

17 May 2004

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Mr Tim Grimwade  
General Manager - Adjudication  
Australian Competition and Consumer Commission  
PO Box 1199  
DICKSON ACT 2602

FILE No.
DOC:
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Dear Sir

## Subaru (Aust) Pty Ltd - Trade Customer Incentive Program

We act on behalf of Subaru (Aust) Pty Ltd (**Subaru Australia**) and enclose:

- notification under section 93(1) of the *Trade Practices Act 1974 (TPA)*; and
- a cheque for \$100 as payment of the required lodgement fee.

### 1. Background

- 1.1 Subaru Australia imports Subaru-branded motor vehicles and associated spare parts and accessories. It distributes genuine Subaru parts to a number of different customer groups via a network of authorised wholesale parts dealers within Australia (**Wholesale Dealers**).
- 1.2 Subaru Australia plans to develop a marketing relationship with trade customers, including independent and franchised mechanical repair shops, and independent and franchised parts and accessories retailers (**Trade Customers**) by establishing a loyalty program (**Trade Customer Incentive Program**). Under the Trade Customer Incentive Program, Trade Customers will be awarded points for purchasing nominated Subaru spare parts from Wholesale Dealers. Trade Customers will be able to redeem designated amounts of points for a variety of goods and services supplied by Subaru Australia. These rewards will include Subaru-branded merchandise, events (rallies, motor shows and drive days) and overseas holidays. Subaru Australia will sub-contract the supply of these rewards via separate agreements with third party retailers and service providers.

## **2. Notified Conduct**

2.1 The notified conduct may be formulated as

- (a) Subaru Australia supplying goods or services to Trade Customers on the condition that the Trade Customer will acquire Subaru parts and/or accessories from a Wholesale Dealer;
- (b) Subaru Australia refusing to supply goods or services to Trade Customers for the reason that the Trade Customer has not acquired Subaru parts and/or accessories from a Wholesale Dealer;
- (c) Subaru Australia supplying loyalty program services to Trade Customers on the condition that the Trade Customer will acquire Subaru parts and/or accessories from a Wholesale Dealer;
- (d) Subaru Australia refusing to supply loyalty program services to Trade Customers for the reason that the Trade Customer has not acquired Subaru parts and/or accessories from a Wholesale Dealer;
- (e) Subaru Australia giving discounts, allowances, rebates or credits to Trade Customers on the condition that the Trade Customer will acquire Subaru parts and/or accessories from a Wholesale Dealer; and
- (f) Subaru Australia refusing to give discounts, allowances, rebates or credits to Trade Customers for the reason that the Trade Customer has not acquired Subaru parts and/or accessories from a Wholesale Dealer.

2.2 Our client appreciates that the conduct notified in paragraph 2.1 may be construed as falling within the prohibitions contained in section 47(6) and 47(7) of the TPA. Accordingly, it wishes to notify the conduct under section 93(1) of the TPA. For the reasons discussed in section 3, we submit that the public benefits associated with the conduct clearly outweigh any public detriment caused by the conduct.

## **3. Competition Issues**

3.1 We submit on behalf of our clients that the Commission should not serve a notice under section 93(3A) of the TPA because:

- (a) the conduct in question will not adversely affect competition in any relevant market; and
- (b) the conduct in question will result in public benefits and no public detriment (or, at the very worst, an immaterial public detriment).

- 3.2 We do not believe that the notified conduct will have any adverse affect on competition in the relevant market. We consider that the relevant market for assessing this notification is the wholesale market for the supply of automotive parts, accessories and ancillary services in Australia. The market is highly competitive. For example, by extrapolation from retail motor vehicle sales data, Subaru Australia's share of the wholesale parts market can be approximated at 3.5%. Accordingly, we do not consider that the conduct will distort demand, create barriers to entry or otherwise harm competition in the market. Further information in relation to the market can be provided to the Commission if requested.
- 3.3 Subaru Australia does not believe that the offer of incentives to purchase Subaru parts from a Wholesale Dealer will distort demand in the relevant market, as there will only be a very small segment of purchasers of automotive parts and accessories affected. Similarly, the Trade Customers retain their genuine choice to deal with any wholesale supplier on the competitive terms offered by those suppliers. They can choose, on the normal commercial basis of quality and price, whether or not to purchase parts alone from any supplier, or to accept Subaru Australia's terms for the package of genuine parts and other goods and services. By retaining the Trade Customers' genuine choice, the conduct is not inherently anti-competitive.
- 3.4 Moreover, there is inherent public benefit in the conduct, as Trade Customers can buy the package of genuine Subaru parts from Wholesale Dealers and receive other goods and services from Subaru Australia at a genuine saving on the total price of the products and services than if they were bought separately in competitive markets. The conduct will therefore result in lower prices for Trade Customers, and an increase competition in the relevant markets.
- 3.5 It is likely that there will also be increased competition in the relevant markets for the goods and services offered by the Retail Partners, as competitors of Subaru Australia and its the Retail Partners may seek to improve their offerings and promotion of similar products and benefits to trade customers at large.
- 3.6 We believe that the notified conduct will have little, if any, public detriment. Loyalty programs that award points to consumers associated with acquiring particular goods or services are widespread throughout Australia and the world. Participation in the loyalty program will be completely voluntary and the Trade Customers will be free to purchase their automotive parts and accessories from any supplier they choose. Overall, the effect of the conduct discussed above on the market is insignificant and is outweighed by the benefits to the Trade Customers and the public at large.

