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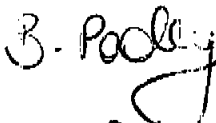
From Bronwyn Pooley on behalf of Jo Ellen Jackson **Total pages** 06

Subject Subaru Third Line Forcing Notifications **Date** Friday 12 December 2003

Dear Isabelle,

Please find attached a response to your correspondence of 25 November 2003, which was addressed to Mr McFarlane, Chief Executive Officer, ANZ Banking Group.

Yours faithfully



Bronwyn Pooley on behalf of Jo Ellen Jackson
 Executive Assistant to MD, Esanda

AUST. COMPETITION & CONSUMER COMMISSION CANBERRA 12 DEC 2003

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12 December 2003

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Dear Ms Arnaud

**Notifications lodged by Subaru (Aust) Pty Ltd and others
 (N40609, N40610, N40611 and N40612)**

I refer to your letter dated 25 November 2003 addressed to Mr McFarlane, Chief Executive Officer, ANZ Banking Group Limited (**ANZ**) in which you seek comments in relation to the following 'third line forcing' notifications:

Subaru (Aust) Pty Ltd (Subaru)	N40609
General Motors Acceptance Corporation, Australia (GMAC)	N40610
Swann Insurance (Australia) Pty Ltd (Swann)	N40611
Interleasing (Australia) Limited (Interleasing)	N40612

I have been asked to respond to your letter. Esanda Finance Corporation Limited (**Esanda**) is a wholly owned subsidiary of ANZ. Esanda supplies asset financial services to consumers and businesses (including finance for motor vehicle dealers in respect of inventory).

Executive Summary

As a matter of principle, Esanda does not object to the efficient bundling of products. However there can be no justification, from a competition perspective, for allowing firms to bundle products to exploit their market power (ie. use their position as a supplier in one market to force customers to purchase a second product from a nominated supplier). This conduct effectively removes choice and bargaining power for their customers.

In the present matter Subaru is effectively forcing its authorised dealers to obtain wholesale vehicle (inventory or floor plan) finance from GMAC.

If an authorised Subaru dealer declines to acquire its wholesale vehicle finance from GMAC, the dealer will suffer severe penalties:

- the dealer will be refused discounts, allowances and credits offered by Subaru in relation to its supply of Subaru vehicles to the dealer;
- the dealer will be refused the right to offer Swann Insurance products to its customers and those customers will be refused discounts, allowances, rebates and credits by Swann when purchasing a Subaru vehicle from that dealer; and
- Interleasing will refuse the dealer the right to offer its leasing service products to customers and those customers will be denied discounts, allowances, rebates and credits by Interleasing when purchasing a Subaru motor vehicle from that dealer.

Subaru dealers have no competitive alternative sources of supply for Subaru vehicles. Accordingly, the penalties for rejecting the GMAC finance tie are so severe that dealers will be denied the opportunity to choose, on the normal commercial basis, whether or not to acquire wholesale vehicles finance from GMAC.

There is no justification or reason for this harsh discrimination against authorised Subaru dealers. No commercial rational or explanation is offered by Subaru for its decision to penalise dealers who might wish to obtain wholesale vehicle finance from GMAC's competitors. Certainly there is no indication in the notification whether Subaru or Swann receives a financial benefit from GMAC for seeking to compel Subaru dealers to obtain wholesale vehicle finance from GMAC. Presumably this is a matter which the Commission is considering.

In Esanda's view, no public benefit whatsoever results from the conduct described in Notification N40609. Indeed, no public benefit is identified in the notification (or accompanying submission) in relation to the GMAC wholesale finance tie. On the other hand, the tie will result in significant public detriment, including removal of choice and a diminution in competition in the market for providing wholesale financial services to motor vehicle dealers. Subaru dealers will not have a real choice as to competitive financing alternatives. They will be compelled to accept GMAC wholesale finance, thus foreclosing business to competitors of GMAC, including Esanda.

Acceptance of this conduct by the Commission may further damage dealer choice and competition if the finance tie is imposed by other large motor vehicle manufacturers, especially those with whom GMAC is already associated.

For these reasons, Esanda urges the Commission to reject the Subaru notification and the related notifications of GMAC, Swann and Interleasing which all involve conduct which seeks to penalise Subaru dealers who might otherwise choose a wholesale vehicle finance alternative to that provided by GMAC. Esanda believes that genuine dealer choice will be effectively removed and competition in the market for wholesale vehicle finance is likely to be impaired.

Furthermore, given industry practice (which is that dealerships generally promote and sell the retail finance products available from their wholesale financier), the entrenchment of GMAC wholesale finance throughout the Subaru dealership network is likely to result in GMAC retail finance being the sole finance product offered to retail customers in respect of Subaru.

Accordingly, Esanda urges the Commission to give section 93(3A) notices in respect of each notification (subject of course to the requirements of section 93A).

The Notifications

The relevant conduct

The various third line forcing conduct described in the notifications plainly constitutes conduct that would be 'per se' contraventions of section 47(1), (6) and (7) of the *Trade Practices Act 1974 (TPA)*.

