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29 October 2010

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

Dear Dr Chadwick

**Form G Notification of exclusive dealing conduct
Subsection 93(1) Trade Practices Act 1974**

We act for Go Vita Distributors Limited (**Go Vita**). We are instructed as follows.

We **attach** for your consideration:

1. a Form G notification lodged on behalf of Go Vita in respect to possible full line forcing conduct
2. a second Form G notification on behalf of Go Vita in relation to associated possible third line forcing conduct, and
3. a cheque for \$3,100 as payment for lodgment fees.

If you have any questions in relation to the consideration of this notification, please contact the writer.

Yours faithfully



David Kennedy
Partner
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Direct Line: +61 (02) 8281 4503

Contact: Alex Rhydderch
Senior Associate
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LAWYERS

Form G

Commonwealth of Australia

Trade Practices Act 1974 — 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 *Trade Practices Act 1974*, 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)

N95072

Go Vita Distributors Limited ABN 27 003 173 439 (Go Vita)

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

Go Vita Distributors is a public company limited by guarantee that operates as a buying co-operative for its members.

For compliance with the Franchising Code of Conduct, its relationships with its members are recognised as franchise agreements although are described as "member licence agreements".

Go Vita has developed a sophisticated system for the establishment and operation of member stores, sales and promotion techniques and personnel training and other matters relating to the maintenance of high standards of quality in the sale of vitamins and health supplements (the Go Vita System).

Individual members are granted rights pursuant to a member licence agreement to use the Go Vita System to operate individual vitamin and health supplement retail stores ("Member Stores").

Member Stores are usually located in shopping centres and high streets, often in proximity to supermarkets, pharmacies and other large box or specialist stores engaged in the sale of vitamins and health supplements.

Go Vita does not operate any company stores.

The competitive pricing and quality of the vitamins and health supplements sold by members has a direct impact on:

- (i) the quality and integrity of the Go Vita brand;
- (ii) customer satisfaction levels;
- (iii) the profitability of Member Stores
- (iv) ultimately, the ability of members to compete for customers in the relevant market.

The proposed requirements described in this notification are new.

New members would be asked to sign a member licence agreement containing the requirements.

Existing members must agree to be bound by the new member licence agreement.

If they do not agree to be bound, existing members will remain on the existing terms and conditions of their member licence agreements.

There is no proposed penalty or specific time frame for the transition to a new member licence agreement for existing members although it is expected that incentives will be offered to existing members to take up the offer to enter into a new member licence agreement.

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

Unit 3, 14 Childs Road, Chipping Norton NSW 2170

2. Notified arrangement

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

Mailing house services

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

Go Vita, as franchisor, proposes to supply franchise rights to members under a revised standard franchise agreement which includes the following terms:

12.7[Distribution of Letterbox Publications] Unless the Member is entitled to distribute publications under clause 12.8, the Company on behalf of the Member will distribute the publications. In all such cases, the Member must promptly

reimburse the Company for the actual distribution charges in addition to paying (in clause 12.6) for any additional copies of a particular publication above the Member's entitlement to a certain number of free copies.

12.8[Delivery of Publications by members]

(a) If the Member can demonstrate to the satisfaction of the Company:

(i) that, as at 1 July 2010, the Member was bound by a pre existing term limited distribution agreement with a third party the term of which has not expired at the time of the proposed mailing of the Publication; or

(ii) that a materially similar service can be obtained at a materially better price than the Company can obtain,

the Company will deliver the Member's allocation of the Publications to the Member or the Member's designated delivery agency.

(b) The Member must promptly procure the distribution of all copies of each such Publication to residences within the Member's Distribution Territory, with no more than one Publication to each residence.

(c) The Member must promptly pay or reimburse the Company for related freight costs for delivery of the Publications to the Member or the Member's designated delivery agency.

12.9 [Delivery of posted publications] The Company, on behalf of the Member, must post copies of the publication "Go Mag" or whatever similar magazine the Company may provide from time to time to the Member's database of customers.

The Member must promptly reimburse the Company for the cost of postage of the publications in addition to paying for any additional copies of the publication of a particular publication above the Member's entitlement to a certain number of free copies.

Possible third line forcing conduct

It is proposed that members must use a central mailing house selected by Go Vita for the distribution of the members' marketing and promotional materials in the member's allocated distribution territories.

This proposed conduct may fall within the definition of exclusive dealing in sections 47(6) and (7) of the *Trade Practices Act 1974*, as Go Vita proposes to:

- (a) supply its services as franchisor on the condition that members acquire, and or**
- (b) refuse to supply its services as franchisor, if members do not acquire (or have not agreed to acquire),**

central mailing house services from a supplier nominated by Go Vita.

(Refer to direction 4)

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)

The Go Vita members that are granted a franchise right to conduct the business of a Go Vita vitamin and health supplement retail store in accordance with the terms and conditions of a member licence agreement.

- (b) Number of those persons:**

- (i) At present time:**

126 members

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

(Refer to direction 6)

135 members

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

N/A

4. Public benefit claims

- (a) Arguments in support of notification:**
(Refer to direction 7)

See paragraph 4(b) below.

