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**BUCHANAN LAW**  
Intellectual Property and Technology

30 October 2007

[www.buchananlaw.com.au](http://www.buchananlaw.com.au)

Mr. Scott Gregson  
General Manager, Adjudication  
Australian Competition & Consumer Commission  
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Dear Mr Gregson

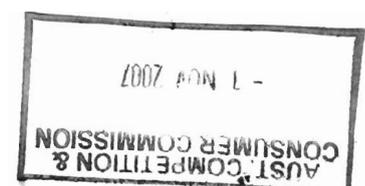
**MIBroadband Pty Ltd T/as 'Engin'**  
**Notification of possible third line forcing conduct under section 93(1) of the Trade Practices Act 1974 (Cth.) (the 'Act')**

We act for Engin. Pursuant to section 93(1) of the Act Engin wishes to notify the Commission of conduct which may amount to third line forcing as such conduct is described under section 47(6) of the Act.

Engin is an Australian VoIP (Voice over Internet Protocol) telephony services provider. The **enclosed Form G Notification** of exclusive dealing relates to the appointment of Dealers by Engin to promote Engin products and telecommunications services. The Dealers' right to sell Engin products is expressed to be conditional upon the Dealers purchasing their requirements of Engin products only from distributors who have been pre-approved by Engin as authorised distributors.

In support of our client's Notification please find **enclosed**:

1. A confidential version of Form G of which Confidential Attachment A contains commercially sensitive information which Engin requests be excluded from the public register maintained by the ACCC.
2. A non-confidential version of Form G (from which Confidential Attachment A has been withheld).
3. A cheque drawn on our firm's office account for \$100 being the prescribed lodgement fee.



B

**Confidential information – request under section 95(2)**

As noted above, our client has requested the Commission to preserve the secrecy of Engin's confidential information in the Confidential Attachment A to Form G. The information provided by Engin in response to items 3(b) and 3(c) together with information relating to certain functional aspects of Engin's Hardware and associated business model is commercially sensitive and not publicly available.

Making this information available to Engin's competitors could result in it being used to Engin's commercial detriment.

Accordingly, and pursuant to section 95(2) of the Act our client respectfully requests the Commission to exercise its power under section 95(3)(b) to exclude this information from the public register maintained by the Commission under section 95(1).

Please do not hesitate to contact Scott Buchanan on 02 6221 9555 in relation to any aspect of this application.

Yours sincerely



**Scott Buchanan**  
Director  
Buchanan Law  
E [scott@buchananlaw.com.au](mailto:scott@buchananlaw.com.au)

**Enc:** Form G Notification (confidential version)  
Form G Notification (non-confidential version for inclusion on the register)

FORM G

COMMONWEALTH OF AUSTRALIA

*Trade Practices Act 1974 - subsection 93(1)*

EXCLUSIVE DEALING NOTIFICATION

To the Australian Competition & Consumer Commission:

Notice is hereby given, in accordance with subsection 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in 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 *[refer to direction 2]*

**MIBroadband Pty Ltd ACN 080 250 371 T/as Engin ("Engin")** *Na3197*

- (b) Short description of business carried on by that person *[refer to direction 3]*

Engin is a broadband phone company enabling telecommunications customers to make and receive telephone calls using their broadband internet connection and a technology commonly referred to as Voice over IP or "VoIP". Engin owns and manages its own Australian VoIP communications network and is regulated as a carrier for the purposes of the Telecommunications Act 1997 (Cth) and associated regulatory regime.

Customers can gain access to the Engin network through their broadband internet service in conjunction with either independent software (known as a "soft phone") or through the use of hardware products including voice boxes and VoIP enabled telephones configured to work on the Engin network.

Engin promotes its telephony services and products directly to consumers and also through an extensive network of retail and distribution channels.

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

Paul Jeronimo  
Company Secretary  
Engin Ltd  
431 Warringah Road  
Frenchs Forest NSW 2086

## Regulation 9

### 2. **Notified Arrangement** *[refer to direction 4]*

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

This notice relates to the appointment of dealers by Engin to promote Engin products and telephony services on the condition that the dealers purchase their Engin product requirements only from specified authorised distributors.

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

#### **Summary**

Engin enters into dealer agreements with individual businesses under which Engin appoints dealers to act as Engin's agents for the purpose of introducing and signing up new customers to the Engin network.

