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Mr Gavin Jones
Director
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Australian Competition and Consumer Commission
470 Northborne Avenue
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FILE No:
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Dear Mr Jones

Notification lodged by Hino Motor Sales Australia Ltd (N031296) (*Hino Motor Sales*)

I refer to your letter dated 4 June 2004 addressed to Mr McFarlane, Chief Executive Officer, ANZ Banking Group Limited (**ANZ**) in which you seek comments in relation to the 'third line forcing' notification detailed above and lodged by Hino Motor Sales.

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

While Esanda does not object to the efficient bundling of products as a matter of principle there is 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 this instance Esanda considers that there is no valid justification for allowing this arrangement to continue.

In the present matter Hino Motor Sales may compel all of its authorised dealers to obtain wholesale vehicle (inventory or floor plan) finance from Toyota Finance Australia Limited trading as Hino Finance (**Hino Finance**).

If an authorised Hino Motor Sales dealer declines to acquire its wholesale vehicle finance from Hino Finance, then Hino Motor Sales can refuse to supply further Hino motor vehicles to that dealer.

Hino dealers have no competitive alternative sources of supply for Hino vehicles. Accordingly, the penalties for rejecting the Hino Finance tie mean that dealers will be unable to acquire wholesale vehicles finance from any other party.

There is no justification or reason for this harsh discrimination against authorised Hino dealers. No valid commercial rationale or explanation is offered by Hino Motor Sales for its decision to penalise dealers who might wish to obtain wholesale vehicle finance from competitors of Hino Finance. Certainly there is no indication in the notification whether Hino Motor Sales will receive any

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financial benefit from Hino Finance for compelling Hino dealers to obtain wholesale vehicle finance from Hino Finance, an issue that Esanda presumes will be considered by the Commission.

In Esanda's view, no public benefit whatsoever results from the conduct described in Notification N031296. Indeed, no public benefit is identified in the notification (or accompanying submission) in relation to the Hino Finance (wholesale finance) tie. On the other hand, the tie will result in significant public detriment, including complete elimination of choice and competition in the market for providing wholesale financial services to Hino motor vehicle dealers. Hino dealers will have no choice as to competitive financing alternatives. They will be compelled to accept Hino Finance wholesale finance, thus foreclosing business to competitors of Hino Finance, 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 Toyota Finance Australia Limited (ie Hino Finance) is already associated.

For these reasons, Esanda urges the Commission to reject the Hino Motor Sales notification which will penalise Hino dealers who might otherwise choose a wholesale vehicle finance alternative to that provided by Hino Finance. Esanda believes that dealer choice will be removed, competition in the market for wholesale vehicle finance is likely to be impaired and specifically competition in the market for wholesale vehicle finance for Hino vehicles will be eliminated altogether.

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

Finally, the entire arrangement will potentially lead to artificially high retail prices for consumers of Hino vehicles. This is because dealers will be unable to pass on any portion of the savings that they might otherwise have negotiated with an alternate financier (in terms of floorplan finance pricing) to consumers.

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

The Notification

The relevant conduct

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

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

The notification states that the ability of Hino dealers to compete in the market for retail vehicles will not be affected, but dealers who refuse to acquire wholesale finance from Hino Finance will be removed from the market, as they will be unable to obtain Hino stock from Hino Motor Sales. Further, as the sole supplier of wholesale finance to Hino dealers, Hino Finance will be able to exercise monopoly behaviour in terms of pricing.

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

The Notification seeks to identify public benefits resulting from the third line forcing arrangements.

As the sole supplier of wholesale finance to dealers, Hino Finance will be under no obligation to offer or agree competitive rates. It will be able to dictate pricing as dealers will be precluded from sourcing competitive alternatives. Viewed in this light, Esanda considers that Hino dealers would be subject to considerable detriment resulting from these arrangements.

In terms of the claimed benefits in reducing transactions costs, there exist numerous offerings already in the marketplace under which payments and orders for vehicles can already be made electronically, without relying on arrangements of the kind detailed in the notification first being in place. In any event if the proposed electronic ordering system can produce the benefits claimed, then Esanda would expect that dealers would be sufficiently attracted to these arrangements without the need to impose mandatory wholesale funding arrangements.

If, contrary to the above, it is established that Hino dealers will somehow benefit from the Hino Finance 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 elimination of competition resulting from the proposed arrangements.

Public Detriment

In normal competitive circumstances, dealers have the flexibility to discount the recommended retail price. With these arrangements in place however, unless a dealer is willing to give up the Hino franchise it will be forced to accept the dictated wholesale pricing for both floorplan financing and vehicle cost. This will potentially lead to artificially high retail prices for consumers of Hino vehicles because dealers will be unable to pass on any portion of the savings that they might otherwise have negotiated with an alternate financier (in terms of floorplan finance pricing) to consumers.

There is no doubt that the wholesale finance tie to Hino Finance will eliminate choice for all Hino dealers (and ultimately adversely impact the end customers' ability to negotiate on price). In this respect Esanda notes that at present Hino vehicles account for around 15% of the entire (new) heavy vehicle market.

The forcing of Hino Finance wholesale finance on Hino 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 Hino dealers will be removed altogether. The proposed arrangements will allow:

- Hino Finance to dictate wholesale finance pricing at its discretion, and
- Hino Motor Sales to dictate the wholesale price of Hino Vehicles.

The competitive outcome will be exacerbated if Toyota Finance Australia Limited seeks to extend the wholesale finance tie to other motor vehicles, such as Toyota. 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 Hino Finance notification to stand it will be a signal that such conduct is acceptable from a competition law perspective. The likelihood is that larger motor vehicle manufacturers (such as Ford and GMH) 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 Hino dealers are effectively tied to Hino Finance, the finance choices offered by dealers to Hino retail customers will also be restricted to Hino Finance 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 Hino Motor Sales notification 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