

**TRADE PRACTICES ACT 1974****UNDERTAKING TO THE AUSTRALIAN COMPETITION AND CONSUMER  
COMMISSION GIVEN PURSUANT TO SECTION 87B.****BY****MAVJON INVESTMENTS PTY LTD****(ACN 078 447 560)****BACKGROUND**

- A. Mavjon Investments Pty Ltd (“Mavjon”) ACN 078 447 560 (trading as Country Snack Delights) produces and sells a range of muesli slices, cakes and nut bars throughout Australia, including a range of slices labelled “Harvest Bake So Slim” (“the So Slim range”).
- B. The Australian Competition and Consumer Commission (“the Commission”) instituted proceedings in the Federal Court of Australia (V384 of 1999) against Mavjon making the claims detailed in the Statement of Claim, a copy of which is annexed hereto and marked “Attachment A.” The Commission alleged that Mavjon had contravened section 52 and sub-section 53(a) of the *Trade Practices Act 1974* (“the Act”) by misrepresenting the fat content of the So Slim range.
- C. In settlement of the abovementioned proceedings, the parties agreed to Consent Orders in the Federal Court of Australia which were made by His Honour Justice Goldberg on 21 July 1999 and Mavjon also agreed to provide the Commission with the following undertakings pursuant to section 87B of the Act.

**UNDERTAKINGS**

1. Mavjon Investments Pty Ltd hereby undertakes to the Commission pursuant to section 87B of the Act that:
  - (a) it will, within three months of the commencement of this undertaking, develop and implement a Trade Practices Corporate Compliance Program (“the program”) that has the characteristics and attributes described in Attachment B.
  - (b) on completion of preparation of the program, Mavjon will forthwith provide a copy of the program to the Commission;
  - (c) throughout the period the program is operative, Mavjon will at all times fully comply with and observe its obligations specified in Attachment B and the program.

2. This undertaking will be operative for the period of two (2) years commencing from the date the undertaking is executed by both parties.

**ACKNOWLEDGMENTS**

3. And Mavjon acknowledges that:

- (a) the Commission will make this undertaking available for public inspection;
- (a) the Commission may from time to time publicly refer to this undertaking;
- (a) this undertaking does not derogate from the rights and remedies available to any other person arising from the alleged conduct;
- (a) the reports referred to in paragraph 7(b) of Attachment B and the Trade Practices Corporate Compliance Program as in force from time to time will be filed with this undertaking on the public register.

IN WITNESS of these undertakings and its agreement the common seal of MAVJON INVESTMENTS PTY LTD (ACN 078 447 560) was hereunto affixed by authority of the Board of Directors in the presence of:

Sole Company Secretary/Director *[Signature]* Director .....

Name(Printed) *JOHN MAVROIDIS* .....

This *23<sup>rd</sup>* day of *October* 1999.

ACCEPTED by the AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974.

*[Signature]*  
.....

Professor Allan Fels  
Chairperson

This *23* day of *November* 1999.

**ATTACHMENT A**

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

No. V 384 of 1999

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

Applicant

- and -

**MAVJON INVESTMENTS PTY LTD**

**ACN 078 447 560**

First Respondent

**JOHN MAVROIDIS**

Second Respondent

**STATEMENT OF CLAIM**

1. The Applicant ("the Commission") is a body corporate capable of suing pursuant to section 6A(2)(d) of the *Trade Practices Act 1974* (Cth) ("the Act").
2. The First Respondent ("Mavjon") is and was at all material times:
  - (a) a company duly incorporated pursuant to the laws of Victoria;
  - (b) a trading corporation within the meaning of the Act.

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3. The Second Respondent ("Mavroidis") is and was at all material times:
- (a) the sole director and the secretary of Mavjon;
  - (b) the sole shareholder in Mavjon;
  - (c) in effective day to day control of Mavjon;
  - (d) acting on behalf of Mavjon in relation to the matters referred to below as its employee or agent within the scope of his actual or apparent authority.
4. At all material times the First Respondent carried on business, inter alia, as a manufacturer, supplier and/or distributor of confectionery and/or food items in Australia including a range of muesli slices labelled "Harvest Bake So Slim ("the So Slim range").
5. From at least about February 1999 the First Respondent represented in relation to two products which formed the So Slim range (or part of it), the Muesli & Apricot Slice ("the Muesli & Apricot Slice") and the Fruit Cocktail Slice ("the Fruit Cocktail Slice") that each:
- (a) was 98% fat free; and
  - (b) contained only 0.9g of fat per 45g serving and 2.0g of fat per 100g serving.

