

AUST. COMPETITION &
CONSUMER COMMISSION
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Our ref: DJP:PCB:972474

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19 January 2005

Mr Sam Di Scerni
Regional Director
ACCC Perth
PO Box 6381
East Perth WA 6892

ACCC
MARS#:
DOC ID:
FILE:

Dear Sam

Notification: Toyota Dealer Assistance Program

We act for Prestige Motors Pty Ltd (ACN 008 679 258), as the trustee of the Prestige Toyota Trust, trading as Toyota WA Distributor (ABN 42 855 447 753) (TWA) and Eastpoint Pty Ltd (ABN 64 008 687 367) (Eastpoint).

We wish to lodge, on behalf of TWA and Eastpoint, notifications in respect of conduct that may constitute third line forcing by TWA and Eastpoint.

Accordingly, please find enclosed:

- a notification under section 93(1) of the *Trade Practices Act 1974 (TPA)* on behalf of TWA;
- a notification under section 93(1) of the TPA on behalf of Eastpoint;
- a cheque in the amount of \$200 as payment of the required fees; and
- A submission in support of TWA and Eastpoint's notifications, at Annexure 1.

We note that the proposed conduct that is the subject of this application is substantially the same as that which is the subject of notification N31334 by Toyota Motor Corporation Australia Ltd.

Please notify us if this communication has been sent to you by mistake. If it has been, any client legal privilege is not waived or lost and you are not entitled to use it in any way.

Please feel free to contact either of us if you wish to discuss this matter.

Yours sincerely



Peter Beekink
Partner



Darren Pratt
Senior Associate

Annexure 1

Background

- 1 TWA is the distributor of Toyota products in Western Australia. These Toyota products include Toyota vehicles and air-conditioners for Toyota vehicles. Eastpoint is the distributor of Toyota and Daihatsu parts and accessories in Western Australia.
- 2 TWA wholesales Toyota products to authorised Toyota dealers (**Dealers**). Eastpoint wholesales parts and accessories to Toyota and Daihatsu dealers. These dealers are generally privately owned businesses operated by a nominated dealer principal. A successful dealership will have a substantial turnover and may own a key dealership site. These businesses therefore commonly sell for substantial sums, and it can prove difficult for some otherwise suitable dealer candidates to finance the purchase of these businesses. It is in TWA and Eastpoint's interests to ensure its authorised dealers are performing and, where a dealer wishes to exit from the business, that he / she is able to do so in favour of a new and potentially more highly motivated dealer principal.
- 3 TWA and Eastpoint have therefore developed in conjunction with Toyota Motor Corporation Australia Ltd (TMCA) the Dealer Assistance Program (**DAP**) which is designed to provide financial assistance to suitable motor vehicle dealership applicants who wish to acquire a Toyota dealership.

Conduct being notified

- 4 The DAP involves TWA and Eastpoint offering prospective motor vehicle dealers a package of goods and services, including the offer of a Toyota dealer agreement. The DAP also involves TWA taking an initial equity stake in the dealership, which over time it will sell down to the dealer. In addition, access to funding has been arranged through a related body corporate of TMCA, Toyota Finance Australia Ltd (**Toyota Finance**). As TWA and Eastpoint are offering the package of goods and services associated with the prospective dealer obtaining a Toyota motor vehicle dealership under the DAP on condition that prospective dealers acquire financial services from Toyota Finance, TWA and Eastpoint wish to notify this proposed conduct, so as to obtain immunity in respect of section 47(6) and (7) of the TPA.
- 5 There are a number of stages to the DAP proposed to be introduced by TWA and Eastpoint, from the qualification of a prospective dealer as a suitable dealer to participate in the DAP, through to the operation by that dealer of a Toyota dealership.
- 6 Relevant for current purposes is the stage at which, after approving a prospective dealer (**Dealer Applicant**) to purchase a Toyota dealership from a dealer wishing to sell it, and approving the Dealer Applicant to take part in the DAP, TWA, Eastpoint and Toyota Finance would jointly sign a letter of intent to the Dealer Applicant. The purpose of this letter of intent would be to conditionally agree to appoint the Dealer Applicant as a Toyota dealer, and to fund the person under the DAP.

- 7 The DAP is to be structured such that Dealer Applicants would be required to register a company (**Company**) which is to purchase the particular Toyota dealership from the existing dealer wishing to sell it. Upon registration of the Company, it is to be agreed between the parties that TWA would provide equity to the Company through entering into an Investment Agreement with the Dealer Applicant, on the condition that the Company acquires any additional funding required to purchase or operate the particular dealership from Toyota Finance.
- 8 Therefore, TWA and Eastpoint propose to supply to Dealer Applicants goods and services associated with operating a Toyota motor vehicle dealership, as well as TWA investment in the Company on the terms and conditions set out in the Investment Agreement between TWA and the Dealer Applicant. A condition to TWA and Eastpoint offering Dealer Applicants these goods and services is that any additional financing that is required by the new dealership is obtained from Toyota Finance.
- 9 TWA, in its capacity as the distributor of Toyota vehicles and airconditioners in Western Australia and Eastpoint, in its capacity as distributors of Toyota parts and accessories in Western Australia, would then appoint the Company as a Toyota motor vehicle dealer. This appointment would be subject to and effective from the completion of the purchase by the Company of the existing dealership from the selling dealer.

