

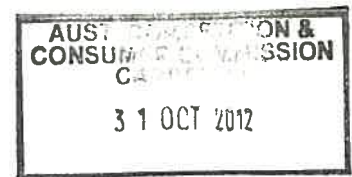
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30 October 2012

BY COURIER

The 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 BMW Australia Ltd (**BMW**).

We enclose:

- one notification under section 93(1) of the *Competition and Consumer Act 2010* (Cth) (CCA);
- one supporting submission;
- one signed authorisation letter enabling BMW Australia to sign and lodge notifications on behalf of participating dealers of the BMW Trade Club; and
- one cheque in the amount of \$100.00 each as payment of the required fee.

If you have any questions in relation to BMW's notifications or require any further information, please do not hesitate to contact Anna Delahey or Geoff Carter of our office.

Yours faithfully

MINTER ELLISON

A handwritten signature in blue ink, appearing to read "Geoff Carter".

Contact: Anna Delahey Direct phone: +61 3 8608 2552 Direct fax: +61 3 8608 1318
Email: anna.delahey@minterellison.com
Partner responsible: Geoff Carter Direct phone: +61 3 8608 2090
Our reference: 30-7037158

Enclosures

MINTER ELLISON OFFICES

ADELAIDE AUCKLAND BEIJING BRISBANE CANBERRA DARWIN GOLD COAST HONG KONG
LONDON MELBOURNE PERTH SHANGHAI SYDNEY ULAANBAATAR WELLINGTON

Form G

Commonwealth of Australia

Competition and Consumer Act 2010 (Cth) - 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 Competition and Consumer Act 2010 of particulars of conduct or of proposed conduct of a kind referred to sub-sections 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:

BMW Australia Ltd ABN 11 004 675 129 (BMW) on behalf of :

N96231 Trivett Classic Pty Ltd ACN 000 874 706, 40-52 Church St Parramatta NSW 2150, a 'Participating Dealer'.

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

A Participating Dealer operates a business involving the:

- sale of new and used cars;
- sale of parts;
- service centre; and / or
- body shop repairs,

under an authorised dealer agreement with BMW relating to BMW-branded and MINI-branded motor vehicles and BMW-branded motorcycles, spare parts, accessories and associated products and services (BMW Goods / Services). A Participating Dealer may deal in exclusively BMW-branded or BMW-branded (including MINI-branded) motor vehicles, BMW-branded motorcycles or a combination thereof.

BMW is the Australian distributor of imported BMW-branded and MINI-branded motor vehicles and BMW-branded motorcycles, spare parts, accessories and associated products and services.

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

C/- Mr Geoff Carter
Partner

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:

The relevant goods or services in relation to the supply or acquisition of which this notice relates are:

- the supply of goods / services (including BMW Goods / Services) by a Participating Dealer; and
- the acquisition of BMW Trade Club member services from BMW, or by or through BMW's agent Nexus Aftermarket Pty Ltd ACN 140 700 590 (or any other entity appointed by BMW as its agent in the same or similar capacity) (BMW Agent).

The terms 'BMW Trade Club' and 'BMW Trade Club Parts' are more fully explained in the submission lodged in support of this notification.

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

BMW proposes to establish a BMW Trade Club (to be administered by the BMW Agent) for the purpose of offering various services and benefits to members of the BMW Trade Club, including the right for members to purchase BMW Trade Club Parts from a Participating Dealer at not more than recommended BMW Trade Club prices.

The proposed conduct to which this notice relates is:

firstly, any Participating Dealer:

- supplying, or offering to supply; or
- supplying or offering to supply at a particular price; or
- giving or allowing, or offering to give or allow, a discount, allowance, rebate or credit in relation to the supply of,

goods or services (including BMW Goods / Services) to a person on the condition that the person will acquire BMW Trade Club member services from BMW or the BMW Agent; and

secondly, any Participating Dealer:

- refusing to supply;
- refusing to supply at a particular price; or

- refusing to give or allow a discount, allowance, rebate or credit in relation to the supply of,

goods or services (including BMW Goods / Services) to a person for the reason that the person, or a related body corporate of that person, has not acquired, or has not agreed to acquire, BMW Trade Club member services from BMW or the BMW Agent.

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:

Future members of the BMW Trade Club.

- (b) Number of those persons:

- (i) At present time:

None.

- (ii) Estimated within the next year:

Approximately 1000.

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 the **Annexure**.

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

Please refer to the **Annexure**.

5. Market definition

Please refer to the **Annexure**.

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 the Annexure.

Facts and evidence relevant to these detriments:

Please refer to the Annexure.

