



AUSTRALIAN
AUTOMOTIVE
DEALER
ASSOCIATION

RESPONSE TO **REVITALISING**
NATIONAL COMPETITION POLICY
CONSULTATION PAPER

OCTOBER 2024



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FOREWORD

The Australian Automotive Dealer Association (AADA) welcomes the opportunity to comment and submit a response to the Revitalising National Competition Policy consultation paper.

There are almost 3,200 new car Dealers in Australia which range from family-owned small businesses to larger and publicly owned businesses operating in regional Australia and capital cities across the country. Franchised new car Dealers employ more than 61,000 people directly with a total economic contribution of over \$18.6 billion.

Each year, franchised new car Dealers sell more than 1.5 million new and used vehicles, complete around 48 million individual service, repair and maintenance jobs and facilitate 476,978 finance contracts. In 2023, Dealers employed around 5,530 apprentices and the commitment to training investment was \$31 million. Dealers make a tax and duty contribution of \$6.8 billion annually and often make significant contributions to their local economies through sponsorships, advertising and indirect contributions.

The AADA welcomes the consultation on revitalising the National Competition Policy and developing options for long-term pro-competitive reforms. The AADA previously participated in the Productivity Commission's - National Competition Policy Analysis and submitted a comprehensive response to the consultation paper.

While this Treasury consultation is focused on 3 potential elements of a revitalised National Competition Policy (NCP), including, National Competition Principles, the National Competition Reform Program, and institutions and governance to support these reforms. In this submission, the AADA will succinctly outline key competition areas of concern in our industry which were outlined in our response to the Productivity Commission. We urge consideration of these issues in the NCP and examination of ongoing limitations on competition, potential competition reforms and implications for our industry as a result of changing distribution models and significant recent policy developments.

