

15 May 2009

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**BY HAND**

Dr Richard Chadwick  
General Manager – Adjudication Branch  
Australian Competition & Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

FILE No:
DOC:
MARS/PRISM:

Dear Sir

**Notification of third line forcing conduct**

We act on behalf of Subaru (Aust) Pty Ltd (ACN 000 312 792) (**Subaru Australia**).

We enclose:

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

In order to minimise the risk of contravening sections 47(6) and (7), and out of an abundance of caution, our client wishes to notify conduct under section 93(1) of the TPA. The conduct is set out in the attached Form G.

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

Yours faithfully  
**MINTER ELLISON**

**Peter George**  
**Partner**

Contact: Simone Cooper Direct phone: +61 3 8608 2137 Direct fax: +61 3 8608 1017  
Email: simone.cooper@minterellison.com  
Partner responsible: Peter George Direct phone: +61 3 8608 2672  
Our reference: PAG 30-3271075

enclosures

**MINTER ELLISON GROUP AND ASSOCIATED OFFICES**  
SYDNEY MELBOURNE BRISBANE CANBERRA ADELAIDE PERTH GOLD COAST DARWIN  
AUCKLAND WELLINGTON HONG KONG SHANGHAI JAKARTA LONDON

**Form G**

Commonwealth of Australia

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

**NOTIFICATION OF EXCLUSIVE DEALING**

To the Australian Competition and Consumer Commission:

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

**1. Applicant**

(a) Name of person giving notice:

*Subaru (Aust) Pty Ltd (ACN 000 312 792) (Subaru Australia) N93988*

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

*Wholesale supply of new and used Subaru branded motor vehicles, spare parts and accessories, and associated services to authorised Subaru dealers.*

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

*C/- Peter George  
Minter Ellison Lawyers  
525 Collins Street  
MELBOURNE VIC 3000*

**2. Notified arrangement**

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

*Subaru genuine accessories fitted by authorised Subaru dealers (Subaru Dealers).*

(b) Description of the conduct or proposed conduct:

*Subaru Australia will supply or offer to supply, Subaru vehicle owners purchasing genuine Subaru accessories (Subaru Accessories):*

- *a three year warranty for Subaru Accessories purchased and fitted by a Subaru Dealer at the time of purchase of a new Subaru vehicle;*
- *a three year warranty for Subaru Accessories purchased and fitted by a Subaru Dealers at a Subaru vehicle's first scheduled service (as per the manufacturer's handbook); and*

- *a two year accessories warranty for Subaru Accessories purchased and fitted by a Subaru Dealer at any time.*

*This conduct can be characterised as Subaru Australia:*

- *supplying or offering to supply extended warranty services to purchasers of Subaru Accessories on the condition that the purchaser will acquire Subaru Accessories and fitting services from Subaru Dealers; or*
- *refusing to supply extended accessory warranty services to purchasers for the reason that the purchaser of the Subaru Accessories has not acquired or not agreed to acquire Subaru Accessories and fitting services from a Subaru Dealer.*

**3. Persons, or classes of persons, affected or likely to be affected by the notified conduct**

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

*Subaru vehicle owners that purchase Subaru Accessories*

- (b) Number of those persons:

- (i) At present time:

*Substantially in excess of 50*

- (ii) Estimated within the next year:

*Substantially in excess of 50*

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

*Not applicable.*

**4. Public benefit claims**

- (a) Arguments in support of notification:

*We believe the notified conduct will generate a number of public benefits. These are set out in more detail in Annexure 1.*

- (b) Facts and evidence relied upon in support of these claims:

*Please refer to Annexure 1.*

**5. Market definition**

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and

acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

*Please refer to Annexure 1.*

**6. Public detriments**

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2(a) above and the prices of goods or services in other affected markets:

*We do not believe that the notified conduct causes any identifiable detriment to the public. Please refer to Annexure 1.*

- (b) Facts and evidence relevant to these detriments:


*Please refer to Annexure 1.*

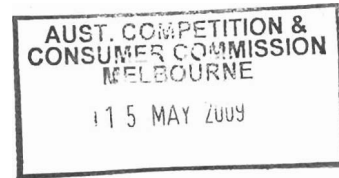
**7. Further information**

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

*Peter George  
Minter Ellison Lawyers  
Level 23  
525 Collins Street  
MELBOURNE VIC 3000*

Dated 15 May 2009

Signed by/on behalf of the applicant

(Signature)
<b>Peter George</b>
(Full Name)
<b>Minter Ellison Lawyers</b>
(Organisation)
<b>Partner</b>
(Position in Organisation)



**DIRECTIONS**

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

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 applicant.

