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**SUBMISSION OF SWANN INSURANCE IN RESPONSE TO THE EXCLUSIVE DEALING
NOTIFICATION OF YAMAHA MOTOR AUSTRALIA PTY LTD (N97423)
13 AUGUST 2014**

1. INTRODUCTION

- 1.1 Swann Insurance (**Swann**) welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (**ACCC**) regarding the exclusive dealing notification lodged by Yamaha Motor Australia Pty Ltd (**YMA**) on 29 May 2014 pursuant to section 93(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
- 1.2 Swann has significant concerns about the proposed exclusive dealing conduct notified by YMA, being a compulsion on YMA franchisees to only supply, offer to supply, promote or recommend Yamaha Finance Products¹ and Yamaha Insurance Products², rather than any Competing Finance and Insurance Products³, if franchisees choose to supply, offer to supply, promote or recommend any insurance or finance on Yamaha products.
- 1.3 As outlined in this submission, Swann considers the notified conduct will not give rise to any public benefit and will in fact have significant adverse consequences for competition in a number of markets.
- 1.4 Section 93(3A) of the CCA permits the ACCC to withdraw the protection provided by a notification if it is satisfied that the conduct is likely to have the effect of substantially lessening competition and that in all the circumstances no public benefit is likely to result from the conduct or any public benefit likely to result would not outweigh the detriment to the public constituted by the lessening of competition. Swann contends that the conditions of section 93(3A) are satisfied in this matter and, accordingly, the ACCC should withdraw the legal protection conferred on YMA by its exclusive dealing notification.

2. NO PUBLIC BENEFITS

- 2.1 Swann submits that the notified conduct will not result in any benefits to the public.
- 2.2 In paragraph 4(a) of its notification YMA lists a number of public benefits it submits arise from the notified conduct. Swann considers that these claimed public benefits

¹ As defined on page 1 of YMA's notification.

² As defined on page 2 of YMA's notification.

³ As defined on page 2 of YMA's notification.

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fall into two categories, namely:

- 2.2.1 reduced risk for customers who purchase finance or insurance products from YMA franchisees that those products will not comply with regulatory or legislative requirements or will not meet customers' requirements or best interests; and
 - 2.2.2 access for consumers to Yamaha Insurance Products and Yamaha Finance Products, which provide unique features and benefits.
- 2.3 Swann considers that a closer examination of the claimed public benefits shows that neither will eventuate and that, in contrast to YMA's claims, there are no public benefits arising from the notified conduct. In particular:
- 2.3.1 in relation to the first claimed public benefit, Swann considers that the notified conduct is not necessary to protect consumers in relation to their purchase of finance and insurance products from YMA franchisees because stringent protections already apply and YMA has not explained how the notified arrangements will further reduce risk; and
 - 2.3.2 in relation to the second claimed public benefit, Swann considers that this claim is incorrect and, in any event, the notified conduct is not necessary in order to achieve the claimed benefit.
- 2.4 The discussion below addresses YMA's two claimed public benefits in turn.

Claimed public benefit 1: Reduced risk for consumers in relation to the finance and insurance products they acquire from YMA franchisees

- 2.5 YMA contends that the following benefits will result from the notified conduct:
- 2.5.1 consumers of Yamaha products will only be offered finance and insurance products that YMA franchisees have been properly educated and trained in respect of, which will limit the risk to consumers of being sold products that do not match their requirements or are not in their best interests;
 - 2.5.2 there will be a reduced risk that YMA franchisees will sell consumers finance or insurance products that do not comply with applicable regulatory and legislative requirements; and
 - 2.5.3 YMA, Yamaha Motor Finance Australia Pty Ltd (YMF) and the joint venture

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between Yamaha and NM Insurance Pty Ltd (**YMI**) will be able to better monitor YMA franchisees to ensure advice provided by franchisees to consumers falls within permitted representations about the Yamaha Insurance Products and Yamaha Finance Products.

