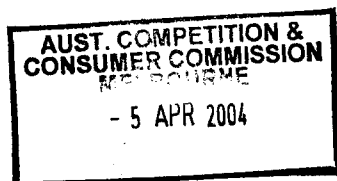


Our ref: PRH:AJM:0364469



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5 April 2004

Mr Tim Grimwade  
Adjudications: Australian Competition and Consumer Commission  
c/- Level 35/ 360 Elizabeth Street  
Melbourne Centre  
Melbourne VIC 3000

Adelaide  
Brisbane  
Canberra  
Melbourne  
Perth  
Sydney  
Auckland  
Wellington  
Hanoi  
Ho Chi Minh City

By courier

FILE No:	16462
DOC: D04	<del>XXXXXXXXXX</del>
MARS/PRISM:	19384-

Dear Mr Grimwade

**Toyota Motor Corporation Australia Limited: notification lodged under section 93 of the Trade Practices Act 1974**

We enclose a notification in respect of conduct which may raise issues under the third line forcing provisions of the *Trade Practices Act 1974* (the **Act**). The notification relates to conduct by Toyota Motor Corporation Australia Limited (trading as **Daihatsu**).

We enclose:

- a Form G;
- a submission in support of the notification, and accompanying annexure. Please note that we request confidentiality in respect of the material contained in Annexure A to this submission; and
- a cheque for \$1,000, being the fee for lodgement of a third line forcing notification by a public company.

In regard to the confidential material contained in Annexure A of the supporting submission, we request that, pursuant to section 95(2) of the Act, this annexure be excluded from the public register on account of its commercial sensitivity and not disclosed to any persons without the prior written consent of Daihatsu.

Yours sincerely

**Alexandra Merrett**  
Solicitor  
Direct +61 3 9274 5830  
Email alexandra.merrett@phillipsfox.com

**Paul Holm**  
Partner  
Direct +61 2 9286 8035  
Email paul.holm@phillipsfox.com

encl

**Form G**

Commonwealth of Australia  
*Trade Practices Act 1974 - sub-section 93(1)*

**EXCLUSIVE DEALING NOTIFICATION**

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(2), (3), (4), (5), (6) or (7) or paragraph 47(8)(a), (b) or (c) or (9)(a), (b), (c) or (d) of that Act in which the person giving notice engages or proposes to engage.

---

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1 (a) Name of person giving notice

Toyota Motor Corporation Australia Limited (ACN 009 686 097) (trading as **Daihatsu**)

(b) Short description of business carried on by that person

Manufacture, supply and distribution of motor vehicles and associated products and services, including the wholesale supply of Daihatsu motor vehicles and associated products and services to authorised Daihatsu dealers ("**Daihatsu Dealers**")

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

c/- Mr Paul Holm, Partner, Phillips Fox, 255 Elizabeth St, Sydney NSW 2000

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

Parts (including air conditioners) and accessories for Daihatsu motor vehicles

(b) Description of the conduct or proposed conduct

Persons appointed as Daihatsu Dealers will be required to acquire parts and accessories from authorised suppliers, namely Daihatsu, other Daihatsu Dealers

and Eastpoint Pty Ltd (ACN 008 687 367) (trading as Autoparts)

3 (a) Class or classes of persons to which the conduct relates

Daihatsu Dealers in Western Australia

(b) Number of those persons -

- (i) At present time 9
- (ii) Estimated within the next year Approximately 10

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

<b>Name</b>	<b>Address</b>
DG McLean & RJ Dawson (trading as Campbell Road Daihatsu)	29 Campbell Road, Albany, WA
Giant Autos (1997) Pty Ltd (trading as Giant Daihatsu)	460 Scarborough Beach Road, Osborne Park, WA
Action Bay Pty Ltd (trading as Goldfields Daihatsu)	35 Boulder Road, Kalgoorlie, WA
Goldy Motors Pty Ltd (trading as Goldy Daihatsu)	161 Great Eastern Highway, Midland, WA
SWGT Pty Ltd as Trustee for the SWGT Unit Trust (trading as Grand Daihatsu)	Corner of Wanneroo and Lancaster Roads, Wangara, WA
Quayside Enterprises Pty Ltd (trading as Mandurah Daihatsu)	285-289 Pinjarra Road, Mandurah, WA
Melville Autos Pty Ltd (trading as Melville Daihatsu)	174 Leach Highway, Melville, WA
Midwest Pty Ltd (trading as Midwest Daihatsu)	339 Marine Terrace, Geraldton, WA
Pittard Motors Pty Ltd (trading as Terry Pittard Daihatsu)	77-79 Spencer Street, Bunbury, WA

- 4 (a) Names and address of person authorised by the person giving this notice to provide additional information in relation to this notice

**Name**

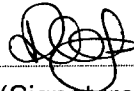
**Address**

Mr Paul Holm

c/o Phillips Fox, 255 Elizabeth St, Sydney  
NSW 2000

Dated 5 April 2004.