James Voortman
Chief Executive Officer

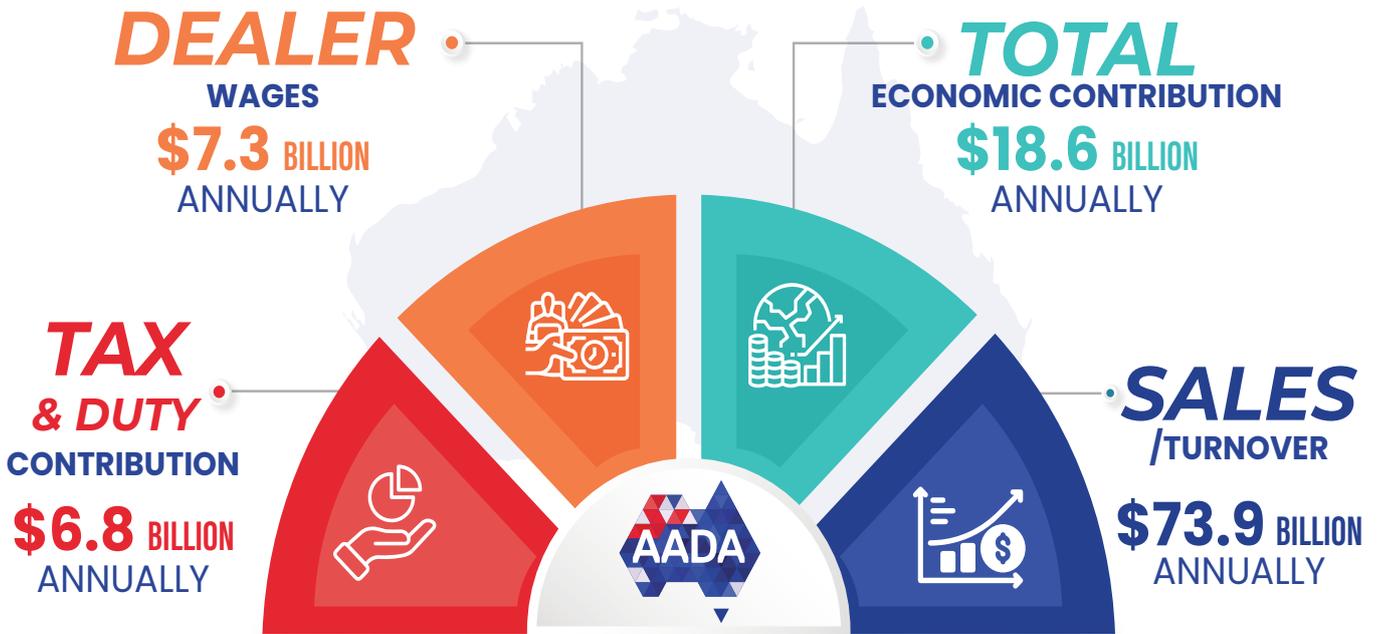




AUSTRALIAN
AUTOMOTIVE
DEALER
ASSOCIATION

DEALERNOMICS

CONTRIBUTION OF
NEW CAR DEALERS TO
AUSTRALIAN ECONOMY



DEALER EMPLOYEES

55,917



APPRENTICES

5,530



TRAINING
INVESTMENT
\$31 MILLION
ANNUALLY



WORKSHOP JOBS
COMPLETED
OVER 48 MILLION
ANNUALLY



CUSTOMER FINANCE
CONTRACTS
FACILITATED
476,978
ANNUALLY



NUMBER OF
DEALERSHIPS
3,179
TOTAL



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AUSTRALIAN AUTOMOTIVE INDUSTRY CONTEXT

The Australian automotive new car retailing industry can be broadly defined into two categories. Vehicle manufacturers or OEMs, which are largely multinational businesses which supply vehicles into the Australian market. Car Dealers, which are generally Australian privately owned or family businesses who enter franchise agreements to purchase vehicles from these manufacturers to retail to Australian consumers. This system is known as the franchising model and has largely underpinned the way in which Australians are able to buy new cars for more than a century.

This franchising system has many benefits and Australia's automotive franchising sector has many examples of successful relationships between OEMs and Dealers. However, a key aspect of concern for the AADA and our members is the inherent power imbalance between OEMs and Dealers, which has significant and far-reaching effects on the industry.

The concept of a power imbalance in the automotive franchising sector is well established, but the franchising regulations in Australia continue to leave new car Dealers exposed to exploitative behaviour.

OEMs enjoy superior bargaining power in comparison to their Dealers through the provision of one-sided, standard-form contracts, offered on a take it or leave it basis. Dealers make significant investments in their businesses, often resulting in a dependency on the ongoing right to run the franchise. With this dependency, the Dealer loses their bargaining power, and the more sunk investment the Dealer commits, the more vulnerable they are.

They are vulnerable because OEMs have extensive powers to bring franchise agreements to an abrupt end using non-renewal and termination powers. Ironically, significant portions of the investments Dealers make are a result of non-negotiable requirements prescribed by the OEM.

The AADA will further explore three key areas where this power imbalance has negative consequences for Dealers.

GOODWILL

The AADA considers that current franchising regulations are ineffectual in protecting the goodwill that Dealers invest in when buying and developing their dealership businesses and is in need of reform in this regard. The lack of recognition of goodwill once a franchise agreement ends enables franchisor opportunism, in which the franchisor exploits its rights of termination and non-renewal to pressure a franchisee to conform with its wishes or face the potential loss of their franchise and the goodwill built up in their business. Dealers make significant ongoing investments to tailor their businesses to evolving customer needs, improving customer relations and accumulating goodwill over time. This generated goodwill needs to be correctly valued upon non-renewal or termination of agreements.

Goodwill is an accepted part of the calculation of the value of the business when it comes time to buy or sell a dealership and as such, Dealers need to be legally compensated for the established goodwill.

The Mercedes-Benz case (attached as appendix A of the submission) highlights how the inadequacies of current franchising protections enabled the OEM to exploit MB Dealer goodwill. It prompted the Federal Court judge to state that the Franchising Code of Conduct needed to be revisited:

“It will be apparent from the reasons that I am publishing that the applicants were successful on many issues of fact but lost on the law, essentially”.

“given the facts of this case leading to an adverse result for the applicants, it may be that further consideration needs to be given to the terms of the franchising code and possible modification, but that is a matter for another day and, obviously, in another forum”.