Appointed dealers are also authorised to sell certain Engin branded third party manufactured hardware items (**Engin Hardware**). Engin Hardware is specifically configured to operate on the Engin network by Engin's appointed manufacturers. The manufacturers in turn supply Engin Hardware to its distributors together with relevant details necessary to track the sale and usage history of individual items of Engin Hardware.

Engin's appointed dealers are required to only obtain their requirements of Engin Hardware from those entities which have previously been authorised by Engin to act as an "Authorised Distributor". Dealers then sell Engin Hardware directly to customers in their own capacity. The catalogue of Engin Hardware items is set out in the terms of the dealer agreement and updated by Engin from time to time.

#### **Further detail**

Engin enters into dealer agreements with individual businesses who are independent contracting corporate entities. Dealers are contracted to promote Engin's telephony services and to sign-up new customers in accordance with a formal connection procedure resulting in dealers connecting new customers to the Engin network and service. Dealers are also granted the right under the Engin dealer agreement to market and sell Engin Hardware.

The right to sell Engin Hardware is expressed as being conditional upon the dealer either purchasing the Engin hardware directly from Engin or from an Authorised Distributor, Where the dealer purchases from an Authorised Distributor it is the dealer's responsibility to establish a trading account with the Authorised Distributor.

## Regulation 9

### Dealer commissions

Engin dealers receive commissions from Engin in a number of ways for their efforts in promoting Engin products and services. Most significantly for present purposes is the calculation of commissions by reference to a percentage of the fees generated on accounts of those customers to whom the Dealer has sold Engin Hardware. The technical and functional specifications and attributes of the Engin Hardware play an important role in ensuring the accuracy of the calculation of dealer commissions. This is explained in further detail in the attached confidential schedule of this notification.

### Conduct or proposed conduct

Engin requires dealers to obtain their requirements for Engin Hardware only from Engin or otherwise from Authorised Distributors being entities who have been pre-approved by Engin.

Engin insists on this requirement for dealers to obtain Engin Hardware only from authorised distributors as a critical component of Engin's quality assurance program and further, to ensure:

- that dealers are appropriately remunerated with the accurate tracking and reporting of hardware use, enabling the accurate calculation of commissions due to dealers and thus helping to ensure that Engin is able to meet its contractual obligations with respect to payment of commissions to dealers;
- that end users consistently enjoy the full functionality and benefits of the Engin service;
- only appropriately configured products are deployed on the Engin Network as is necessary for the protection of the network; and
- that Engin limits its disclosure of confidential information and trade secrets to select high quality manufacturers and distributors.

At present there is only one distributor who has been authorised by Engin to distribute Engin hardware to dealers. If other distributors are able to consistently meet Engin's required technical, functional and reporting standards with respect to the Engin hardware then Engin would consider expanding its network of authorised distributors to such other companies.

These arrangements may constitute conduct of the kind described in sections 47(6) or 47(7) of the Trade Practices Act 1974 (*TPA*). Engin submits that this notification should be allowed to remain in force and the notified conduct be afforded the statutory protection provided by section 93 of the TPA, in order to achieve commercial certainty and in view of the considerable public benefits outlined below.

## Regulation 9

### 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 direction 5]*

Entities that enter into agreements with Engin to become a dealer of Engin's products and services.

- (b) Number of those persons

- (i) At present time:

See attached confidential schedule (not to be included on the Commission's public register)

- (ii) Estimated within the next year: *[refer to Direction 6]*

See attached confidential schedule (not to be included on the Commission's public register)

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

See attached confidential schedule (not to be included on the Commission's public register)

### 4. Public benefit claims

- (a) Arguments in support of notification: *[refer Direction 7]*

Engin submits that its requirement that dealers only purchase their Engin Hardware requirements from pre-approved or authorised distributors does not result in any detriment to the public. To the contrary, it is submitted that the notified conduct will generate a number of public benefits, including:

- (i) The conduct the subject of this notification will help ensure new customers are sold hardware that is of a high standard and which has been manufactured, tested and supplied in accordance with Engin's exacting standards helping to achieve reliable, responsive and consistent access to the Engin network through appropriately configured Hardware.
- (ii) Additionally, Engin will be able to ensure that there is a consistent standard and availability of products available for purchase by prospective Engin customers from dealers.
- (iii) To effectively compete against traditional telephony service providers (e.g. Telstra and Optus) it is paramount that Engin, and any "new" telephony services provider for that matter providing a modern competitive technology, does all that it can to ensure a positive customer experience.