2.6 These three claimed benefits are essentially a claim that a single public benefit will result from allowing YMA to control the insurance and finance products distributed by its franchisees, that is, reduced risk for consumers.

2.7 Swann submits that this benefit does not result from the notified conduct because the risk that finance or insurance products purchased from YMA franchisees will not comply with regulatory or legislative requirements or will not meet the customer's requirements or best interests is already addressed by other means.

Detailed education and training is already offered by suppliers of finance and insurance products

2.8 Suppliers of finance and insurance products in relation to motorcycles and marine products provide their distributors (including, currently, YMA franchisees) with regular and detailed education and training in relation to their products and would be expected to continue to do so in the future without the notified conduct. Indeed, as outlined further in paragraph 2.12.1.2 below, there is an obligation on suppliers who hold an Australian Financial Services Licence (**AFSL**) to ensure on an on-going basis that its representatives are appropriately qualified and trained.

2.9 For example, Swann currently offers the following education and training to its authorised Intermediaries (**Intermediaries**) (which currently include some of the YMA franchisees) to ensure they are fully informed about Swann's insurance products for motorcycles and marine products:

2.9.1 Intensive and compulsory training is provided to all Intermediaries when they are first authorised and at regular intervals thereafter. That training is conducted via an online comprehensive compliance system entitled "iLearn". The system, via updated and regularly reviewed modules, explains how Swann products work, compliance and disclosure requirements and how to present Swann products so as to ensure that consumers are fully informed regarding the products.

2.9.2 In-house sales training is provided to Intermediaries when they are first

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authorised. This training has a focus on consumer laws.

2.9.3 Experienced and well-trained Account Managers regularly make visits to Intermediaries and provide support as required.

2.9.4 Intermediaries have 24 / 7 access to the iLearn system.

2.10 In light of this detailed, regular and tailored regime of education and training, Swann does not believe that YMA franchisees would, in the absence of the notified conduct, sell to consumers products that do not match their requirements or that are not in their best interests. Further, YMA franchisees have no incentive to act in this manner, as they would be likely to suffer considerable reputational damage by doing so.

2.11 In any event, YMA has not explained how the notified conduct will assist consumers to purchase products that match their requirements and are in their best interests.

Competing finance and insurance products currently meet the relevant regulatory and legislative requirements

2.12 Extensive regulations and legislation currently exist to protect consumers in relation to insurance and finance products, including:

2.12.1 The *Corporations Act 2001* (Cth), which imposes certain disclosure requirements in relation to financial services that aim to ensure customers are informed about the services they are acquiring. In addition, the Act requires companies that issue finance and insurance products (e.g. YMF, Swann, etc) hold an Australian financial services licence and imposes a wide range of obligations on licensees and their authorised representatives (e.g. YMA franchisees), including obligations to:

2.12.1.1 do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;

2.12.1.2 take reasonable steps to ensure that licensees' representatives comply with the financial services laws and are adequately trained and competent to provide the financial services;

2.12.1.3 have available adequate resources (including financial, technological and human resources) to provide the financial

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services covered by the licence and carry out supervisory arrangements; and

- 2.12.1.4 have adequate risk management, dispute resolution and conflict management systems.
- 2.12.2 The *Insurance Contracts Act 1984* (Cth), which contains specific requirements around financial services disclosure. For example, if an insurer wants to avoid or limit its obligation to pay under a motor vehicle insurance contract or consumer credit insurance contract, it must, before the insurance contract is entered into, inform the customer in writing of provisions which deviate from standard cover and on which the insurer relies to refuse or limit cover.
- 2.12.3 The *Australian Securities and Investments Commission Act 2001* (Cth), which implies into every contract for the supply of financial services a guarantee that the services will be rendered with due care and skill.
- 2.12.4 The *National Credit Code* and the *National Consumer Credit Protection Act 2009* (Cth), which:
 - 2.12.4.1 impose responsible lending obligations on credit licensees and their credit representatives, including an obligation to ensure that a credit contract is not unsuitable for a consumer. To assess this, licensees must consider whether the contract meets the consumer's requirements and objectives and whether the consumer will be able to meet their payment obligations.
 - 2.12.4.2 impose a range of general obligations on all credit licensees, including obligations to:
 - (a) ensure credit activities authorised by the licensee are engaged in efficiently, honestly and fairly;
 - (b) ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence;
 - (c) have certain dispute resolution procedures in place;

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- (d) have sufficient professional indemnity insurance cover;
- (e) have adequate resources (including financial, technological and human resources) available to engage in the authorised credit activities and to carry out supervisory arrangements; and
- (f) have adequate risk management systems.