("the Representations").

#### **Particulars**

The Representations were made on the see through packaging of the Muesli & Apricot Slice and the Fruit Cocktail Slice. The Muesli & Apricot Slice and the Fruit Cocktail Slice were each packaged as twin slices marked 90g net.

- (a) the front of each wrapper included the following wording prominently in a circle:

*FAT FREE 98% FAT FREE*

below the words:

*SO SLIM*

which appeared across the outlines of 2 slender bodies

- (b) the back of each wrapper included the following wording under the heading:

*NUTRITIONAL INFORMATION*

<i>2 SERVINGS PER PACK SIZE 45g</i>		
<i>PER SERVING</i>	<i>45g</i>	<i>100g</i>
<i>ENERGY</i>	<i>630kj</i>	<i>1400kj</i>
<i>PROTEIN</i>	<i>2.8g</i>	<i>6.2g</i>
<i>FAT</i>	<i>0.9g</i>	<i>2.0g</i>

Copies of the packaging referred to above may be inspected at the offices of the solicitors for the Applicant on reasonable notice.

6. The Representations were false in that neither the Muesli & Apricot Slice nor the Fruit Cocktail Slice:
- (a) was 98% fat free;
  - (b) contained only 0.9g of fat per 45g serving nor 2.0g of fat per 100g serving.

**Particulars**

- (a) An analysis of the fat content of a sample pack of the Muesli & Apricot Slice purchased in about mid-February 1999 carried out by Food Laboratories (Aust.) Pty Ltd ("Food Laboratories") on behalf of The Grain Bakery Pty Ltd ("the Grain Bakery") showed that the fat content of the Muesli & Apricot Slice was 9.8g per 100g as set out in the Food Laboratories analysis report dated 24 February 1999;
- (b) An analysis of the fat content of sample packs of the Fruit Cocktail Slice and the Muesli & Apricot Slice carried out by Dunn, Son & Stone ("DSS") which received the samples on about 3 March 1999 from Mavjon showed that the fat content of the Fruit Cocktail Slice was 8.8g per 100g and of the Muesli & Apricot Slice was 9.7g per 100g as set out in the facsimile marked to the attention of Mavroidis dated 13 April 1999 ("the 13 April facsimile") which under a heading "Re: Summary of Fat Analysis" referred to Analytical Report no P815 dated 3 March 1999;
- (c) An analysis of the fat content of sample packs of the Fruit Cocktail Slice and the Muesli & Apricot Slice carried out by DSS which received the samples on about 15 March 1999 from Mavjon showed that the fat content of the Fruit Cocktail Slice was 2.9g per 100g and of the Muesli &

Apricot Slice was 4.0g per 100g as set out in the 13 April facsimile which under a heading "Re: Summary of Fat Analysis" referred to Analytical Report no P961 dated 15 March 1999;