## Regulation 9

It is widely understood that the telecommunications sector is dominated by Telstra and Optus with a plethora of smaller telecommunications companies fiercely vying for the remainder of the market and to reduce Telstra's and Optus' stranglehold on the market. In this environment it can be seen the importance for small telecommunications providers (particularly those such as Engin providing an alternative technology) to take whatever steps are available to them to help control the quality of the products and services being offered, to ensure consistency and enhance the end user's experience in taking the perceived 'bold' decision to switch from tried and tested land line services offered by the incumbent to a lesser known (albeit outstanding) technology.

- (iv) Although explained further in the attached confidential schedule to this notification, the applicant's required technological features and post sale requirements of authorised distributors helps facilitate the effective resolution of customer disputes. Effective and timely resolution of disputes assumes heightened importance in the context of new technologies such as VoIP to help eliminate potential but often unfounded negative perceptions as to reliability and the like.
- (v) By carefully selecting and limiting its relationships with select and trusted distributors, the applicant places itself in an improved position to efficiently manage any recall program that may need to be introduced in relation to Engin Hardware than otherwise would be the case if for example there were a large number of distributors.
- (vi) In addition, Engin will be able to ensure that there is a consistent standard and availability of products and ensure that dealers deal with reliable, committed suppliers.
- (vii) Engin has expended a great deal of effort and financial resources to establish itself as Australia's leading VoIP telecommunications service provider and as such has an obligation to its shareholders to preserve the value of its brand and associated intellectual property rights and the technological integrity of its communication network generally. Essential to the preservation of the value of all Engin intellectual property rights and its communication network is the requirement that Engin be able to select at its sole discretion organisations it considers to be the best qualified to distribute Engin Hardware and then only grant such organisations the right to be authorised distributors if they agree to distribute in a manner consistent with the maintenance of Engin's standards.

## Regulation 9

### 5. Details of relevant market *[refer to direction 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.

Engin considers the relevant markets to be the Australian markets for the retail supply of telecommunication services and associated products.

### 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]*

Engin submits that there is no significant anti-competitive detriment associated with the notified conduct for the reasons set out below:

- (i) The requirement for dealers to procure their requirements for Engin Hardware from specified distributors should not disadvantage the end user because end users are able to use their own third party hardware (e.g. voice-boxes, modems and VoIP enabled handsets) as it is not a condition for becoming an Engin customer that the customer only uses Engin Hardware. Thus the price determination for Engin Hardware will necessarily need to be sympathetic of and reflect the broader market for these products.
- (ii) The arrangements with dealers requiring them to only source their Engin Hardware requirements from nominated distributors does not in any way impede the dealer from being involved in the supply and promotion of an Engin competitor's products and service offerings. The notified conduct only relates to the source from which dealers can procure Engin Hardware.

- (b) Important fact relevant to any public detriments:

- (i) An entity which does not wish to accept appointment as an Engin dealer on terms that require it to only procure its Engin Hardware requirements from an authorised distributor is not excluded from operating as a dealer for other telecommunication products and services.

- (c) **Conclusion**

Engin submits that the proposed arrangements with dealers do not give rise to any significant anti-competitive detriment, and will result in considerable public benefit. Accordingly, Engin submits that the Commission ought to allow this notification to stand.

## Regulation 9

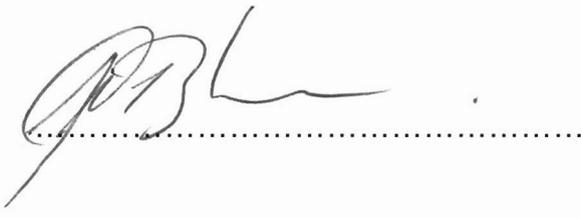
### 7. Further information

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

Scott Buchanan  
Director  
Buchanan Law  
Level 3, 54 Marcus Clarke Street  
Canberra ACT 2601  
Tel: 02 6221 9555  
Fax: 02 6162 3202

**Dated:** this 30<sup>th</sup> day of October 2007

Signed for and on behalf of the applicant:

A handwritten signature in black ink, appearing to be 'S Buchanan', is written over a horizontal dotted line. The signature is cursive and extends to the right of the line.

**Scott Buchanan**  
Director (principal lawyer)  
Buchanan Law

## Regulation 9

### 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 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 *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. 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.

## Schedule A - Confidential Description

A copy of the confidential schedule has been removed by the applicant from this copy of the applicant's notification which is provided for inclusion on the notifications register maintained by the Commission.