7. Further information

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

Mr Geoff Carter
Partner
Minter Ellison Lawyers
Level 23
525 Collins Street
MELBOURNE VIC 3000

Dated 10 July 2012

Signed by BMW Australia Ltd on behalf of
Trivett Classic Pty Ltd ACN 000 874 706, 40-52
Church St Parramatta NSW 2150


(Signature)

T R Beard
(Full Name)

BMW Australia Ltd
(Organisation)

Company Secretary 23/10/12
(Position in Organisation)

Annexure

1. Background

- 1.1 BMW is the Australian distributor of imported BMW-branded and MINI-branded motor vehicles and BMW-branded motorcycles, spare parts, accessories and associated products and services.
- 1.2 A Participating Dealer operates a business involving the:
- sale of new and used cars;
 - sale of parts;
 - service centre; and / or
 - body shop repairs
- under an authorised dealer agreement with BMW relating to BMW-branded and MINI-branded motor vehicles and BMW-branded motorcycles, spare parts, accessories and associated products and services. A Participating Dealer may deal in exclusively BMW-branded or BMW-branded (including MINI-branded) motor vehicles, BMW-branded motorcycles or a combination thereof.
- 1.3 BMW is launching a 'BMW Trade Club' program, facilitated by Nexus Aftermarket, designed to secure and grow the sale of genuine BMW and MINI parts, by increasing the penetration of such parts to the independent repairs sector. Under the BMW Trade Club program trade club members will be able to obtain access to BMW Trade Club Parts (see definition below) from a Participating Dealer (see definition below) at prices being not more than recommended BMW trade club prices (**BMW Trade Club**).
- 1.4 BMW Trade Club membership will be open to 'Qualifying Customers', being businesses or companies that fit 'BMW Trade Club Parts' or parts that are functionally equivalent to BMW Trade Club Parts.
- 1.5 BMW Trade Club Parts will include parts, exchange parts, components, accessories, consumables and assembled units supplied by a Participating Dealer for use in designated BMW-branded or MINI-branded vehicles identified by BMW for inclusion in the BMW Trade Club (**BMW Trade Club Parts**). Currently, the designated vehicles are BMW-branded or MINI-branded vehicles aged over 3 years.
- 1.6 BMW authorised / licensed dealers under dealer agreements with BMW are permitted to apply to BMW to become a 'participating dealer' of the BMW Trade Club (a **Participating Dealer**) under which they will be entitled to obtain price support from BMW in the form of a rebate where they sell BMW Trade Club Parts to BMW Trade Club members at or below recommended BMW Trade Club prices.

- 1.7 Under the BMW Trade Club a Participating Dealer will offer for sale and sell BMW Trade Club Parts to BMW Trade Club Members at not more than recommended BMW Trade Club prices set by BMW.
- 1.8 BMW Trade Club membership will afford members various benefits including, a copy of the BMW Trade Club Parts and Applications Catalogue, access to a dedicated BMW Trade Club website and an entitlement to purchase BMW Trade Club Parts at not more than recommended BMW Trade Club prices.
- 1.9 BMW Trade Club membership will afford a Participating Dealer various benefits including, dedicated sales management and operational support and materials, access to regular reporting tools to measure performance and improve trade sales, access to a BMW Trade Club database, access to a dedicated BMW Trade Club website and price support in the form of rebates where BMW Trade Club Parts are sold to BMW Trade Club members at or below recommended BMW Trade Club prices.
- 1.10 The proposed arrangement under the BMW Trade Club will involve some costs for a Participating Dealer, i.e. the price to be paid by a Participating Dealer to BMW for BMW Trade Club Parts.
- 1.11 BMW has determined that it is appropriate to lodge a notification to reflect the proposed arrangement with a Participating Dealer and BMW Trade Club members going forward.

2. Notified Conduct

- 2.1 Our client is concerned that the above conduct could be characterised in a way which could technically contravene sections 47(6) and (7) of the CCA. For example, from time to time a Participating Dealer might engage in conduct that could be characterised as the supply, or offer of supply, of BMW Trade Club Parts to members at a particular price (for example, at not more than recommended BMW Trade Club prices) on condition that they acquire BMW Trade Club member services from BMW, or, alternatively, refusing to supply at that particular price if such membership services are not acquired.
- 2.2 Out of an abundance of caution, in order to minimise the risk of contravening sections 47(6) and (7), our client wishes to notify the conduct described above under section 93(1). The notified conduct is described in the attached Form G.