Signed by/on behalf of the applicant  
giving notice



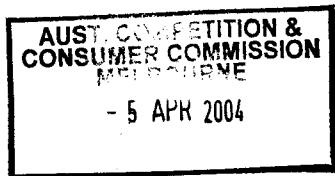
(Signature)

Alexandra Merrett

(Full Name)

Solicitor, Phillips Fox

(Description)



**DIRECTIONS**

- 1 If there is insufficient space on this form for the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the person giving the notice.
- 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 In item 1(b), 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 sub-section 47(2), (3), (4), (5), (6), (7), (8) or (9) 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 In item 3(a), describe the nature of the business carried on by the persons referred to in that item.
- 6 In item 3(b)(ii), state an estimate of the highest number of persons with whom the person giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.

#### NOTICE

If this notification is in respect of conduct of a kind referred to in sub-section 47(6) or (7) or paragraph 47(8)(c) or (9)(d) of the *Trade Practices Act* 1974 ("the Act"), it comes into force at the end of the period prescribed for the purposes of subsection 93(7a) of the Act ("the prescribed period") unless the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, or this notification is withdrawn.

The prescribed period is 21 days (if this notification is given on or before 30 June 1996) or 14 days (if this notification is given after 30 June 1996), starting on the day when this notification is given.

If the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, this notification will not come into force unless the Commission, after completing the procedures in section 93A of the Act, decides not to give a notice under subsection 93(3A) of the Act. The notification comes into force when that decision is made.

If this notification is in respect of conduct of a kind referred to in subsection 47(2), (3), (4) or (5), or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c), of the Act, it comes into force when it is given.

## Notification application - supporting submission

This submission supports a notification of third line forcing lodged by Toyota Motor Corporation Australia Limited (ACN 009 686 097) (trading as **Daihatsu**) with the Australian Competition and Consumer Commission (the **Commission**) on 5 April 2004.

### Background

Daihatsu is engaged in the manufacture, supply and distribution of motor vehicles and associated products and services, including the wholesale supply of Daihatsu motor vehicles and associated products and services to authorised Daihatsu dealers ("**Daihatsu Dealers**"). It is proposing to amend its current arrangements in Western Australia, such that Daihatsu Dealers primarily acquire parts and accessories from a third party distributor for Daihatsu, rather than directly from Daihatsu as has previously been the case.

### The notified conduct

Daihatsu proposes to amend its arrangements relating to the appointment of Daihatsu Dealers (the **proposed arrangements**). As a consequence Daihatsu will be making it a condition of the Daihatsu dealer agreement that Daihatsu Dealers acquire parts and accessories from authorised suppliers. Authorised suppliers will be Daihatsu, other Daihatsu Dealers and Eastpoint Pty Ltd (ACN 008 687 367) (trading as **Autoparts**).

As a commercial decision, Daihatsu will not be actively seeking to supply parts and accessories to Daihatsu Dealers and will be advising Daihatsu Dealers to place orders with Autoparts. Nonetheless, under the terms of its arrangements with Autoparts, Daihatsu remains entitled to distribute parts and accessories to Daihatsu Dealers and should Dealers elect to place orders with Daihatsu, such orders will be considered on a case by case basis in light of Daihatsu's commercial objectives.

Attached to this notification are clauses from the dealership agreement between Daihatsu and each effected Daihatsu Dealer which relate to the proposed arrangements and an example letter notifying each Dealer of the proposed arrangements (see Confidential Annexure A).

Daihatsu Dealers are supplied various goods and services by Daihatsu under the terms of the Daihatsu Dealer Agreement, principally the ability to acquire wholesale supply of Daihatsu vehicles. We note that the existing requirement in the Daihatsu dealer agreements is that the Daihatsu Dealer must acquire genuine parts and accessories only from Daihatsu. This is a full line force, which we have advised Daihatsu will not breach section 47(2) of the *Trade Practices Act 1974* due to the conduct not having the purpose or likely effect of substantially lessening competition in the wider market for wholesale supply of motor vehicle parts and accessories. The market analysis underlying this conclusion is given below.