2.12.4.3 impose certain disclosure obligations on credit licensees and their authorised credit representatives. These obligations aim to ensure that consumers are informed about the product, their obligations, their statutory rights and complaint handling and dispute resolution procedures.

2.13 There is a high compliance rate in the industry with the applicable legislation and regulations. For example, Swann has a comprehensive and rigorous compliance model.

2.14 In relation to the example YMA provides on page 4 of its notification regarding the improper financing of tyre and rim insurance premiums, Swann notes that this issue was a confined incident that was self-reported by a financier⁴ and it would be inappropriate to use this incident as a basis on which to express broad concerns about risk and compliance in the industry. No examples were given by YMA that were widespread or that relate to insurance or finance for motorcycles or marine products, nor could they be given.

2.15 In addition, the insurance products to which the notification relates are low risk, commoditised and easily understood and, therefore, pose a low risk to consumers. This is reflected in the classification of these products as Tier 2 products for the

⁴ BMW Finance (**BMWF**) notified ASIC in 2011 that BMWF had provided credit to debtors to finance the premium of Tyre and Rim insurance policies (**Product**) for periods in excess of one year, which it had formed the view was in breach of the National Consumer Credit Protection Act (**NCCP Act**). Swann understands that this incident occurred because BMWF had decided to adopt a different definition of the term “insurance over mortgaged property” which appears, but is not defined, in the NCCP Act. The prevailing view in the industry at the time was that the Product was essentially unrelated to the credit contract, even though it may be financed under a credit contract, and accordingly the Product should not be deemed to be insurance over mortgaged property. Swann understands that this was BMWF's position until immediately before it approached ASIC, and this view was shared by other financiers including YFI. BMWF declared to ASIC that the Product it had offered constituted insurance over property mortgaged to secure obligations under a relevant credit contract and, therefore, it should not have provided finance for insurance premiums for periods in excess of one year. Swann (nor, to the best of our knowledge, any other relevant parties), had not been made aware of BMWF's changed position or their approach to ASIC until notified by way of a media release. Subsequently, other financiers (including YFI) adopted BMWF's position and all agreed to provide refunds to any affected customers.

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purposes of the *Corporations Act* and AFSL purposes⁵.

- 2.16 YMA provides no evidence to support its claim that the notified conduct will reduce the risk of YMA franchisees selling finance and insurance products that are not compliant with the relevant regulatory and legislative requirements. For example, YMA provides no evidence that compliance rates by franchisees that sell only Yamaha Insurance Products and Yamaha Finance Products are higher than the compliance rates of franchisees that sell other insurance and finance products.

Better monitoring to ensure only permitted representations are made by franchisees regarding Yamaha Finance Products and Yamaha Insurance Products

- 2.17 YMA has not explained how the notified conduct itself, being a compulsion on franchisees to only supply Yamaha Finance Products and Yamaha Insurance Products if they choose to supply any such products, will enable YMA to better monitor representations made by its franchisees in relation to Yamaha Finance Products and Yamaha Insurance Products.

- 2.18 YMA also does not specify in its notification what the "permitted" representations are that franchisees may make about the Yamaha products.

- 2.19 Further, Swann submits that the "increased control" given to YMA by the notification does not give rise to the claimed public benefit when compared with the likely future without the notified conduct because sufficient controls already exist to protect consumers against false representations being made by YMA franchisees about the finance and insurance products they sell to customers.

