay an additional one time fee of approximately \$500 US.

Franchisees will be required to pay a monthly maintenance fee for all software and currently estimated at \$32 US each month. This monthly maintenance fee may increase or decrease each year depending upon the expenses that are incurred by SSA to maintain the software each year.

There may be additional fees for any future software and web based applications that SSA requires.

SSA and DAI will not receive any revenue from the technology enhancement fee. All monies received will be put towards paying for the cost of developing and maintaining the software.

SSA does not receive any rebate or financial payment from DAI relating to the supply of the Software to franchisees.

SSA submits that franchisees should be reasonably aware about the requirement to use the software and the introduction of the Technology Enhancement Fee as:

- 1) SSA's disclosure document states that franchisees may be required to use the software that SSA requires from time to time, and that franchisees may be required to pay fees to use such software;
- 2) since 1 July 2011, SSA's disclosure document has disclosed that franchisees would be required, in the future, to use additional software in their store and pay a fee for use of the software;
- 3) since 14 March 2014, prospective franchisees have been notified, via an addendum to the SUBWAY® disclosure document, that they may be required, in the future to use additional software in their store and pay a Technology Enhancement Fee of approximately \$1,500 for use of the software;
- 4) on 22 May 2014, existing franchisees were notified that they would be required to use additional software in their stores; and
- 5) SSA has made a variation to the Franchise Agreement for each franchisee relating to the payment of the Technology Enhancement Fee.

SSA has previously lodged a Form G exclusive dealing notification with the Australian Competition and Consumer Commission (ACCC) in relation to requirement of franchisees to use certain point of sale (POS) software (N94253). In that notification, SSA estimated that a fee of approximately \$300-400 would be payable by the franchisees for use of the POS software. However, the software subject of that notification related only to POS software. Since notification N94253 was lodged with the ACCC, SSA has developed and obtained licences for, additional software for use by SUBWAY® franchisees, which delivers the benefits and features outlined in paragraph 4(a). SSA has incurred significant costs in developing the software subject of this notification.

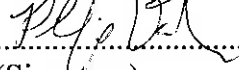
## **7. Further information**

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

Philip Vickery  
Holding Redlich  
GPO Box 490  
BRISBANE QLD 4001

Dated 8 July 2014

Signed by/on behalf of the applicant

  
.....

(Signature)

..Philip Vickery.....

(Full Name)

..Holding Redlich.....

(Organisation)

..Partner.....

(Position in Organisation)



## **Annexure A**

### **DAI developed software:**

- 1) SubwayPOS®;
- 2) Subway Exchange System (SubEx);
- 3) SUBWAY® Payment Manager (“SPM”) software; and
- 4) Live IQ.

### **DAI licensed software:**

- 1) ESET;
- 2) Sub Shop/2000™; and
- 3) Home Office.