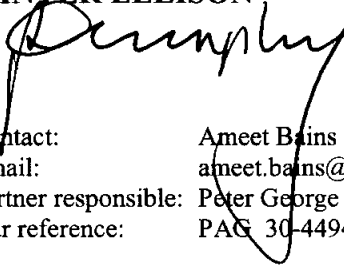
#### **4. Conclusion**

- 4.1 For the reasons set out above, we do not believe the Commission should serve a notice under section 93(3A) of the TPA in respect of this notification. This is because the notified conduct will cause little, if any, detriment and will generate public benefits.

If you have any questions in relation to this notification or require any further information, please do not hesitate to contact Peter George or Ameet Bains of our office.

Yours faithfully

**MINTER ELLISON**



Contact: Ameet Bains Direct phone: +61 3 8608 2063 Direct fax: +61 3 8608 1084  
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Partner responsible: Peter George Direct phone: +61 3 8608 2634  
Our reference: PAG 30-4494204

**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 engaged or proposes to engage.

1. (a) Name of person giving notice:

*Subaru (Aust) Pty Ltd (Subaru Australia)*  
*ABN 95 000 312 792*

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

*Wholesale supply of imported motor vehicles, spare parts and accessories, and associated services, including supply of spare parts to authorised dealer distributors (Wholesale Dealers).*

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

*C/- Ameet Bains*  
*Minter Ellison Lawyers*  
*525 Collins Street*  
*MELBOURNE VIC 3000*

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

*Subaru spare parts and accessories*

*Retail goods and services provided by Subaru Australia and third party retailers and service providers*

*Loyalty program services, including awarding points to trade customers, including independent and franchised mechanical repair shops, and independent and franchised parts and accessories retailers (Trade Customers) and promotional and other support services.*

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

(i) *Subaru Australia supplying, or offering to supply goods or services to Trade Customers on the condition that the Trade Customer will acquire Subaru parts and/or accessories from a Wholesale Dealer;*

(ii) *Subaru Australia refusing to supply goods or services to Trade Customers for the reason that the Trade Customer has not acquired,*

*or has not agreed to acquire, Subaru parts and/or accessories from a Wholesale Dealer;*

- (iii) *Subaru Australia supplying, or offering to supply, loyalty program services to Trade Customers on the condition that the Trade Customer will acquire their Subaru parts and/or accessories from a Wholesale Dealer;*
- (iv) *Subaru Australia refusing to supply, or offer to supply, loyalty program services to Trade Customers for the reason that the Trade Customer has not acquired, or has not agreed to acquire, their Subaru parts and/or accessories from a Wholesale Dealer;*
- (v) *Subaru Australia giving or, or offering to give, discounts, allowances, rebates or credits to Trade Customers on the condition that the Trade Customer will acquire their Subaru parts and/or accessories from a Wholesale Dealer; and*
- (vi) *Subaru Australia refusing to give, or offer to give, discounts, allowances, rebates or credits to Trade Customers for the reason that the Trade Customer has not acquired, or has not agreed to acquire, their Subaru parts and/or accessories from a Wholesale Dealer.*

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

*Trade Customers*

- (b) Number of those persons:

- (i) At the present time:

**Nil**

- (ii) Estimated within the next year:

**1,000**

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

**Not applicable**

4. Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice:

*Ameet Bains  
Minter Ellison Lawyers  
525 Collins Street  
MELBOURNE VIC 3000*

**DATED**

*14<sup>th</sup> May*, 2004

**SIGNED** by/on behalf of the applicant

*Anthony Ross Thomas*  
\_\_\_\_\_  
(Signature)

ANTHONY ROSS THOMAS  
\_\_\_\_\_  
(Full Name)

COMPANY SECRETARY  
\_\_\_\_\_  
(Description)

## DIRECTIONS

1. 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 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 sub-section 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 June 30 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 sub-section 93(3A) of the Act. The notification comes into force when that decision is made.

If this notification is in respect of conduct or a kind referred to in sub-section 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.