

Clancy, Sharon

From: Susan Yee-Kong [Susan.Yee-Kong@phillipsfox.com]
Sent: Monday, 19 June 2006 3:01 PM
To: Clancy, Sharon
Cc: Paul Holm
Subject: Toyota notification

Dear Sharon

I refer to our telephone conversation earlier today and confirm your request for further information on our client's claim for confidentiality over:

- (a) the submission concerning the notification and
- (b) the proposed rules.

Our client maintains its claim for confidentiality over the following:

- (a) paragraphs 3 - 8 and 17 in the submission and
- (b) the proposed rules

for the following reasons:

(a) paragraphs 3 - 8 and 17 of the submission contain details of the structure of the proposed arrangement. This is commercially sensitive information.

(b) the association has yet to be formed, so the rules have not yet been formally adopted nor publicly lodged. As such, it is a commercially sensitive working document subject to common interest privilege, which privilege has not been waived.

Please let me know if you have any further questions about the documents we have lodged.

Kind regards

Susan Yee-Kong | Special Counsel
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PHILLIPS FOX - NOTICE: Please notify us if this communication has been sent to you by mistake. If it has been, Client Legal Privilege is not waived or lost and you are not entitled to use it in any way.



Our ref: PRH 0391182 SZY

13 June 2006

Australian Competition and Consumer Commission
Level 7, Angel Place
123 Pitt Street
SYDNEY NSW 2000

By hand

Dear Sir/Madam

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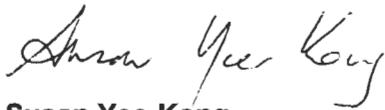


Toyota Motor Corporation Australia Ltd (Toyota) Third Line Forcing Notification

- 1 Please find attached a third line forcing notification in relation to Toyota's proposed conduct in relation to the Toyota Dealers Advertising Association (TDAA). We also attach a confidential submission and copy of the TDAA rules.
- 2 Toyota is a manufacturer and supplier of Toyota motor vehicles to its dealer network. In common with other motor vehicle manufactures, Toyota has a long standing practice of offering targeted rebates and incentives to its dealers on a discretionary basis (**factory support**). Factory support has the effect of reducing the wholesale price of a vehicle to a dealer so that it may reduce retail pricing and respond more effectively to competitive pressures within the Australian market for the retail sale of motor vehicles.
- 3 Toyota and the Toyota Dealer Council made the decision to incorporate the TDAA in order to formalise the process by which Toyota and its dealers monitor market activity and develop competitive responses, including promotional offers and group advertising campaigns. Toyota's marketing activities will continue to be substantially underwritten by Toyota, in its provision of factory support to dealers and funding of national and regional advertising campaigns. However Toyota now intends to make access to factory support conditional upon Toyota dealers being members of the TDAA and complying with the TDAA rules.
- 4 The TDAA is intended to be incorporated cooperatively by Toyota, the Toyota Dealer Council and dealers. The TDAA will only come into effect if 80% or more of the existing Toyota dealership (by number and volume) agree to its formation.

Please do not hesitate to contact either of the signatories if you require any further information.

Yours sincerely



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Paul Holm
Partner

FORM G

Regulation 9

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-sections 47(6) or (7) of that Act in which the person giving notice engages or proposes to engage.

(PLEASE READ DIRECTIONS AND NOTICE ON BACK OF FORM)

1. (a) Name of person giving notice:

Toyota Motor Corporation Australia Ltd ABN 64 009 686 097 ("TMCA").
(See Direction 2 on the back of this Form)

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

The manufacture and distribution of motor vehicles and parts.

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

C/- Paul Holm, Phillips Fox, 201 Elizabeth Street, Sydney NSW 2000.

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

Toyota motor vehicles supplied by TMCA to Toyota dealers.

Rebates and discounts given or allowed in relation to the wholesale price of motor vehicles given or allowed, or offered to be given or allowed, by TMCA to TMCA dealers from time to time.

The acquisition of membership services by Toyota dealers from the Toyota Dealers Advertising Association Inc. ("TDAA").

(b) Description of the conduct or proposed conduct:

TMCA wishes to formalise its arrangements with its dealers with respect to:

- (a) the design and implementation of targeted advertising campaigns, and
- (b) its provision of associated rebates and incentives to dealers.

To this end, and in cooperation with the Toyota Dealer Council, TMCA proposes to establish the Toyota Dealers Advertising Association Inc ("TDAA").

Members of the TDAA will be

- (a) TMCA,
- (b) TMCA's authorised Western Australian distributor, and
- (c) those TMCA dealers who elect to join.

TDAA will not be incorporated unless 80% of Toyota dealers (by number and by combined volume of total Toyota motor vehicle national sales) apply to become members.

As part of this formalisation of arrangements, TMCA proposes to only give or allow, or offer to give or allow, rebates and/or discounts in relation to the wholesale price of the supply of motor vehicles and parts to those dealers that:

- (a) are current members of the TDAA and
- (b) comply with the terms and conditions of national or regional advertising campaign (**Declared Campaign**) developed by the TDAA.

TMCA also proposes to refuse to give or allow, or to refuse to offer to give or allow, rebates and/or discounts in relation to the supply of motor vehicles and parts to those dealers that are

- (a) not current members of the TDAA, or
- (b) members that have not complied with the terms and conditions of a TDAA Declared campaign to which the rebate and/or discount relates.

The following confidential documents are **attached**:

- (a) A submission in support of the notification
- (b) The proposed rules of the TDAA.

(See Direction 4 on the back of this Form)

*See communication of
19 June 2006 re
withdrawal of claim
over aspects of
submission.*

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

TMCA dealers (existing and future) being those persons that have entered into a Dealer Agreement with TMCA allowing them to sell Toyota motor vehicles, parts and services.

