

Our Ref: 235850

10 November 2005

FILE No:

DOC:

MARS/PRISM:

Mr Scott Gregson  
General Manager, Adjudication Branch  
Australian Competition and Consumer Commission  
PO Box 119  
DICKSON ACT 2602

Dear Sir

**Notification – Third Line Forcing**

We act for Bernie Lewis Home Loans Pty Ltd (ACN 008 284 544) (**Bernie Lewis**).

We enclose a notification under section 93(1) of the *Trade Practices Act 1974* (**Act**) in relation to the proposed conduct by Bernie Lewis.

We also enclose a cheque for \$100.00, being the relevant fee for lodging a notification by a proprietary company in relation to conduct under section 47 of the Act.

Please do not hesitate to contact Luke Dale on (08) 8205 0580 if you have any queries in relation to the enclosed notification.

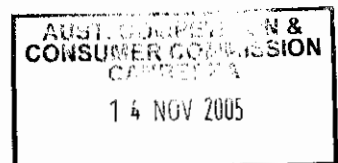
Yours faithfully  
KELLY & CO

per:



LUKE DALE  
Senior Associate  
Direct Telephone: 08 8205 0580  
Direct Facsimile: 08 8205 0807  
Email: ldale@kellyco.com.au

Enclosure(s): Form G  
cheque



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Kelly & Co. • ABN 95 723 883 859

## FORM G

Commonwealth of Australia  
*Trade Practices Act 1974 – Sub-section 93(1)*

### EXCLUSIVE DEALING NOTIFICATION

To the Australian Competition & Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(2), (3), (4), (5), (6) or (7) or paragraph 47(8)(a), (b) or (c) or (9)(a), (b), (c) or (d) of that Act in which the person giving notice engages or proposes to engage.

(PLEASE READ DIRECTIONS AND NOTICE AT END OF FORM)

**1. (a) Name of person giving notice**

Bernie Lewis Home Loans Pty Ltd ACN 008 284 544 (**Bernie Lewis**).

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

Bernie Lewis intends to operate a business as franchisor to a network of franchisees which will operate businesses involving finance and mortgage broking (**Products and Services**) under the Bernie Lewis systems and brands (**Bernie Lewis Franchise**).

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

Luke Dale, Senior Associate, Kelly & Co. Lawyers, Level 17, 91 King William Street, Adelaide SA 5000

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

The notification relates to the acquisition of certain Products and Services, incorporating or using the distinctive "Bernie Lewis" systems and brands and certain finance and mortgage products sourced by Bernie Lewis (**Bernie Lewis Products and Services**) which Bernie Lewis requires the franchisee to use exclusively in order to operate a Bernie Lewis franchised business.

**(b) Description of the conduct or proposed conduct**

(See Direction 4 at the end of this Form)

**Proposed Conduct**

It is proposed that franchisees will pay an upfront fee to Bernie Lewis upon execution of the franchise agreement, and an ongoing service fee, in return for which they:

- (i) are granted a Bernie Lewis Franchise;
- (ii) receive access to Bernie Lewis Products and Services at competitive prices from suppliers approved and contracted directly by Bernie Lewis (**Approved Suppliers**) who supply certain types of Bernie Lewis Products and Services that

have been approved and contracted directly by Bernie Lewis (**Approved Products and Services**);

- (iii) receive initial training from Bernie Lewis in relation to the operation of a Bernie Lewis franchised business; and
- (iv) receive ongoing back up and support from Bernie Lewis in relation to the operation of a Bernie Lewis franchised business.

The conduct to which this notification specifically relates is the proposed supply arrangements with the Approved Suppliers. It will be a condition of the standard Bernie Lewis franchise agreement that franchisees acquire the Approved Products and Services only from specified Approved Suppliers via Bernie Lewis. Approved Suppliers will be those suppliers that have been approved and contracted directly by Bernie Lewis or a related entity of Bernie Lewis to supply the Bernie Lewis Products and Services for re-supply to clients in Australia.