- (d) An analysis of the fat content of a sample pack of the Muesli & Apricot Slice carried out by Food Laboratories (on behalf of the Grain Bakery) which received the sample on or about 16 March 1999 showed that the fat content of the Muesli & Apricot Slice was 9.6g per 100g as set out in the Food Laboratories analysis report dated 23 March 1999;
- (e) An analysis of the fat content of a sample pack of the Fruit Cocktail Slice and of a sample pack of the Muesli & Apricot Slice with Use By dates of September 1999 carried out by DSS which received the samples on or about 30 March 1999 from Mavjon showed that the fat content of the Fruit Cocktail Slice was 5.4g per 100g and that of the Muesli & Apricot Slice was 5.5g per 100g as set out in the Analytical Report no. P1185.1/2 marked to the attention of Mavroidis dated 13 April 1999;
- (f) An analysis of the fat content of sample packs of the Fruit Cocktail Slice and the Muesli & Apricot Slice with Use By dates of September 1999 carried out by Food Laboratories (on behalf of the Grain Bakery) which received the samples on or about 12 April 1999 showed that the fat content of the Fruit Cocktail Slice was 3.8g per 100g and of the Muesli & Apricot Slice was 5.5g per 100g as set out in the Food Laboratories analysis report dated 14 April 1999;
- (g) An analysis of the fat content of a sample pack of the Muesli & Apricot Slice with a Use By date of October 1999, two sample packs of the Fruit Cocktail Slice, one with a Use By date of October 1999 and the other with a use By date of September 1999 carried out by Food Laboratories (on behalf of the Grain Bakery) which received the samples on or about 27 April 1999 showed that the fat content of the Muesli & Apricot Slice was 3.0g per 100g, that of the first Fruit Cocktail Slice was 3.0g per 100g and that of the Second Fruit Cocktail Slice was 5.0g per 100g, as set out in the Food Laboratories analysis report dated 30 April 1999;
- (h) An analysis of the fat content of two sample packs of the Fruit Cocktail Slice with Use By dates of 8 August 1999 and September 1999 and two sample packs of Muesli & Apricot Slice with Use By dates of 23 August 1999 and September 1999 carried out by Dairy Technical Services Ltd ("DTS") (on behalf of the Commission) which received the samples on or about 27 April 1999 showed that the fat content of the sample packs of Fruit Cocktail Slice was 7.4g per 100g and 3.9g per 100g respectively and that of the sample packs of

Muesli & Apricot Slice was 9.0g per 100g and 5.5g per 100g as set out in the DTS Laboratory Report dated 19 May 1999;

- (i) An analysis of the fat content of a sample pack of the Muesli & Apricot Slice with a Use By date of October 1999 and two sample packs of the Fruit Cocktail Slice one with a Use By date of October 1999 and the other with a Use By date of September 1999 carried out by Food Laboratories (on behalf of the Grain Bakery) which received the samples on or about 12 May 1999 showed that the fat content of the Muesli & Apricot Slice was 3.0g per 100g and that of the sample packs of Fruit Cocktail Slice was 3.0g per 100g and 5.0g per 100g respectively as set out in the Food Laboratories analysis report dated 19 May 1999.

Copies of the documents referred to above may be inspected at the offices of the solicitors for the Applicant upon reasonable notice.

- 7. By reason of the matters referred to above Mavjon has, in trade or commerce, engaged in conduct that is misleading or deceptive or likely to mislead or deceive in contravention of s.52 of the Act.
- 8. Further by reason of the matters referred to above Mavjon has, in trade or commerce, in connection with the supply or possible supply of the Muesli & Apricot Slice and/or the Fruit Cocktail Slice or in connection with the promotion by any means of the supply or use of the Muesli & Apricot Slice and/or the Fruit Cocktail Slice falsely represented that the Muesli & Apricot Slice and/or the Fruit Cocktail Slice was of a particular composition in contravention of sub-section 53(a) of the Act.
- 9. By reason of his involvement in the management of Mavjon, Mavroidis:
  - (a) has aided, abetted, counselled or procured;
  - (b) was directly or indirectly knowingly concerned in, or party to;
 the contravention or contraventions by Mavjon of s.52 and sub-section 53(a) of the Act.

### Particulars

(a) The Applicant refers to and repeats the particulars under paragraph 3 above;

(b) On or about 26 February 1999 Mavroidis was sent a facsimile dated 26 February 1999 by the Grain Bakery referring to the Harvest Bake "So Slim" Muesli Slice and stating inter alia:

" . . .

- IT APPEARS THE ABOVE PRODUCT IS NOT 98% FAT FREE AS THE LABEL SUGGESTS.

- INDEED WE HAVE A NUTRITION TEST RESULT WHICH SAYS IT HAS 9.8% FAT PER 100g.

(NOT 2% FAT AS STATED ON YOUR LABEL)

(c) on or about 3 March 1999 Mavroidis sent a facsimile dated 3 March 1999 to the Grain Bakery acknowledging its facsimile of 26 February 1999;

(d) on or about 4 March 1999 the Grain Bakery sent Mavroidis a facsimile dated 4 March 1999 referring to the "SO SLIM" Muesli Slice acknowledging his facsimile of 3 March 1999 and stating inter alia:

" . . . WE THEREFORE AGAIN INVITE YOU TO EXCHANGE ONLY THE FAT CONTENT PORTION OF YOUR TEST.