(b) Number of those persons—

- (i) At present time: 281
- (ii) Estimated within the next year: 3 additional dealers

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

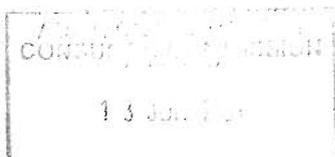
Not applicable.

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

Paul Holm, Phillips Fox, 201 Elizabeth Street, Sydney NSW 2000.

Dated 13 June 2006

Signed by/on behalf of the person giving this notice:



[Handwritten signature]

Paul Holm
Partner, Phillips Fox

[Back of Form]

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 subsection 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 subsection 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 subsection 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 subsection 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.

See communication
of 19 June 2006.

Confidential Submission in support of notification

Background

- 1 In common with other motor vehicle manufacturers/wholesalers, TMCA provides its dealers with rebates and incentives from time to time (**factory support**). This is done primarily to assist dealers to respond to inter-brand competition. The provision of rebates and incentives have the effect of lowering the wholesale price paid by its dealers for particular vehicles and gives dealers the ability to offer reduced retail prices to consumers. Dealers however continue to negotiate actual sales with customers on a deal by deal basis.

- 2 TMCA presently determines the scope and amount of factory support to be provided to dealers with reference to market conditions, including feedback from dealers via the Toyota Dealer Council. When it provides factory support in relation to particular vehicles, it may also assist with the funding of an associated (National or Regional) advertising campaigns.

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Part IV Trade Practices Act

- 9 TMCA is aware that the prohibition against Resale Price Maintenance in the TPA prohibits a supplier imposing a minimum resale price or minimum advertising price. TMCA does not set a minimum price and its recommended retail prices are clearly stated to be recommended only. TMCA does however impose a maximum retail price for its vehicles. Dealer are however free to negotiate prices with customers below this maximum price.
- 10 With TDAA Declared Campaigns the advertised price of a vehicle will similarly constitute a maximum price. Dealers remain free to price below the price advertised for any vehicle.
- 11 TMCA and the Toyota Dealer Council are fully aware of the prohibition against price fixing. Toyota dealers currently engage in group advertising from time to time, usually of promotional offers underwritten by TMCA. The ACCC noted in its November 2004 Motor Vehicle Pricing Guidelines that:
- 'Group advertising arrangements will not raise competition issues if the effect or likely effect of the arrangement is not to control or maintain prices by agreeing to an artificially high advertised price, and prices remain genuinely negotiable between dealers and customers.'
- 12 The TDAA will formalise the process for developing group advertising in a more structured and transparent forum than currently exists. The resulting group advertising will continue to be substantially underwritten by TMCA, through the provision of factory support and funding of the actual advertising. It will generally be directed at promoting a vehicle at a lower price, or on better terms, than exist outside the promotion period. Its effect therefore will be to lower price and heighten inter-brand competition.

Public Benefits

- 13 In the circumstances as described above, the benefits to the public of TMCA only providing factory support (or supplying vehicles at reduced wholesale price) to dealers who are members of the TDAA are as follows:

- (a) allows the implementation of a transparent and coherent framework in which TMCA and its dealers coordinate national and regional advertising;
- (b) facilitates advertising campaigns that will follow best practice and ensure compliance with consumer protection legislation;
- (c) provides a formal and transparent system of self regulation for non compliance with the Guidelines and the law
- (d) gives access to economies of scale in the provision of advertising and marketing services, which will result in more efficient outcomes for dealers and TMCA
- (e) facilitates national and regional promotional offers that offer consumers lower prices and therefore will serve to further enhance inter brand competition.

These features are discussed in more detail below.

Transparent and coherent framework

- 14 The TDAA will provide a recognisable framework for the relationship between dealers who are members of the TDAA and TMCA in advertising and marketing Toyota motor vehicles. It will also provide greater transparency to members on the discretion exercised in the criteria for the payment of rebates and incentives.

Advertising best practice

- 15 TDAA advertising campaigns will be designed to ensure:

- (c) consistency with advertising best practice; and
- (d) compliance with consumer protection legislation including the Trade Practices Act

thereby protecting the investment made in the advertising campaign and protecting the Toyota brand and reputation.

Self regulation

- 16 The TDAA will monitor and investigate non compliance with the terms of a campaign or the rules of the Association. TMCA will unilaterally decide whether further action, such as the withdrawal of rebates or incentives, is an appropriate response to any non compliance.

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Promotion of competition

- 18 The use of national and regional advertising and marketing campaigns supplements the advertising power of smaller participating dealers, so that they can compete more effectively with other brand retailers.
- 19 TDAA national and regional campaigns will be backed by TMCA factory support. Consumers therefore will benefit by access to reduced prices from dealers (subject to their negotiations with the dealer).
- 20 More broadly, such advertising campaigns will promote inter brand competition in the relevant markets by encouraging competitors to make similar or better offers of motor vehicles.

No anticompetitive detriment

- 21 TDAA declared campaigns advertising price will be a maximum retail price and dealers are free to make offers, such as discounts and other deals, which are more advantageous to customers during the period of the promotion. To the extent to which Toyota dealers currently compete, levels of intra brand competition will therefore be unchanged.
- 22 The number of dealers potentially affected by the proposed conduct is not significant compared to the total number of car dealers in the Australian motor vehicle industry.

Conclusion

- 23 TMCA therefore submits that the public benefits likely to result from the conduct outweigh any anticompetitive detriment, as the likely effect of the conduct is lower prices for motor vehicles, increase inter brand competition and promote "best practice" advertising.

Phillips Fox

13 June 2006

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Rules of the Association

Toyota Dealers Advertising Association Incorporated