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. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 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. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible

## Supporting submission

### 1. Background

- 1.1 Subaru Australia imports Subaru branded motor vehicles, spare parts and Subaru Accessories.
- 1.2 Subaru Australia has established a network of Subaru Dealers who are authorised retailers of Subaru branded vehicles. Subaru Dealers sell both new and used Subaru branded motor vehicles, spares parts and accessories in the retail market, and also service new and used motor vehicles (predominantly Subaru branded motor vehicles).
- 1.3 Subaru Australia's Subaru Accessory range includes:
  - (a) 'styling' accessories, including items such a front grille mesh or a waist spoiler;
  - (b) 'protection' accessories, including items such as headlamp and bonnet protectors and carpet mats;
  - (c) 'cargo and tow' accessories, including items such as luggage pods, roof cross bars, bicycle holders, and towbars;
  - (d) 'audio' accessories designed to enhance the standard audio equipment available on Subaru vehicles; and
  - (e) 'security' accessories, including items which are antitheft deterrents.
- 1.4 Subaru Australia offers an express warranty to all purchasers of Subaru Accessories. Purchaser's of Subaru Accessories currently receive a 12 month/unlimited kilometre 'Genuine Accessories Warranty' (**Accessory Warranty**).
- 1.5 Subaru Australia is notifying its two year (**2 Year Extended Warranty**), and three year (**3 Year Warranty**), extended accessory warranties (together the '**Extended Warranties**'). The Extended Warranties are to be offered by Subaru Australia, and are high quality, comprehensive warranties which are, apart from duration, the same as an Accessory Warranty.
- 1.6 Purchasers of Subaru Accessories will be able to obtain the benefit of the Extended Warranties in either of the following circumstances:
  - (a) in the case of a 3 Year Extended Warranty:
    - (i) provided they purchase, and at the time of purchase have fitted, their Subaru Accessory(s) at a Subaru Dealer at the time of purchasing their Subaru Vehicle; or
    - (ii) provided they purchase, and at the time of purchase have fitted, the Subaru Accessory at the time of the first scheduled service (as per the Subaru handbook) being conducted by the Subaru Dealer; and
  - (b) in the case of a 2 Year Extended Warranty, provided they purchase and, at the time of purchase, have fitted, their Subaru Accessories, at a Subaru Dealer.

- 1.7 In the case of the 2 Year Extended Warranty, the offer is not time restricted, ie it is applicable on any Subaru Accessories purchased and fitted at Subaru Dealers at *any* time.
- 1.8 The offering of the Extended Warranties does not alter the operation of the Accessory Warranty, ie Subaru Australia will continue to offer its Accessory Warranty, with the Extended Warranties being additional warranties offered to consumers of Subaru Accessories.
- 1.9 Both Extended Warranties are fully transferable, and can be transferred to future owners of the vehicles fitted with the Subaru Accessories, at no additional cost.

## 2. Notified Conduct

- 2.1 This conduct can be characterised as Subaru Australia:
  - (a) supplying or offering to supply Extended Warranty services to purchasers of Subaru Accessories on the condition that the purchaser will acquire Subaru Accessories from Subaru Dealers; or
  - (b) refusing to supply Extended Warranty services to purchasers of Subaru Accessories for the reason that the purchaser of the genuine Subaru accessories has not acquired or not agreed to acquire Subaru Accessories from a Subaru Dealer.
- 2.2 Subaru Australia appreciates that the conduct described 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

## 3. Competition Issues

- 3.1 We submit on behalf of our client that the Commission should not serve a notice under section 93(3A) of the TPA because the conduct in question:
  - (a) will not adversely affect competition in any relevant market; and
  - (b) will result in public benefits and no identifiable public detriment.
- 3.2 The conduct notified by Subaru Australia comprises the *optional* acquisition of Extended Warranty services by Subaru owners from a range of nominated suppliers (i.e. from any of the 105 Subaru Dealers). Subaru owners retain their genuine choice to deal with any Subaru Accessory 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 Subaru Accessories from any supplier, or to accept Subaru Australia's terms for the package of Subaru Accessories and fitting from Subaru Dealers and the relevant Extended Warranty. By retaining consumers genuine choice, the conduct is not inherently anti-competitive.
- 3.3 Additionally, the existence of the Extended Warranties in no way impacts Subaru owners purchasing non-Subaru Accessories from any supplier.
- 3.4 Set out below is a competition analysis of the conduct on the relevant markets.