Sections 47(6) and 47(7) of the *Trade Practices Act 1974* (the **Act**) prohibit conduct which constitutes third line forcing. To the extent that the proposed arrangements would constitute

third line forcing within the meaning of either section 47(6) or section 47(7), the conduct is hereby notified under section 93 of the Act.

## **Competition analysis**

### **Relevant market**

Recent authority suggests that it is not appropriate to consider a single brand or make of motor vehicle to constitute a market, as - from an economic point of view - one brand of passenger vehicle is broadly substitutable for any other brand of passenger vehicle. Similarly, it has been found that there is no single brand market for parts of a particular brand vehicle, as there is a high degree of substitutability between genuine parts and non-genuine parts. This issue was most recently considered in *Regents Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-647.

Accordingly, the most narrow market to be affected by the proposed arrangements would be a State-wide market for the distribution and retail supply of passenger motor vehicle parts and accessories. In our view, however, the market should more properly be considered as Australia-wide, given the ease with which parts and accessories can be transported between States. Indeed, until such time as the proposed arrangements are implemented, Daihatsu will continue to supply the relevant parts and accessories from the eastern States as it has done for a number of years.

### **Impact of proposed changes**

The Australian market for the retail sale of motor vehicles, parts and accessories is a highly competitive market with a number of globally based manufacturers competing vigorously for sales. On the supply side, this includes the domestic manufacturing facilities of four multinational companies, including Toyota (manufacturer of the Daihatsu brand). It also includes a number of overseas manufacturers who face low and reducing barriers to entry into the market.

In the context of such a competitive market, the introduction of a requirement that Daihatsu Dealers acquire Daihatsu genuine parts from authorised suppliers (including a third party distributor of Daihatsu), rather than directly from Daihatsu, will not reduce competition at all in this market. Arguably, it will marginally increase competition due to Daihatsu dealers having an increased choice of suppliers and access to a more efficient distribution system.

### **Expansion of choice, not contraction**

The proposed arrangements effectively *expand*, rather than contract, the options available to Daihatsu Dealers for the acquisition of parts and accessories. Previously, Daihatsu Dealers were required to acquire their parts and accessories directly from Daihatsu. Now they will have the additional option of acquiring from Autoparts. As Autoparts will be able to order parts and accessories in bulk quantities, it will be in a position to save on freight costs, and thus provide Dealers with a more cost-effective alternative.

### **Effect on consumers**

We note that the proposed arrangements will have no impact on consumers who will remain able to acquire both genuine and non-genuine parts and accessories from a variety of competing suppliers, including Daihatsu Dealers.

## **Conclusion**

In light of the above, it is submitted that the proposed conduct will not have the purpose or likely effect of substantially lessening competition in any market.

## **Public benefits**

As noted above, Autoparts will be in a position to order parts and accessories in bulk quantities, thus saving on freight costs and ensuring greater efficiency. Daihatsu would expect that, due to the competitive nature of this market, such efficiency savings will be passed on to Daihatsu Dealers and consumers, such that they are able to acquire genuine parts and accessories at a lower price than present.

Furthermore, the proposed arrangements will continue to ensure that only genuine parts and accessories are used by Daihatsu Dealers when providing automotive services to consumers, thus resulting in a high degree of quality control. This in turn will protect consumers, and ensure that the express guarantees and warranties provided by Daihatsu in relation to genuine parts and service can be maintained.

Finally, customer service will be enhanced as stocks of Daihatsu parts and accessories will be held by Autoparts in Western Australia, allowing a more timely supply to Daihatsu Dealers and consequently to vehicle owners.

## **Detriment**

It is submitted that the proposed conduct will result in no detriment.

## **Assessment**

It is submitted that the proposed conduct will give rise to demonstrable public benefits for both Daihatsu Dealers and end-consumers of Daihatsu products and that the public benefits clearly outweigh any potential detriment.

For these reasons and based on the information provided in this submission and the Form G Notification which it supports, it is submitted that the notified conduct should not be opposed by the Commission.

## **Further information**

If the Commission requires any further information in relation to this submission, it should not hesitate to contact Mr Paul Holm, by way of the contact details below.

### **Paul Holm**

Partner

Phillips Fox

Phone: 02 9286 8035

5 April 2004



**Confidentiality has been granted for Annexure A**