- 2.20 Swann notes that there are various constraints on Intermediaries of finance and insurance products, including YMA franchisees, regarding the representations that can be made with respect to those products. For example:

2.20.1 under the *Corporations Act 2001* (Cth), it is an offence to make false or misleading statements or engage in misleading or deceptive conduct in relation to the provision of financial product advice or financial services. An offence of 'dishonesty' also exists;

2.20.2 under the *Australian Securities and Investment Commission Act 2001* (Cth), it is also an offence to make false or misleading representations or engage in

⁵ Tier 1 products are complex insurance products, such as personal accident and health; Tier 2 products are less complex insurance products.

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misleading and deceptive conduct in relation to the provision of financial services; and

2.20.3 contract law enables a party to claim damages or rescind a contract where there has been a misrepresentation.

2.21 Further, Swann expects that the franchise agreements between YMA and its franchisees contain standards or requirements that franchisees must comply with in relation to the YMA brand and is likely to include a right for YMA to terminate the franchise agreement if a franchisee brings the YMA brand into disrepute.

Claimed public benefit 2: Access to Yamaha's insurance and finance products, which provide unique features and benefits

2.22 YMA claims that its insurance and finance products offer features and benefits that many others do not. This claim is incorrect.

2.23 The benefits and features listed by YMA on page 5 of its notification are not unique and most, if not all, of these are offered by other suppliers of finance and insurance products for motorcycles and marine products. For example, Swann's products for motorcycle and marine products include each of the features and benefits of Yamaha Insurance Products cited on page 5 of YMA's notification.

2.24 Further, there are features and benefits of other finance and insurance products for motorcycles and marine products that are not offered as part of Yamaha Insurance Products and Yamaha Finance Products, which would in the future with the notification no longer be available to consumers who purchase such products from YMA franchisees. For example, in Western Australia, Swann currently offers a broader range of pricing structures and accepts higher rider risk profiles than its competitors.

2.25 In addition, the notification is not necessary in order to achieve this claimed public benefit. If Yamaha Insurance Products and Yamaha Finance Products offer consumers unique benefits or features of value then it could be expected that in the likely future without the notified conduct consumers would choose to purchase those products (including through YMA franchisees, who could be expected to offer such beneficial products).

3. SIGNIFICANT PUBLIC DETRIMENTS

- 3.1 Contrary to YMA's claims, Swann submits that significant anti-competitive detriments will arise from the notified conduct as outlined below.
- 3.2 For the purpose of commenting on YMA's notification only, Swann adopts as the relevant markets the four markets identified by YMA in paragraph 5 of its notification. Swann considers that each of these markets are national in geographic scope.
- 3.3 The notified conduct will foreclose competitors to YMI and YMF from selling products through Yamaha franchisees. As explained further below, this foreclosure is likely to have the following effects which, in turn, will be likely to substantially lessen competition in the four markets identified by YMA in paragraph 5 of its notification:
- 3.3.1 significantly increase the costs of supplying insurance and finance products for Yamaha-branded motorcycles and marine products in competition with YMI and YMF and, thereby, substantially lessen the competitive constraint provided by competitors to YMI and YMF; and
 - 3.3.2 eliminate choice for consumers who wish to acquire insurance or finance at the time of purchasing a Yamaha motorcycle or marine product from a Yamaha franchisee.

Foreclosure of a critical sales avenue

- 3.4 The proposed conduct will eliminate any form of competition in relation to the supply of finance or insurance for Yamaha motorcycles and marine products at point of sale.⁶
- 3.5 YMA claims that no public detriment will result from the notified conduct on the basis that consumers are freely able to obtain finance and insurance products from third parties elsewhere. Swann considers that this is incorrect.
- 3.6 Swann submits that although the notification allows consumers the option of obtaining insurance products elsewhere, the reality is that a significant proportion of

⁶ While YMA's notification states that YMA may provide consent to its franchisees to distribute non-YMA finance and insurance products in respect of YMA motorcycles and marine products, the notification does not provide any detail regarding the circumstances (if any) in which YMA will grant written consent. In particular, there are no details provided in the notification as to the process for franchisees to seek consent, what factors YMA would consider in deciding whether to give consent and what conditions YMA may impose on its consent. There are also no details in relation to how often YMA anticipates it will grant consent (i.e. often or rarely). In the absence of this information, Swann considers it likely that franchisees will consider written consent to be an exception and not a real option.