Bernie Lewis maintains that for so long as Bernie Lewis considers it appropriate and consistent with the prescribed image for a Bernie Lewis business:

- (i) all Approved Suppliers must be approved and contracted directly by Bernie Lewis or a related entity of Bernie Lewis to supply the Bernie Lewis Products and Services for re-supply to clients in Australia; and
- (ii) all Approved Products and Services must be Bernie Lewis Products and Services which have been supplied by Approved Suppliers.

This requirement is a critical part of the Bernie Lewis system and format.

However, Approved Suppliers may also supply products and services similar to the Bernie Lewis Products and Services to other finance and mortgage providers, other than Bernie Lewis franchisees, for re-supply within Australia. This means that consumers will be able to obtain genuine Bernie Lewis Products and Services only from Bernie Lewis or its franchisees or other consultants but that similar products and services will be available to consumers from other finance and mortgage providers in Australia.

### **Trade Practices Act: Exclusive Dealing**

Section 47 of the *Trade Practices Act 1974* (Cth) (Act) prohibits anti-competitive dealing and outlines a number of proscribed practices which amount to exclusive dealing.

Sections 47(1) and (6) prohibit third line forcing which arises when a product or service is offered on the condition that the purchaser also acquires goods or services from a specified third person or class of third persons.

The proposed conduct outlined above may fall within section 47(2)(d) as it will be a condition of the Bernie Lewis franchise agreement that franchisees acquire the Approved Products and Services only from Approved Suppliers via Bernie Lewis or a related entity of Bernie Lewis.

However, Bernie Lewis maintains, as outlined below, that the proposed exclusivity of Bernie Lewis branded Products and Services in Bernie Lewis branches is an integral part of the Bernie Lewis format and contends that it will have a negligible effect on competition within the relevant markets.

Section 93 of the Act deals with the procedure by which corporations are entitled to

obtain statutory protection in relation to exclusive dealing conduct which may otherwise contravene the prohibition in section 47.

In order for the immunity to be revoked, the Australian Competition and Consumer Commission (Commission), the Commission must be satisfied that the likely benefit to the public will not outweigh the likely detriment to the public as specified in section 93(3A) of the Act.

#### **Identification of the market**

The markets can be reasonably identified as:

- (i) the broad retail and wholesale markets for the supply of the Products and Services in Australia; and
- (ii) the retail and wholesale markets for the supply of each of the above Products and Services in isolation in Australia.

Each of the above markets is characterised by a large number of participants at retail level. In some cases, the competitors in the market may often be large corporations, such as banks.

#### **Public Benefits**

- (i) **Franchisees and consumers**

The proposed conduct is likely to have the benefits listed below for the Bernie Lewis franchisees and end consumers.

- (A) The proposed conduct provides franchisees with access to the unique Bernie Lewis Products and Services at competitive prices due to the established supply relationships between Bernie Lewis' related entities and the Approved Suppliers. This will allow franchisees to offer favourable prices to the end consumer and establish a competitive advantage.
- (B) The proposed conduct is likely to foster business efficiency by ensuring that franchisees have access to a range of products of a consistent standard and quality that gives them more time to focus on running their businesses. This may provide a competitive advantage.
- (C) The proposed conduct improves the supply of better information to consumers to permit informed choices of selecting the relevant Bernie Lewis Product. Franchisees will be more skilled in their knowledge of the Bernie Lewis Products and Services and will be able to offer a higher level of service.
- (D) The proposed conduct ensures that franchisees, and ultimately consumers, are able to purchase genuine Bernie Lewis Products and Services. The proposed arrangement seeks to prevent suppliers from producing and supplying imitation Bernie Lewis brand Products or Services to consumers in Australia.
- (E) The proposed conduct ensures that franchisees purchase Bernie Lewis Products and Services via Bernie Lewis from the appropriate licensed suppliers, and not from unlicensed suppliers.

(F) The proposed conduct allows Bernie Lewis to focus on controlling quality, managing and maintaining the Bernie Lewis brand. This ultimately benefits both the franchisees and consumers as it ensures that they are purchasing products which are genuine and are of a consistent standard and quality.