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 CCA because the conduct in question will not adversely affect competition in any relevant market, and will result in public benefits and no identifiable public detriment.
- 3.2 We believe the notified conduct will generate a number of public benefits including, for example:

- (a) the BMW Trade Club will assist a Participating Dealer to compete for increased sales of parts (specifically BMW Trade Club Parts) to BMW Trade Club members for designated vehicles (currently BMW-branded or MINI-branded vehicles aged three years and over) which will improve overall access at competitive prices to genuine BMW and MINI parts (specifically, BMW Trade Club Parts) for owners of BMW and MINI motor vehicles, particularly relevant in the context of vehicle servicing and repair;
- (b) the BMW Trade Club will help BMW and a Participating Dealer market effectively and sell competitively to specific sectors of the vehicle aftermarket which will benefit consumers;
- (c) the BMW Trade Club will enable BMW to effectively and efficiently manage the process, status and conversion of BMW Trade Club customer-related information via data provided to it from a Participating Dealer and in turn offer more responsive, timely and competitive products and services to BMW Trade Club members, thereby fostering business efficiency;
- (d) the BMW Trade Club will enable BMW Trade Club members to access goods (i.e. BMW Trade Club Parts) at not more than recommended BMW Trade Club prices from a Participating Dealer, thereby fostering competitive pricing for such parts;
- (e) the BMW Trade Club will enable BMW Trade Club members to effectively access and utilise goods / services from BMW (i.e. benefits they receive in BMW Trade Club memberships such as BMW Trade Club website) and goods / services from a Participating Dealer (i.e. BMW Trade Club Parts at not more than recommended BMW Trade Club prices), and in turn offer more responsive, tailored and competitive products and services to consumers;
- (f) membership of the BMW Trade Club will afford price support in the form of rebates to a Participating Dealer where BMW Trade Club Parts are sold at or below recommended BMW Trade Club prices to BMW Trade Club members which cost benefit may be passed on to end customers; and
- (g) the BMW Trade Club will ensure that consumers who have purchased BMW-branded or MINI-branded vehicles are able to receive better performance and longevity from their vehicles via the increased penetration of genuine BMW and MINI parts to the independent repair sector via the BMW Trade Club, ultimately saving consumers time and expense.

3.3 These factors will ultimately enhance consumer welfare via increased competition from a Participating Dealer seeking to access price support from BMW and hence selling at or below recommended BMW Trade Club prices to BMW Trade Club members, which cost benefit may be passed on to consumers.

- 3.4 We do not believe that the notified conduct can have any adverse affect on competition in the relevant market. We consider the relevant market for assessing this notification is the wholesale market for parts, exchange parts, components, accessories and assembled units for use in motor vehicles. This market is generally regarded as being highly competitive.
- 3.5 Accordingly, we do not consider that the conduct will harm competition in the relevant market. Further information in relation to this market can be provided to the Commission, if requested.
- 3.6 We also do not believe that the notified conduct causes any identifiable detriment to the public. There is no material restriction on BMW Trade Club members purchasing choices. BMW Trade Club members remain free to purchase parts for vehicles (including repair parts, accessories and associated products) from their retailer of choice (including from a Participating Dealer). In relation to a Participating Dealer, if they choose to obtain BMW Trade Club membership and use the services offered by BMW, they will incur some cost in accessing the BMW Trade Club Parts, but, will also be entitled to price support from BMW in relation to sales to BMW Trade Club members.
- 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 CCA in respect of the attached notifications. This is because the notified conduct will cause little, if any, identifiable detriment and will generate public benefits.

BMW Group Australia



Trivett Classic Pty Ltd
40-52 Church St
Parramatta NSW 2150

[Date]

Dear Trivett Classic Pty Ltd

BMW Trade Club program third line forcing notification

In order for the BMW Trade Club program to comply with relevant legislative requirements under the Competition and Consumer Act 2010 (Cth), a third line forcing notification must be lodged with the Australian Competition and Consumer Commission (ACCC).

The notification will consist of:

- i) a completed Form G outlining the relevant conduct; and
- ii) a covering letter to the ACCC and an accompanying submission (**third line forcing notification**).

In signing this letter you acknowledge that you provide BMW Australia or its solicitors with authorisation to sign and lodge the third line forcing notification on your behalf.

Yours sincerely

Tim Baird
General Counsel & Business Controller
BMW Australia Ltd

Gavin Cowie
Aftersales Business Development Manager
BMW Australia Ltd

Signed for Trivett Classic Pty Ltd
000 874 706 by a duly authorised
representative:

G. J. Duncan

Name of authorised representative

In the presence of:

Alejandro Vidales

Name of witness

Date

X

Signature of authorised representative

X

Signature of witness

Company
BMW Australia Ltd
A.C.N. 004 675 129
A.B.N. 11 004 675 129

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