***The Hon Justice Jonathan Beach,
Federal Court of Australia.***

INSECURITY OF TENURE

As described above, the power imbalance present between Dealers and OEMs in the franchising relationship permeates every aspect of the relationship but is often highlighted through the issue of tenure insecurity. Franchised new car Dealers often face the prospect of short-term franchise agreements, sometimes as brief as one year, despite the substantial capital investments in business facilities required by their OEM. The inflexibility of being able to transition to another brand easily due to brand-specific business prerequisites (such as design features of dealership sites) puts Dealers in a difficult position and forces them to either accept shorter agreements or lose the brand altogether, along with any goodwill the business has built.

The issue of tenure insecurity is further exacerbated by the sweeping powers of non-renewal and termination available to franchisors. Almost every Dealer agreement in Australia has a clause giving the OEM power to issue a non-renewal without cause notice. While the AADA acknowledges that most franchise agreements have a limited term, there is an implied renewal in these agreements so long as the franchisee is meeting their performance obligations. While this arrangement works well in many cases, when the franchisee-franchisor relation sours or the franchisor wants to cull franchisees from its network, franchisees can often be left with no recourse to challenge a non-renewal decision.

Given the power imbalance and the potential for misuse inherent in the current franchise model, combined with the introduction of the New Vehicle Efficiency Standard (NVES), the AADA calls for revisions to the Franchising Code that would protect Dealers and promote a more balanced franchising environment.

AGENCY OR OMNI CHANNEL DISTRIBUTION

While the franchising model remains the basis of the Australian automotive retail industry, in recent times vehicle manufacturers have begun exploring different distribution models, including the agency or omni channel distribution models.

An agency model is one where existing Dealers are converted into delivery agents, who act on behalf of the OEM and are remunerated through a fixed fee paid to dealerships on each vehicle that is delivered. The AADA considers that the agency model erodes intra-brand competition due to fixed price points, which could result in higher vehicle prices, lower productivity, loss of jobs and dealership viability through reduced competition between dealerships with discounting potential. For example, Mercedes-Benz Australia's first new model to be launched since the move to the agency model had a \$12,000 price increase, while other new models have increased by over \$15,000.

Moreover, when the implementation and terms for an agency model are not negotiable with respect to how they transition and operate, it can represent greater risks to Dealers which is expanded on in this submission.

By shifting to an agency model, manufacturers can capitalise on the power imbalance between themselves and Dealers. They can exploit the Dealers' substantial sunk investments in capital, time, effort and goodwill, accumulated over the years, using these assets as the retailer of vehicles without compensating Dealers.

This shift negatively impacts Australian dealer business and profitability by undermining their control and reducing their role to mere suppliers of vehicles. Although anecdotal evidence suggests that some brands are reconsidering their plans to adopt an agency model following the post-pandemic increase in vehicle supply and the return to business-as-usual, there are brands that have continued with the agency model, adversely affecting Dealer satisfaction and relations.

While shifting business models and appropriating dealer investments through moves to direct to consumer models is just one example, the history of the sector is characterised by too many examples whereby franchisors exploit the power disparity characterising their relationship with franchisees for their own purposes. This includes headlines around the way in which General Motors (GM) terminated the Holden brand and exited the Australian market, leading to a Senate Inquiry which extraordinarily censured GM.

Dealers facing the risk of non-renewal, short agreement terms or abrupt termination often find it challenging to pursue recourse against these actions due to the extremely high bar for proving unconscionable conduct. Dealers' sunk investments go unrecognised, leaving them with little resources to seek compensation. The AADA urges that this Code review address these changes, particularly the shift to the 'agency' model, to protect franchisees from being disadvantaged.

UNFAIR CONTRACT TERMS AND TRADE PRACTICES

In exploring what revitalised NCP could involve, the AADA draws attention to two regimes that assist in levelling the playing field for Australian businesses against multinational corporations with significant resources at their disposal.

These are: changes to Unfair Contract Terms (UCT) laws which took effect last year, and recent moves to explore implementing an Unfair Trading Practices (UTP) regime. While these protections are very welcome by the industry, due to restrictions on employee count and turnover thresholds, many Dealers are not covered by the UCT and proposed UTP protections.

