

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] N93235

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

- (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, including through the Harvey Norman retail chain of company owned and franchisee owned stores. This notification relates specifically to a proposed arrangement to be entered into by Engin with Harvey Norman.

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

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

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 an arrangement which the applicant proposes to enter into with Derni Pty Ltd trading as "Harvey Norman" ABN 41 002 263 872 Harvey Norman for that company's wholesale purchase of an Engin branded telecommunications product for retail sale through its chain of Harvey Norman branded stores. The proposed arrangement, if approved by the Commission, will involve:

- (i) Engin offering to supply the relevant Engin product at a reduced price but only in circumstances where Harvey Norman purchases the product from a particular third party hardware distributor designated by Engin (and defined below as the **Authorised Distributor**); and
- (ii) Engin entering into an agreement with the Authorised Distributor whereby Engin compensates the Authorised Distributor by an amount equal to the Authorised Distributor's discount to Harvey Norman. It being proposed therefore that Engin will subsidise Harvey Norman's reduced purchase price for the relevant hardware.

The proposed arrangement is non-exclusive in that Harvey Norman will not be precluded from purchasing its requirements of the relevant telecommunications hardware from other distributors.

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

Engin is not of the definitive opinion that the proposed conduct to which this notification relates falls within the scope of conduct prohibited by s.47(6) or (7) of the Act. However, for the avoidance of any doubt, and to ensure there is no risk of breaching the Act, Engin wishes to bring the proposed arrangement to the Commission's attention.

Engin has an established relationship with Harvey Norman pursuant to which Harvey Norman, through its network of company owned and franchised stores, promotes and sells Engin products and telecommunication services.

Pursuant to the above relationship Harvey Norman is authorised to sell certain Engin branded third party manufactured hardware items (**Engin Hardware**). Engin Hardware is specifically configured, by Engin's appointed manufacturers, to operate on the Engin network. The manufacturers in turn supply Engin Hardware to distributors for the wholesale distribution and sale to approved Engin dealers, including Harvey Norman.

Importance of distributors

The distributors play an important and continuing role in the after sales management and administration of Engin Hardware. This role is explained in further detail in Engin's notification to the Commission, pursuant to regulation 9, dated 31 October 2007. The importance of this role necessitates that Engin takes contractual steps to ensure that distributors achieve certain technical and administrative performance objectives for the long term benefit of Engin's relationship with both its customers and dealers. To date only one distributor has consistently achieved these performance objectives (the **Authorised Distributor**).

Although there are various entities that stock and distribute Engin Hardware to dealers, at present there is only one distributor who has achieved Engin's requirements to be appointed as an Authorised Distributor. 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.

The product to which this notification relates

This notification relates to one item of Engin Hardware only, being the Voice Box 3102 (the **Engin Product**).

A new dealer remuneration model for Harvey Norman

Engin traditionally relies on a commission model as the central basis for remunerating dealers for achieving sales of Engin Hardware. Although described in further detail in the confidential version of this notification, one component of the Commission Model involves remunerating dealers with commission amounts calculated by reference (usually as a percentage) to amounts by which Engin invoices end users of the relevant Engin Hardware sold by the dealer. In this sense the commissions are akin to what is commonly termed a "trailing commission".

Trailing commissions are proving cumbersome in the context of Harvey Norman which has the ability to sell large volumes of Engin Product. Feedback from Harvey Norman has consistently shown that the complexities associated with the present trailing commission model is proving to be a barrier to Harvey Norman achieving greater volumes of sales. Harvey Norman and Engin have collectively formed the view that a simpler remuneration model is required.

It is proposed that the current commission model applicable to sales of the Engin Product be replaced with a remuneration model whereby Harvey Norman is able to receive a larger up front retail margin on the retail sale of the Engin Product. The increased retail margin will be subsidised by Engin who it is proposed will compensate the distributor for an amount equal to the discount provided by the distributor. Engin is agreeable to provide proposed subsidy provided that Harvey Norman purchases the Engin Product from the Authorised Distributor.

Engin's requirement that Harvey Norman obtain its requirements for the Engin Product only from the Authorised Distributor is a critical component of Engin's quality assurance program to ensure for example:

- 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 integrity of the network in line with the requirements of the *Telecommunications Act 1997 (Cth)*; and
- that Engin limits its disclosure of confidential information and trade secrets to select high quality manufacturers and distributors.

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.

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]*

- Those entities which distribute the Engin Product (being the Voice Box 3102) who are not recognised by Engin as an Authorised Distributor.
- Those entities, other than Harvey Norman, who are appointed dealers of the Engin Product.

(b) Number of those persons

**EXCLUDED FROM
PUBLIC REGISTER**

(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)

**EXCLUDED FROM
PUBLIC REGISTER**

4. Public benefit claims

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

Engin submits that its requirement that Harvey Norman only purchase their Engin Product 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 when appropriately configured. The sale of such hardware in the manner proposed would, therefore, promote a greater level of terminal equipment/network interoperability, network connectivity and network integrity for the overall benefit of consumers.
- (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, including Harvey Norman.
- (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.

It is widely understood that the telecommunications sector is dominated by Telstra and Optus. A plethora of smaller telecommunications companies is 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.

Regulation 9

- (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 Harvey Norman deals with reliable, committed suppliers.
- (vii) Engin's standard practice of providing product sales incentives to dealers through product commissions and trailing services commissions can be a complicated and time consuming process for large scale businesses such as Harvey Norman. By removing the need for regular sales reports to Engin in order to calculate monthly product sales commissions, and monthly assessment of customer use and calculation of service commissions, it is anticipated that Harvey Norman will be capable of reducing its administrative overheads.
- (viii) 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.

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:

Regulation 9

- (i) The requirement for Harvey Norman to procure its requirements for the Engin Product 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 Harvey Norman requiring them to only source their Engin Product requirements from the Authorised Distributor so as to qualify for the proposed rebate being offered by Engin does not in any way impede Harvey Norman 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 Harvey Norman can procure the Engin Product
 - (iii) The discounted wholesale price offered to Harvey Norman is unlikely to have a detrimental effect on consumers. As the wholesale discount offered to Harvey Norman is in substitution of the payment of sales commissions, this arrangement will continue to encourage between retailers the fair and competitive pricing of Engin Hardware and VoIP products generally.
- (b) **Conclusion**

Engin submits that the proposed arrangements with Harvey Norman does 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.

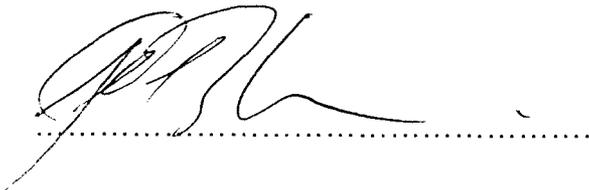
7. Further information

- (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 23rd day of November 2007

Signed for and on behalf of the applicant:

A handwritten signature in black ink, appearing to be 'SB', is written over a horizontal dotted line.

Scott Buchanan
Director (principal lawyer)
Buchanan Law

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

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PUBLIC REGISTER**