- (b) Facts and evidence relied upon in support of these claims:

Go Vita considers that the proposed conduct will provide the following public benefits:

- a) **assist in the marketing positioning of the Go Vita network of speciality vitamin and human health stores against the supermarkets, pharmacy chains and larger box store competitors.**
- b) **Go Vita will be able to better focus on controlling quality, managing and maintaining the Go Vita brand by controlling the distribution of marketing and promotional materials to customers and potential customers.**
- c) **Go Vita will have greater purchasing power and be able to negotiate with suppliers to obtain more competitive prices. This in turn can be passed onto members and consumers.**

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 markets can be reasonably identified as the Australian market for the acquisition of mailing house services.

There are a number of mailing house operators of whom it would be expected that the business of individual Go Vita members would only be a small fraction of their total custom.

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) below.

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

The proposed conduct will largely prevent members from choosing their own mailing house on the usual commercial basis.

However, Go Vita considers that the efficiencies, price savings, brand protection and quality control benefits (as outlined above) far outweigh any such detriment.

Go Vita does not consider that the proposed conduct will have any adverse effect on consumers.

Indeed, Go Vita believes that the proposed conduct will enable members to obtain the benefit of mailing house services at a price that is competitive, and in a manner that involves little administrative effort.

The resultant cost and overhead savings will allow members to operate more profitable businesses, and provide value to their customers.

Go Vita maintains that effect of the proposed conduct on suppliers of mail house services will be minimal, if there is any impact at all.

This is because the size and competitive nature of the market in which they operate (including large number of suppliers within it), and the relatively small volume of services required by individual members, means that any impact will be negligible.

Go Vita will also consider alternative suppliers periodically, to ensure that it obtains competitive pricing.

7. Further information

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

**Alex Rhydderch
Senior Associate
Colin Biggers & Paisley
Level 42, 2 Park Street
Sydney NSW 2000
(02) 8281 4570**

Dated..... 20 October 2010

Signed on behalf of the applicant

..... *David Kennedy*

David Kennedy
Colin Biggers & Paisley
Partner

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 *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.

Form G

Commonwealth of Australia

Trade Practices Act 1974 — 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 *Trade Practices Act 1974*, 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)

N95073 **Go Vita Distributors Limited ABN 27 003 173 439 (Go Vita)**

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

Go Vita Distributors is a public company limited by guarantee that operates as a buying co-operative for its members.

For compliance with the Franchising Code of Conduct, its relationships with its members are recognised as franchise agreements although are described as "member licence agreements".

Go Vita has developed a sophisticated system for the establishment and operation of member stores, sales and promotion techniques and personnel training and other matters relating to the maintenance of high standards of quality in the sale of vitamins and health supplements (the Go Vita System).

Individual members are granted rights pursuant to a member licence agreement to use the Go Vita System to operate individual vitamin and health supplement retail stores ("Member Stores").

Member Stores are usually located in shopping centres and high streets, often in proximity to supermarkets, pharmacies and other large box or specialist stores engaged in the sale of vitamins and health supplements.

Go Vita does not operate any company stores.

The competitive pricing and quality of the vitamins and health supplements sold by members has a direct impact on:

- (i) the quality and integrity of the Go Vita brand;
- (ii) customer satisfaction levels;
- (iii) the profitability of Member Stores
- (iv) ultimately, the ability of members to compete for customers in the relevant market.

The proposed requirements described in this notification are new.

New members would be asked to sign a member licence agreement containing the proposed requirements.

Existing members must agree to be bound by the new member licence agreement.

If they do not agree to be bound, existing members will remain on the existing terms and conditions of their member licence agreements.

There is no proposed penalty or specific time frame for the transition to a new member licence agreement for existing members although it is expected that incentives will be offered to existing members to take up the offer to enter into a new member licence agreement.

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

Unit 3, 14 Childs Road, Chipping Norton NSW 2170

2. Notified arrangement

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

Vitamins and health supplements

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

Go Vita proposes to supply franchise rights to new and continuing members under a new member licence agreement which includes the following terms:

Commercial Schedule: Item 12:

12.	<i>Minimum Own-Brand Product Shelving requirements</i>	<i>Determined by Store Category (see above). A. - 6 linear metres:</i>
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		<p>B.- 4 linear metres:</p> <p>C. - 2 linear metres</p>
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11.1 [Sourcing products from the Company] *The Member must purchase all products required for resale in the Member's business operating from the Licensed Premises from the Company and not from any other person or other source if the product or products are available from the Company's warehouse. The Member must only source product or products from another source after first checking with the Company as to the availability of the product or products in question. The Company in return agrees that at all times the Company will use best endeavours to treat the Member equally along with all other Members in the same Category, showing no preference to one over others in the same Category.*

11.2 [Adequate stocks]*The Member must at all times stock at least 85% of the range of Own Brand Products made available for purchase by the Company by Members.*

Without limiting the above, the Member at all times must use best endeavours to maintain a representative product range and reasonable stock levels (relative to store size and style of business) including Own Brand Products.