Furthermore, in New South Wales, the Motor Dealers and Repairers Act 2013 ensures that all Dealers are protected from unfair terms in contracts and unjust conduct in their dealings with manufacturers. So as an industry, Dealers across Australia are operating under a patchwork approach to UCT protections and any proposed UTP protections, whereby coverage is determined by the size of your workforce, the location of your business or business turnover. For example, a dealership employing 101 people will not be protected against a Fortune 100 company that generates revenues of hundreds of billions of dollars and employs half a million people. This is also the case for businesses such as dealerships which are often above the turnover threshold, which is due to the high value of the product they retail.

Another example is where a Dealer operating in Wodonga will not enjoy UCT protections while a Dealer of the same size in Albury will be protected. Given the power imbalance in the franchising sector, UCT and UTP protections should be made available to all franchisees.

Enabling Dealer access to these protections will strengthen the ability for Dealers to negotiate with their franchisor and help bring Australia's competition regulations in line with community expectations and other OECD countries.

Further detail on the AADA's calls for expanded protections can be found in our [Response to Protecting Consumers from Unfair Trading Practices Consultation RIS](#) and [Response to the Exposure Draft to Strengthen Protections Against Unfair Contract Terms](#) submissions.

For further information, the AADA explores in further detail many of the areas listed above in our [Response to the Productivity Commission's National Competition Policy Analysis](#).

CONCLUSION

We would be happy to meet with you to discuss our submission and participate in any further consultation. If you require further information or clarification in respect of any matters raised, please do not hesitate to contact me.

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APPENDIX A: MERCEDES-BENZ DEALER ACTION - CASE STUDY

Mercedes-Benz Australia (MBAuP) changed its business model from the traditional franchise model to an agency model. Almost 80% of MBAuP Dealers objected to the way in which the change to the business model was brought about, launching an action in the Federal Court of Australia. Among their claims was that MBAuP engaged in unconscionable conduct in the way it treated its Dealers.

All claims against MBAuP were dismissed, but in handing down his judgement Justice Jonathan Beach said, “that the applicants were successful on many issues of fact but lost on the law.”

He went on to state that “the applicants’ strongest case, although unsuccessful, concerned statutory unconscionable conduct”.

In the publicly available judgement, Justice Beach listed off a series of behaviours MBAuP, including:

- MBAuP cherry-picked the best bits of the dealers’ businesses on which the agency model was imposed and left the dealers with less desirable features.
- The dealers ultimately had a lack of choice concerning the terms of the agency agreements. Ultimately, they were presented on a take it or leave it basis they were given little time to negotiate the final form of the agency agreements and the associated agreements.
- There was no meaningful negotiation that the new model to be imposed would be an agency model.
- And on the main commission aspects, in my view MBAuP and MBAG ratcheted this down as low as they thought that they could get away with.
- I accept that the dealers were ultimately placed in a position of situational disadvantage and possibly constitutional disadvantage in terms of the agency model.
- MBAuP did not consider the individual circumstances of dealers. Moreover, it had little regard for the top 30% of dealers who were likely to suffer under the agency model. It noted that effect but had no sympathy for it.
- There were various themes that from time to time MBAuP put to dealers that were either exaggerated or turned out to be incorrect.
- It was put that the substantial reason justifying the agency model was because of the problem of disruptors, aggregators and future on-line transactions. These so-called concerns were also used in an effort to spook the dealers.

- MBAuP persistently ran the line that a concern was the intra-brand discounting between dealers and that the agency model was designed to avoid this. But the reality was that most of the intra-brand discounting was brought about by MBAuP's and MBAG's conduct in causing over-supply to increase market share and also the incentives to discount that MBAuP itself created flowing from its commission structure with the dealers.

Despite, these assertions, Justice Beach still decided that this behaviour did not amount to statutory unconscionable conduct, reinforcing the very high bar needed to prove such an offence as demonstrated by other cases in the franchising sector such as the Pizza Hut case and ACCC's undertaking with the Retail Food Group.

***Note the above material is taken from Justice Beach's judgement in AHG WA (2015) PTY LTD T/A MERCEDES-BENZ PERTH AND WESTPOINT STAR MERCEDES-BENZ and OTHERS And MERCEDES-BENZ AUSTRALIA/PACIFIC PTY LTD**



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