***Relevant market***

- 3.5 Adopting a conservative approach to market definition, we consider the relevant markets to be for the retail supply of automotive accessories,<sup>1</sup> and the Australian market for extended warranty services. We consider the effect of the notified conduct on competition in each of these markets in turn.

***Effect of competition in the relevant market***

- 3.6 The market for motor vehicle accessories is characterised by a high degree of competition between a large number of suppliers, which include vehicle retailers, large independent chains, niche specialists and smaller local providers.
- 3.7 With respect to the market for extended warranty services, there are many providers of such extended warranty services. These include other motor vehicle manufacturers and importers which offer extended warranties on their own products (including, Toyota, BMW, Volvo, Honda, Mercedes-Benz and BMW) and numerous finance providers and insurers which offer extended warranty products generally (including The Warranty Group).
- 3.8 The maximum impact of the conduct in relation to Subaru Accessories should be considered in relation to Subaru Australia's proportional share of the market for the supply of new vehicles, which is approximately 4.4%. Accordingly, we do not consider that the conduct will create barriers to entry or otherwise harm competition in the relevant markets. Further information in relation to these markets can be provided to the Commission, if requested.

***Public benefits***

- 3.9 Moreover, the notified conduct is pro-competitive and will generate a number of public benefits, including the following:
- (a) Providing purchasers of Subaru Accessories with **genuine savings**. Extended warranty services are available to the general public, at a (sometimes quite significant) cost, from numerous providers. As Subaru Accessory purchasers will not be required to pay an additional amount to obtain an Extended Warranty, they will obtain a saving;
  - (b) Providing high quality, **specialist accessory fitting**. The notified conduct will ensure that Subaru Accessory purchasers obtain high quality fitting services through Subaru Dealers using appropriately qualified and trained service technicians, with a focus on safety. Further, Subaru Dealers have direct access to Subaru product specialists (being Subaru Australia's technical services team). This will ensure that the performance and safety of the vehicles fitted with Subaru Accessories is maintained;

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<sup>1</sup> Because of the huge supply side substitution, with multiple channels for automotive accessories to be supplied in the retail automotive accessory market, it is our view that the accessory market is indeed national. However, we understand that the focus of the Commission may be on the competitive impact in more localised geographic regions.

- (c) Providing a high quality, **comprehensive warranty** (which operates in addition to their existing statutory rights) and which is 'backed' by Subaru Australia. The Extended Warranty is easy to understand and operates in a similar way to the Accessory Warranty;
- (d) Providing Subaru owners with an Extended Warranty that will 'go with the car', that is, it will be **fully transferable** to the next owner at no cost. Many of the extended warranties currently available do not allow such a transfer; and
- (e) Encouraging other distributors and manufacturers of motor vehicles and service providers to offer similar value-added benefits, thereby encouraging competition in the relevant market. These factors will ultimately enhance consumer welfare by reducing the costs of competitive products and services.

#### ***Public detriment***

- 3.10 Subaru Australia considers that the notified conduct causes little, if any, identifiable detriment to the public.
- 3.11 The Extended Warranties will in no way effect the ability of purchasers of Subaru Accessories to acquire the accessories from any retailer they choose. It merely offers the Extended Warranties benefits to those Subaru owners who do choose to purchase and have fitted Subaru Accessories at the time of purchasing their Subaru vehicle, at the time of the Subaru vehicles' first service or, at any other time if purchased from, and fitted by, a Subaru Dealer.
- 3.12 Overall, the effect of the conduct, discussed above, in relevant markets is insignificant and is outweighed by benefits.
- 3.13 We submit that the Extended Warranties should be viewed as conferring an additional benefit on purchasers of Subaru Accessories who choose to obtain and have fitted, Subaru accessories from Subaru Dealers, rather than causing detriment to purchasers of Subaru Accessories who choose not to have their Subaru Accessories fitted by a Subaru Dealer.

#### **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 the attached notifications. This is because the notified conduct will cause little, if any, identifiable detriment and will generate public benefits.