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sales (between 40 - 60%, depending on the region) for insurance of motorcycles and marine products occurs at the time the motorcycle or marine product is purchased and from the same retailer from whom they have purchased the motorcycle or marine product (at point of sale).

3.7 Swann considers the reasons that a substantial proportion of consumers choose to purchase insurance products at the point of sale include:

3.7.1 the risk of acquiring a motorcycle or marine product without it being insured straight away;

3.7.2 certain insurance products (e.g. CCI or Gap products), when acquired in conjunction with financed motorcycle or marine products, can only be acquired at point of sale;

3.7.3 the convenience of acquiring all necessary products in one place;

3.7.4 the rapport the retailer builds with the customer whilst selling the Yamaha motorcycle or marine product; and

3.7.5 the retailer's demonstrated expertise and knowledge, including regarding insurers' service levels in the event of a claim.

3.8 In Swann's experience, a customer's decision regarding motorcycle insurance is often largely based on the factors outlined in paragraphs 3.7.3 to 3.7.5 above. Swann considers that this is a fundamental difference in the approach of customers to acquiring insurance on other products, such as on motor vehicles.

3.9 The foreclosure of the point of sale of Yamaha products as a distribution avenue for competitors to YMI and YMF is particularly significant in light of Yamaha's substantial share of the market for the supply of motorcycles and its considerable share of the market for the supply of marine products. Swann estimates that Yamaha's share of Australian sales of motorcycles is approximately 20% and further estimates its shares by state are as follows:

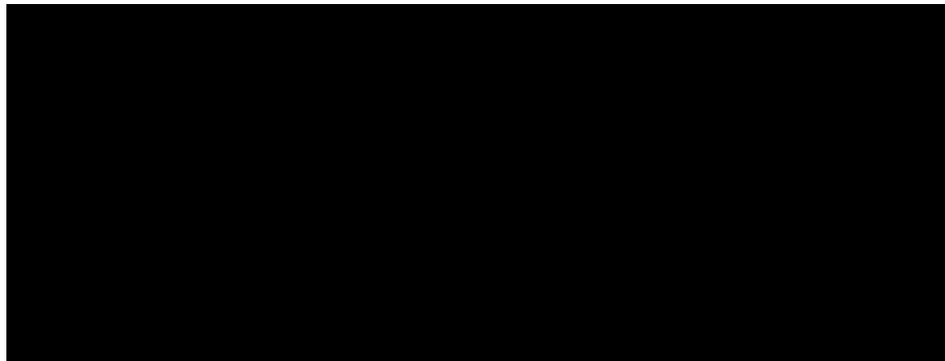
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State	Yamaha's share of Australian sales of motorcycles (%)
Victoria	22
Queensland	20
Western Australia	17
New South Wales	17
South Australia	10

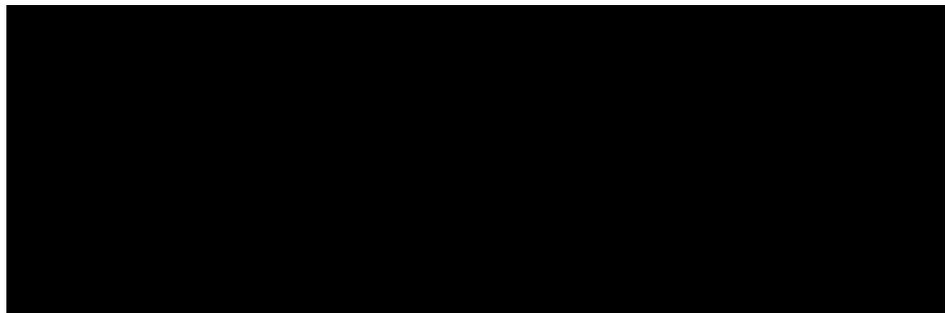
3.10 If YMA's notification is allowed to stand, the foreclosure of the point of sale as a distribution option for providers of finance and insurance products that compete with YMI and YMF is likely to harm the ability of those providers to effectively compete with YMI and YMF in the relevant market.