Competition analysis

- 10 We submit that the public benefits likely to arise out of TWA and Eastpoint's proposed conduct would outweigh any public detriment. In particular we submit that little or no public detriment is likely to arise out of the proposed conduct.
- 11 An important factor in this regard is that the DAP is expected to be offered to about 2 dealers over the coming 3 to 5 years. Clearly therefore, the impact of such arrangements would be minimal as the restraint upon this number of persons is insignificant in the context of the broader market for commercial finance. In addition, the effect of the DAP is to provide a level of financing to suitable Dealer Applicants that they otherwise would be unable to access. The DAP is therefore not preventing Dealer Applicants seeking finance from other sources, but effectively provides a level of funding that otherwise would not be available to them. Further, any such Dealer Applicants are not constrained to use the DAP, rather this will be an option offered to suitable candidates that they may choose to accept or reject.
- 12 The DAP will not impact upon the broader market/s for the provision of commercial finance. Prospective motor vehicle dealers who are not offered the DAP would continue to be free to deal with the financier of their choice. Dealer Applicants who are offered the DAP have the choice to seek funding from other sources and will not be required to acquire a dealership concerned through the DAP.
- 13 The notified conduct would be likely to lead to public benefits as follows:
 - 13.1 The DAP would give persons who might not otherwise be able to finance the purchase of a motor vehicle dealership the ability to do so. This

increases the liquidity of Toyota dealerships and assists existing retiring dealers to sell their business for a fair market price.

- 13.2 Under the DAP, Dealer Applicants are in effect being given access to financing that might not otherwise be available or, if they were able to access funding on their own behalf, finance at effectively lower rates. This reduces these Dealers' operating costs, increases their ability to run a competitive dealership and offer a more competitive product to end consumers.
- 13.3 TWA and Eastpoint's ability to compete with other motor vehicle manufacturers is substantially dependant upon the performance of its authorised dealers. It therefore is in TWA and Eastpoint's interests to ensure dealers who are no longer committed to running a dealership have the opportunity to exit the dealership on commercial terms. This process also assists in maintaining the competitive dynamic between Toyota and other manufacturers of motor vehicles.

Conclusion

- 14 On the basis of the above submissions, we consider that the notified conduct has minimal, if any, public detriment. On the other hand, we consider that the notified conduct would lead to public benefits of the type discussed above. Accordingly, we consider that the public benefits likely to arise out of the notified conduct would outweigh the public detriment and this notification should be allowed to stand.
- 15 For these reasons, we submit that the Commission should not serve a notice under section 93(3A) of the TPA in respect of this notification.

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

Eastpoint Pty Ltd (ABN 64 008 687 367) (Eastpoint)

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

Supply and distribution of Toyota and Daihatsu motor vehicle parts and accessories

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

Mr Peter Beekink, Partner, Phillips Fox Lawyers, 1 William Street, Perth, Western Australia, 6000

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

Services under a Toyota dealership agreement, including rights to retail Toyota motor vehicles, parts and accessories in a defined territory.

(b) Description of the conduct or proposed conduct

Prestige Motors Pty Ltd (ACN 008 679 258), as Trustee of the Prestige Toyota Trust, trading as Toyota WA Distributor (ABN 42 855 447 753) (TWA) and Eastpoint will provide qualifying prospective Toyota dealers with an offer of a Toyota Dealer Agreement and assistance to acquire an existing Toyota Dealership, pursuant to their Dealer Assistance Program (DAP). A condition of TWA and Eastpoint's offer to a prospective dealer under the DAP is that the

Dealer Applicant's operating company acquires its financing requirements from Toyota Finance Australia Limited.

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

Prospective motor vehicle dealers who meet the criteria for participation in the Dealer Assistance Program.

(b) Number of those persons -

- (i) At present time None
- (ii) Estimated within the next 3 to 5 years 2

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

| Name | Address |
|------|---------|
| N/A | |

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 Peter Beekink Partner, Phillips Fox Lawyers | 1 William Street Perth WA 6000 |

Dated 19 January.....2005.

Signed by/on behalf of the applicant giving notice

(Signature)

Peter Cornelius Beekink

(Full Name)

Solicitor (partner of Phillips Fox Perth)

(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.

Form G

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

EXCLUSIVE DEALING NOTIFICATION

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(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1 (a) Name of person giving notice

Prestige Motors Pty Ltd (ACN 008 679 258), as Trustee of the Prestige Toyota Trust, trading as Toyota WA Distributor (ABN 42 855 447 753) (TWA)

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

Supply and distribution of Toyota motor vehicles and motor vehicle air-conditioners.

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

Mr Peter Beekink, Partner, Phillips Fox Lawyers, 1 William Street, Perth, Western Australia, 6000

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

Services under a Toyota dealership agreement, including rights to retail Toyota motor vehicles, parts and accessories in a defined territory.

(b) Description of the conduct or proposed conduct

TWA and Eastpoint Pty Ltd (ABN 64 008 687 367) will provide qualifying prospective Toyota dealers with an offer of a Toyota Dealer Agreement and assistance to acquire an existing Toyota Dealership, pursuant to their Dealer Assistance Program (DAP). A condition of TWA and Eastpoint's offer to a prospective dealer under the DAP is that the Dealer Applicant's operating

company acquires its financing requirements from Toyota Finance Australia Limited.

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Prospective motor vehicle dealers who meet the criteria for participation in the Dealer Assistance Program.

(b) Number of those persons -

(i) At present time None

(ii) Estimated within the next 3 to 5 years 2

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| N/A | |

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| Mr Peter Beekink Partner, Phillips Fox Lawyers | 1 William Street Perth WA 6000 |

Dated 19 January.....2005.

Signed by/on behalf of the applicant giving notice



(Signature)

Peter Cornelius Beekink

(Full Name)

Solicitor (partner of Phillips Fox, Perth)

(Description)

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- 5 In item 3(a), describe the nature of the business carried on by the persons referred to in that item.
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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.