(ii) **Suppliers**

The proposed conduct provides the Approved Suppliers with certainty of supply and quantities of supply to franchisees which may result in:

- (A) cost savings in the management of their businesses;
- (B) increased business efficiency which gives them more time to focus on running their businesses, planning future production and innovative strategies. This may provide them with a competitive advantage in the wholesale market; and
- (C) promoting competition among Approved Suppliers.

**Public Detriment**

(i) **Franchisees**

The proposed conduct contemplated by Bernie Lewis denies the franchisees the opportunity to choose on the normal commercial basis of product quality and price whether or not to purchase other Products and Services which are not Bernie Lewis Products and Services.

(ii) **Consumers**

The proposed conduct will only marginally affect the choice of consumers in acquiring the Bernie Lewis Products and Services as they may be required to purchase other similar products and services from other finance and mortgage providers. Although this may inconvenience some consumers, the anti-competitive effect is negligible, as it will not ultimately prohibit consumers from comparing prices and products for the following reasons:

- (A) similar suppliers which provide the licensed Products and Services in the relevant markets are numerous in Australia which allows consumers to “shop around” easily; and
- (B) there is arguably no barrier to entry at this level, other than the industry regulation and licensing requirements (which are for the benefit of the consumer) because of the volume of similar suppliers in Australia which provide a wide range of the similar Products and Services in the relevant retail markets.

(iii) **Suppliers**

The anti-competitive effect on wholesale suppliers of the Products and Services will be insignificant given the number of suppliers similar to Bernie Lewis in Australia to which suppliers may sell their products.

**Conclusion**

To the extent that the proposed conduct contravenes section 47 of the Act, Bernie Lewis contends that it is entitled to statutory immunity provided by section 93 of the Act as the public benefits resulting from the proposed conduct outweighs any public detriments caused by the conduct.

**3. (a) Class or classes of persons to which the conduct relates**

Bernie Lewis franchisees.

**(b) Number of these persons**

**(i) At present time:**

There are currently no Bernie Lewis franchisees.

**(ii) Estimated within the next year:**

3 Bernie Lewis franchisees.

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

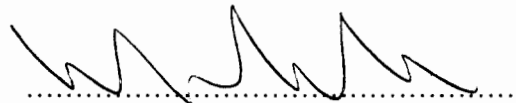
Not applicable.

**4. Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice**

Luke Dale, Senior Associate, Kelly & Co. Lawyers, Level 17, 91 King William Street, Adelaide SA 5000.

Dated 11 November 2005

Signed on behalf of the applicant



.....  
 Luke Dale  
 Senior Associate  
 Kelly & Co. Lawyers

### DIRECTIONS

1. If there is insufficient space on this form for the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the person giving the notice.
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), together with 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. In item 1(b), describe that part of the business of the person giving the notice in the course of which the conduct is engaged in.
4. Where particulars of a condition or of a reason of the type referred to in subsection 47(2), (3), (4), (5), (6), (7), (8) or (9) 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. In item 3(a), describe the nature of the business carried on by the persons referred to in that item.
6. In item 3(b)(ii), state an estimate of the highest number of persons with whom the person giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.

### NOTICE

If this notification is in respect of conduct of a kind referred to in sub-section 47(6) or (7) or paragraph 47(8)(c) or (9)(d) of the *Trade Practices Act 1974* ("the Act"), it comes into force at the end of the period prescribed for the purposes of sub-section 93(7a) of the Act (the "prescribed period") unless the Commission gives a notice under subsection 93A(2) of the Act within the prescribed period, or this notification is withdrawn.

The prescribed period is 21 days (if this notification is given on or before 30 June 1996) or 14 days (if this notification is given after 30 June 1996), starting on the day when this notification is given.

If the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, this notification will not come into force unless the Commission, after completing the procedures in section 93A of the Act, decides not to give a notice under sub-section 93(3A) of the Act. The notification comes into force when that decision is made.

If this notification is in respect of conduct of a kind referred to in sub-section 47(2), (3), (4) or (5), or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c) of the Act, it comes into force when it is given.