3.11 For example, for Swann:

3.11.1



3.11.2



3.12 Swann expects that other suppliers of insurance or finance products will be impacted in a similar manner.

3.13 Accordingly, Swann considers that the notification is likely to weaken the

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competitive constraint that competitors of YMI and YMF impose and to increase barriers to entry and expansion in the relevant markets.

- 3.14 Further, Swann is concerned that if YMA's notification is allowed to stand, other manufacturers of motorcycles and marine products will lodge similar notifications. If allowed to stand, these similar notifications would have the effect of further foreclosing point of sale as a distribution avenue for suppliers of insurance and finance for motorcycles and marine products and would further lessen competition.

Restricts consumer choice

- 3.15 The notified conduct will also eliminate choice for consumers that wish to acquire insurance or finance at the time of purchasing a Yamaha motorcycle or marine product from a Yamaha franchisee.
- 3.16 As outlined above at paragraph 2.24, there are features and benefits of other insurance and finance products for motorcycles and marine products that are not offered as part of Yamaha Insurance Products or Yamaha Finance Products, which would in the future with the notified conduct no longer be available to consumers who wish to purchase insurance or finance products from YMA franchisees.
- 3.17 For example, Swann currently offers a broader range of pricing structures and depth of coverage (i.e. it accepts higher rider risk profiles), and offers less stringent exclusions around rider experience, than YMI does.
- 3.18 An overwhelming proportion of YMA franchisees currently offer non-Yamaha finance and insurance or a combination of both Yamaha and non-Yamaha finance and insurance. Swann considers that this demonstrates that YMA franchisees and their customers value the non-Yamaha insurance and finance products and consider non-Yamaha insurance and finance products competitive in terms of their price and non-price offering.
- 3.19 Further, Swann considers that the level of innovation in terms of price and non-price offerings in the relevant markets will significantly decrease over time if the notification is allowed to stand. This is to be expected because YMF and YMI will face considerably reduced competitive constraint as a result of gaining all sales of insurance and finance made on Yamaha-branded products at point of sale (and as outlined above, point of sales is the sales avenue through which the majority of sales of these products are currently made and could be expected to continue to be made if

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the notification is allowed to stand for the reasons outlined in paragraphs 3.7.1 to 3.7.5 above).

Multi-branded franchisees

- 3.20 Swann understands that a significant proportion of YMA franchisees distribute a number of different brands of motorcycles and marine products (i.e. they are multi-branded dealers).
- 3.21 YMA does not specifically state in its notification whether multi-branded franchisees will be restricted from providing competing finance and insurance offerings on non-Yamaha branded products.

Transitional arrangements

- 3.22 YMA does not specify in its notification how it proposes to deal with franchisees who have pre-existing contractual relationships with competing providers of finance and insurance products. For example, will there be transitional arrangements for those franchisees and, if so, what will those arrangements be?

4. CONCLUSION

- 4.1 In Swann's view, the notified conduct does not give rise to any benefit to the public and is likely to have significant detrimental effects on competition in the affected markets.
- 4.2 Swann notes that, in light of the significant anti-competitive detriments arising from the notified conduct, YMA must demonstrate that the public benefits are considerable in order for it to demonstrate that those benefits outweigh the substantial detriments to the public that arise from the notified conduct. Swann contends that YMA has not done so.
- 4.3 Swann urges the ACCC to give notice to Yamaha under section 93(3A) of the CCA that the public detriment of the notified conduct outweighs the public benefit and that the protection Yamaha currently enjoys from the notification will be removed.