(e) on or about 4 March 1999 the Grain Bakery sent Mavroidis a further facsimile dated 4 March 1999 referring to:

"YOUR "FAT FREE" CLAIM / SLICES."

(f) on or about 4 March 1999 Mavroidis sent a facsimile to the Grain Bakery responding to its second facsimile of 4 March 1999;

(g) on or about 5 March 1999 the Grain Bakery sent a facsimile to Mavroidis dated 5 March 1999 which stated inter alia:

"IF WE DO NOT GET THE TEST AS REQUESTED ON 4/3 A FORMAL WRITTEN COMPLAINT WILL BE MADE TO THE A.C.C.C."

(h) on or about 11 March 1999 the Grain Bakery sent a facsimile dated 11 March 1999 to Mavroidis stating inter alia:



**"A FORMAL WRITTEN COMPLAINT WILL NOW BE LODGED!"**

- (i) by letter dated 17 March 1999 the Applicant informed Mavroidis of its concerns that:
- "your company may be in breach of the Act . . . [and it sought] your advice as to the test results you have to substantiate the claim of "98% fat free" which the representation makes."*
- (j) on or about 29 March 1999 Mavroidis provided only a hand written "Preliminary Report" from DSS dated 3 September 1998 to the Applicant which stated inter alia:

*"Muesli Bar"*

. . .  
*Fat g/100g 2.0"*

- (k) Mavroidis stated in a facsimile to the Applicant dated 29 March 1999 in a letter to which the preliminary report of DSS dated 3 September 1998 was attached that:
- . . .  
*this is a genuine and gradual mistake"*
- (l) on or about 30 March 1999 Mavroidis received the results of tests carried out by DSS on samples of the Fruit Cocktail Slice and the Muesli & Apricot Slice which showed the fat content of the Fruit Cocktail Slice was 5.4g per 100g and that of the Muesli & Apricot was 5.5g per 100g.
- (m) Mavroidis did not provide the final report arising out of the preliminary report dated 3 September 1998 despite requests from the Applicant by telephone on or about 25 March 1999 and by facsimile from the Applicant dated 31 March 1999
- (n) Mavroidis stated in a facsimile to the Applicant dated 15 April 1999:
- "I KNOW THERE IS A PROBLEM WITH THE SLICE. I AM WORKING DAY AND NITE [?] TO RECTIFIG (sic) THE PROBLEM"*

which enclosed a copy of the 13 April facsimile and the DSS Analytical Report no. P1185.1/2 dated 13 April 1999.

- (o) notwithstanding his knowledge of test results from Food Laboratories and DSS in the period from at least about late February or early March 1999 which showed fat contents well in excess of 2% per 100g Mavroidis allowed Mavjon to continue supplying the Muesli & Apricot Slice and the Fruit Cocktail Slice.

The Applicant reserves the right to provide further particulars after discovery.

Copies of the documents referred to above may be inspected at the offices of the solicitors for the Applicant upon reasonable notice.

THE APPLICANT CLAIMS THE RELIEF SPECIFIED IN THE APPLICATION



.....  
E. A. Strong

DATED: 9 July 1999

*per Martin Bruckard*  
.....

Australian Government Solicitor  
Solicitor for the Applicant

## ATTACHMENT B

### MAVJON INVESTMENTS PTY LTD ("MAVJON") TRADE PRACTICES ACT 1974 CORPORATE COMPLIANCE PROGRAM

The Trade Practices Corporate Compliance Program ("the program") to be implemented by Mavjon will have the following characteristics and attributes:

#### A. AIM

To create a culture of compliance within Mavjon (having regard to Australian Standard AS 3806-1998 **Compliance Programs**) and to prevent, so far as possible, any contraventions of Part V Division 1 of the *Trade Practices Act 1974* ("the Act") by Mavjon or by its directors, employees or agents.

#### B. POLICY

The formal adoption or reaffirmation by Mavjon of a policy of strict compliance with both the letter and spirit of Part V Division 1 of the Act within Mavjon and the adoption or reaffirmation and enforcement of sanctions against any director, employee or agent who is knowingly or recklessly concerned in a contravention of that part of the Act.

#### C. COVERAGE

The program is to cover all directors, employees and agents of Mavjon whose duties could result in them being concerned in conduct that might breach Part V Division 1 of the Act ("the relevant staff"). The program will include a specific reference to the duty of care of company directors in respect of Part V Division 1 of the Act.