11.3 [Take particular allocations] *The Member must accept and pay for, all allocations of Own Brand Products which the Company determines from time to time are to be taken by Members in the same Category as the Member. In determining allocations, the Company must act reasonably having regard to the level of stock which Members in a particular Category could reasonably be expected to require or sell in a relevant period.*

The Member must also maintain the minimum linear metres of retail shelving for Own Brand Products as specified in Item 12.

25.1 [Dictionary] *In this Agreement, unless the context otherwise requires –*

Own Brand Product means every product bearing the Company's or the Company's related bodies corporate' own name or proprietary brand or brands from time to time

Possible full line forcing conduct

Go Vita, as a condition of the supply of franchise rights, proposes that its members must acquire all vitamin and health supplement stock from Go Vita and must not to deal directly

with any other third party suppliers except in certain limited circumstances.

It is also contemplated, as a condition of the supply of franchise rights, that members must accept the allocation of certain stock by Go Vita on a store category basis, must commit to stocking a minimum percentage of a range of Go Vita's own brand stock and must also maintain minimum certain shelf space for Go Vita's own brand stock depending on store category.

These requirements may fall within the definition of exclusive dealing under section 47(2) of the *Trade Practices Act 1974*.

(Refer to direction 4)

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)

The Go Vita members that are granted a franchise right to conduct the business of a Go Vita vitamin and health supplement retail store in accordance with the terms and conditions of a member licence agreement.

- (b) Number of those persons:

- (i) At present time:

126 members

- (ii) Estimated within the next year:
(Refer to direction 6)

135 members

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

N/A

4. Public benefit claims

- (a) Arguments in support of notification:
(Refer to direction 7)

See paragraph 4(b) below.

- (b) Facts and evidence relied upon in support of these claims:

Go Vita considers that the proposed conduct will provide the following public benefits:

- a) assist small individual store business owners to participate in a strong co-operative buying group to better compete with**

large supermarket chains, chain pharmacies, chain health food stores and other large competitors and thereby preserve and promote competition in the vitamin and health supplement markets.

- b) ensure that only high quality vitamins and health supplements that are consistent with Go Vita's standards and image are supplied by members to differentiate Go Vita's products and services.**
- c) ensure that customers will be able to purchase particular vitamins and health supplements from a Member Store when advertised or promoted by Go Vita on a national basis.**
- d) ensure that consumers get the benefit of the unique points of difference of the Go Vita vitamins and health supplements supplied by members.**
- e) ensure that Go Vita will have greater purchasing power and be able to negotiate with suppliers to obtain more competitive prices. This in turn can be passed onto members and consumers.**
- f) that Go Vita will be able to better focus on controlling quality, managing and maintaining the Go Vita brand.**

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 markets can be reasonably identified as the national market for the supply of vitamins and health supplements.

The market for the sale of vitamin and other health supplements is highly competitive with a large number of participants including other franchise system speciality stores, pharmacies, large box format stores, online retailers and supermarkets.

There are relatively minimal barriers to entry into the industry.

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) below.

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

The proposed conduct will largely prevent members from choosing their own supplier or suppliers of vitamin and health supplements.

However, Go Vita considers that the efficiencies, price savings, brand protection and quality control benefits (as outlined above) outweigh any such detriment.

Many current members already voluntarily purchase all their requirements of products from Go Vita.

Go Vita does not consider that the proposed conduct will have any adverse effect on consumers.

Consumers and competition generally are not likely to be harmed by the notified conduct because Go Vita and its members do not account for a competitively significant proportion of sales or purchases in any relevant market. As such, the notified conduct is unlikely to be capable of generating any anti-competitive effects.

Indeed, Go Vita believes that the proposed conduct will enable members to obtain vitamins and health supplements at a price that is competitive with the supermarkets and the large box retailers, and in a manner that involves little administrative effort.

The resultant cost and overhead savings will allow members to operate more profitable businesses, and provide value to their customers.

Go Vita maintains that effect of the proposed conduct on suppliers of vitamins and health supplements will be minimal.

This is because the size and competitive nature of the market in which they operate (including the large number of suppliers within it), and the relatively small volume of products ordered by members, means that any impact will be negligible.

Go Vita reviews constantly the pricing and quality of the products sourced for its warehouse and made available to members, through both tender and request for proposals processes, to ensure that it obtains the quality and competitive pricing needed to allow its members to effectively compete with the supermarkets, chain pharmacies and large speciality stores.

There is no restriction on members to sell only stock held and distributed by Go Vita. Members have the ability to source and sell stock from other suppliers if the stock is not available from Go Vita after inquiry. Members, subject to requirements to stock limited quantities of Own Brand stock, have the ability to choose their own product mix.

7. Further information

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

**Alex Rhydderch
Senior Associate
Colin Biggers & Paisley
Level 42, 2 Park Street
Sydney NSW 2000
(02) 8281 4570**

Dated..... *26 October 2020*

Signed on behalf of the applicant

..... *David Kennedy*

David Kennedy
Colin Biggers & Paisley
Partner

DIRECTIONS

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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.