Comments made in the submission accompanying the Subaru notification (N40609) that the conduct of Subaru would not involve the supply of 'service' are, in Esanda's view, incorrect as a matter of law. Whilst the mere payment of money may not be a 'service' (*Queensland Aggregates Pty Ltd v TPC*), the relevant conduct (as paragraph 2(a) of the notification provides) involves Subaru engaging in third line forcing conduct of the kind specifically referred to in sections 47(6)(c) and 47(7)(c) (i.e. giving or allowing a discount, allowance, rebate or credit in relation to the supply of goods (Subaru vehicles) to Subaru dealers). The correctness of this view is evident from the decision of the Federal Court in *TPC v Tepeda Pty Ltd (1994) ATPR 41-319 at 42,246*.

Although the third line forcing conduct described in the notifications:

- refers to discounts, allowances, rebate and credits being offered by Subaru – neither the notification nor the accompanying submission identifies the nature, extent and duration of these benefits for compliant Subaru dealers; and
- suggests that the conduct will be limited to promotions – there is no time limit on the conduct of the promotions.

It follows that the discrimination against non-compliant Subaru dealers and the impact on competition in the market for wholesale financial services to motor vehicle dealers is likely to be substantial.

The Statutory Test

The conduct described in the notifications constitutes 'per se' breaches of the Act.

Immunity (via notification) is available unless the Commission determines that the likely benefit to the public from the conduct (or proposed conduct) will not outweigh the likely detriment to the public (section 93(3A)).

The Claimed Public Benefits

Paragraphs 1.9 to 1.13 of the submission accompanying the Notifications seek to identify public benefits resulting from the third line forcing arrangements.

However, as noted above, no effort is made to identify any public benefit likely to result from Subaru offering discounts, allowances, rebates and credits in relation to the supply of vehicles to those Subaru dealers who acquire their wholesale vehicle finance from GMAC.

Nor is any public benefit claimed for Swann and Interleasing denying non-complaint Subaru dealers the right to offer insurance and leasing services.

If, contrary to the above, it is established that Subaru dealers will somehow benefit from the GMAC tie, there is no guarantee that any such 'benefit' will ever be passed on to retail customers in the way of lower prices. While any such benefit in the form of higher dealer profit margins may be an attractive proposition to dealers, it is not a public benefit which should be seen as mitigating the loss of competition resulting from the proposed arrangements.

Public Detriment

There is no doubt that the wholesale finance tie to GMAC will remove real choice for the vast majority of Subaru dealers (and ultimately their customers). In this respect Esanda notes that at present 74% of Subaru dealers (or about 80 in number) stock their inventory by utilising wholesale finance from providers other than GMAC. This represents sales of over 14,000 Subaru vehicles.

Esanda rejects the argument that dealers will continue to have a genuine choice (based on price and other terms) to obtain wholesale finance from GMAC's competitors. Subaru dealers will find it impossible not to buckle in the face of the significant discrimination they will face from their only motor vehicle supplier.

The forcing of GMAC wholesale finance on Subaru dealers is inherently anti-competitive and will inevitably distort the demand for, and supply of, wholesale vehicle finance. Independent suppliers of wholesale vehicle finance, such as Esanda, will be impacted significantly. Competition to supply inventory finance to Subaru dealers will be effectively removed as Subaru dealers are significantly disadvantaged by their only supplier of motor vehicles, Subaru, and by Swann and Interleasing for not choosing GMAC finance.

The competitive outcome will be exacerbated if General Motors Corporation seeks to extend the GMAC tie to other motor vehicles, such as Holden, Saab and Suzuki. Attempts to force wholesale vehicle finance on dealers are not new but have been rejected by competition law authorities in the past. In this regard, we draw the Commission's attention to the observations of the Federal Court in *TPC v Tepeda Pty Ltd* at 42,245-42,246:

The law in the United States is differently expressed. However, it is useful to note in *United States of America v General Motors Corporation* 121 F.2d 376 (1941), General Motors was held to have breached section 1 of the *Sherman Act* because it had made every endeavour to persuade dealers of General Motors' vehicles to use the services of its finance arm, General Motors Acceptance Corporation, and to have retail transactions financed through that corporation. Pressure had been put upon dealers to achieve this end.

If the Commission allows the Subaru (and related) notifications to stand it will be a signal that such conduct is acceptable from a competition law perspective. The likelihood is that General Motors and other motor vehicle manufacturers (such as Ford and Toyota) will follow suit. The flow on effects for competition will be significant as over 50% of the market would be foreclosed to independent finance companies.


Although this submission concentrates upon the impact of the third line forcing conduct in the wholesale vehicle finance market, Esanda believes that if Subaru dealers are effectively tied to GMAC, the finance choices offered by dealers to Subaru retail customers will also be restricted to GMAC products, given industry practice under which dealerships generally promote and sell the retail finance products available from their wholesale financier. Accordingly, competition in respect of retail vehicle financing will be harmed as well.

Conclusion

For the reasons discussed above, Esanda submits that the immunity in respect of the third line forcing conduct described in the Subaru notification (and the inextricably linked notifications of GMAC, Swann and Interleasing) should be withdrawn by the Commission.

Please contact me if you wish to discuss any aspect of this letter.

Yours sincerely,



Elizabeth Proust
Managing Director
Esanda