#### D. COMPLIANCE INFRASTRUCTURE

The appointment of a manager as the Compliance Officer with overall responsibility for compliance with the program.

#### E. APPROVAL OF PROGRAM

Mavjon will ensure that prior to implementation of the program a person or firm of practitioners with expertise in trade practices corporate compliance programs provides

written confirmation to Mavjon that the program possesses all the characteristics and attributes set out herein.

#### **F. DURATION OF PROGRAM**

The program will remain in force for a period of not less than two (2) years.

#### **G. EDUCATION OF STAFF**

The development and implementation of an education program calculated to have the relevant staff conversant with the provisions of the Act to a level where they can avoid obvious contraventions of the Act and can identify more complex trade practices problems for referral to the Compliance Officer.

The education program must include:

- (i) a one-hour mandatory training session for the Compliance Officer and all relevant staff on their obligations under Part V Division 1 of the Act (“the training session”). The training session is to be conducted by a person (“the Specialist”) who is experienced in trade practices law and approved by the Australian Competition and Consumer Commission (“the Commission”).
- (ii) training as described in paragraph E(i) for any employees who are hired after the training session in paragraph E(i) has taken place (to be held within one year of engagement);
- (iii) a requirement that the Compliance Officer refer any questions or difficulties that arise in relation to Mavjon’s compliance with Part V Division 1 of the Act to the Specialist. The Compliance Officer must keep a file of any such referrals, including a record of the Specialist’s response and any subsequent action taken by Mavjon in relation to the referral;
- (iv) the use of posters and/or notices to facilitate education of and communication with the relevant staff about matters under Part V Div 1 of the Act. Posters should be displayed in the work area, and notices supplied to all relevant staff for their further information. Such posters and/or notices are to be checked and approved by the Specialist before they are displayed.

#### **H. RECIPE AND NUTRITIONAL CLAIMS REGISTER**

To minimise or remove the likelihood of misleading nutritional claims in the future, Mavjon will establish and implement a Recipe and Nutritional Claims Register (“the register”) containing recipes for all products made by Mavjon

where nutritional claims are made about the products. The register will have the following features:

- (i) the register will contain accompanying test results to substantiate the nutritional claims;
- (ii) such tests will be carried out by an accredited and recognised food testing laboratory;
- (iii) any changes to the recipes of the products will be recorded on this register and will be accompanied by new test results substantiating the nutritional content of the altered product;
- (iv) the Register will be monitored by an Independent Third Party for a period of two years;
- (v) the Independent party will review the register every 3 months to ensure that the nutritional claims made about a product accurately reflect the independent test results.
- (vi) the Commission will, from time to time, request the company to engage the Independent Third Party to review and provide a written report with respect to the integrity of the register. Such report is to be provided to the Commission within 28 days of the request by the Commission.
- (vii) the Commission may inspect the register upon reasonable notice.

Mavjon will notify the Commission of its chosen Independent Third Party and food testing laboratory.

#### **I. SELECTION OF THE INDEPENDENT THIRD PARTY**

The Independent Third Party will be selected on the basis that he or she has a knowledge of the Act and experience in implementing or auditing trade practices compliance programs.

The Independent Party will qualify as independent on the basis that he or she :

- is not a present or past staff member or director of Mavjon;
- has not acted or does not act for Mavjon;
- is not retained by Mavjon in any other capacity;
- has not and does not provide consultancy or other services for Mavjon;
- has no substantial shareholding or other interest in Mavjon.

**J. REPORTS TO THE ACCC**

Mavjon will, at its own expense, cause the Independent Third Party to complete a review and provide a copy of its report to Mavjon and the Commission within one month of the end of each twelve month period. The report should:

- i) certify that a Compliance Officer has been appointed for the period of the report;
- ii) detail the steps that have been taken to educate staff on their obligations under Part V Division 1 of the Act; and
- iii) provide details of the compliance by Mavjon as to the nutritional claims made on their food products, and the accuracy of the claims in comparison to the contents of the register;

**K. AMENDMENTS TO THE PROGRAM**

Mavjon will incorporate into the Program and implement as part of the Program all reasonable changes that are seen as appropriate by the Commission.