



***SUBMISSION BY***

***THE AUSTRALIAN AUTOMOBILE DEALERS  
ASSOCIATION***

***TO THE***

***REVIEW OF THE TRADE PRACTICES ACT***

***JULY 2002***

## **Introduction**

The Australian Automobile Dealers Association (AADA) is the national peak body for the new vehicle retail sector of the Australian automotive industry and a Member of the Motor Trades Association of Australia (MTAA). AADA's affairs are directed by a Board on which each of the states and territories (except Tasmania) is represented.

The role of AADA is to:

encourage, promote and protect the interests of the retail motor dealer business in Australia and to conserve the interests of Members;

hold an annual national convention for retail motor dealers and/or their employees;

cultivate and obtain reciprocal relations with like associations, both nationally and internationally;

establish and maintain contact with the legislatures of the Commonwealth and of the states and territories to promote, support and protect the interests of the Association; and

conduct seminars, educational programs or other meetings for the purposes of improving the knowledge and understanding of new vehicle franchise dealers of business, economic and related matters.

## **Background**

Over some time Australia's franchised motor vehicle dealers have noted the following changes in the market:

- continuing international amalgamations, rationalisations, mergers and acquisitions by vehicle manufacturers thereby reducing inter-brand competition at the manufacturer level;
- the desire by manufacturers to capture additional profit from the dealer network by reducing margins, reducing brand distribution costs and by shifting cost to dealers and capping their returns;
- the acquisition by a leading manufacturer of all dealerships in a single city in so-called joint venture arrangements which are either designed to, or have the incidental effect of, eliminating or significantly reducing intra-brand competition;

- the establishment of one “super dealership” controlled by the maker/distributor and the relegation of current dealerships to service centre arrangements thus reducing intra-brand competition;
- the acquisition by foreign controlled interests of formerly Australian-owned dealerships and the development of Australia-wide network arrangements;
- the imposition of terms and conditions on franchise renewals which are designed to introduce de facto solus trading operations for dealerships holding multiple franchises for certain makes, such terms and conditions being designed to eliminate intra-brand competition;
- the imposition of additional dealership costs by insisting on the development of separate service and finance facilities for brands operating in multi-franchise dealerships; and
- the continuing non-renewal of major dealerships preparatory to further dealership rationalisation following from international mergers by manufacturers.

In 2001 AADA sought to have the Australian Competition and Consumer Commission (ACCC) address these issues in a comprehensive manner with a view to determining whether the cumulative effect has been an insidious and otherwise unremarked reduction of competition.

The ACCC has tended to deal with these issues in a piecemeal, brand by brand manner examining such market features as:

- the Ford Retail Joint Venture;
- the amalgamation of Landrover and BMW dealerships;
- BMW seeking approval for solus trading arrangements; and
- Subaru’s sacking of its Melbourne dealership network and its proposed replacement by a single “super” dealership.

### **Franchising Study**

In the light of likely continuing changes, a more comprehensive examination of the market was called for taking into account all these developments. The chief concern expressed by dealers was that the changes taking place in the market had already created a substantial lessening in competition and, if unchecked, would continue to do so. The report by Sirius Consulting provides extensive detail about this aspect of the market and examines both inter-brand competition (pp32-33) and intra-brand competition (pp 35-42). In regard to the latter it is important to understand as Sirius makes clear (p.33):

*“Independent new vehicle franchisees can only differentiate themselves via location, staff selection, service levels, inventory levels, product augmentation expertise and marketing effort”*

Sirius goes on to say (p.34)

*“Recent developments in Perth, Melbourne, Sydney and other NSW market centres have, or are likely to have, the effect of substantially lessening intra-brand competition by changing regional market structures from monopolistically competitive to unbalanced oligopolistic and in two examples involving Inchcape Automotive Australia Ltd, Subaru(Melbourne) and Volkswagen (Sydney), monopolistic.*

The effect of all the changes has been, and will continue to be, the removal of independent franchisees from the market and their replacement with factory controlled entities that are less interested in intra-brand competition and more interested in taking steps towards capturing benefits from manufacturer rationalisation. Consumers will be faced with a market that features less competition, less service and increased prices.

The ACCC made no formal response to this submission though discussions about the issues involved have taken place. The unsatisfactory lack of resolution of these issues caused AADA to consider what other strategies it might adopt to have the issues of concern discussed by Government in the context of competition policy and regulation.

As a result AADA called upon MTAA to commission a study of dealership franchising, taking into account international developments in Europe and taking note in particular of the laws which apply in many of the states of the USA which expressly prevent manufacturers owning and operating dealerships.

Since this project was commenced there have been significant changes announced to the competition regulatory arrangements relating to motor vehicle distribution in Europe. The European changes have also been advised to all of our Members. In brief, the European Commission (EC) has proposed new rules for motor vehicle retailing as follows:

- . the rules will apply to the sale of cars, vans, trucks and buses;
- . manufacturers will be able to choose to distribute their vehicles either by exclusive distribution (allocated sales territories) or by selective distribution (manufacturers must supply all dealers who meet set "criteria");
- . there are no definitions of what "criteria" are permitted but "severely anti-competitive restrictions" are forbidden;

- . multi-brand dealerships are permitted but manufacturers can insist on the establishment of "brand-specific areas";
- . dealers may sell vehicles into another country without penalty or the application of a quota and open a dealership in another Member country;
- . dealers need not provide servicing. It may be outsourced to independent approved repairers;
- . there is to be no limit to the number of approved repairers; and
- . manufacturers may decide whether they wish to sell to "car supermarkets" and will not be forced to supply to Internet operators.

The MTAA National Secretariat has also compiled a matrix setting out in which states competition regulatory arrangements apply to motor vehicle dealerships in the United States of America. This matrix is appended to this submission.

### **AADA Board Consideration**

Following consideration of the initial findings of its Franchising Study, AADA took two steps at its most recent Board Meeting on 19 June 2002. It adopted a Charter of Fairness. As well, AADA commissioned a report from the Sirius Consulting Group to examine the automotive industry. This report was intended to identify areas where market power has been abused or is likely in future to be abused (when current global market rationalisation moves have been completed), provide commentary on the AADA Charter of Fairness and make recommendations to the Review of the Trade Practices Act.

## The AADA Charter of Fairness

The AADA Charter of Fairness is as follows:

1. ***Strengthen the Trade Practices Act to give the ACCC greater power to prevent abuse of market power by big business***
2. ***Allow small business the right (under the Trade Practices Act) of collective negotiation***
3. ***Introduce a mandatory code of conduct (under the Trade Practices Act) to regulate commercial relationships between motor vehicle suppliers and franchised motor vehicle dealers***
4. ***Limit suppliers involvement in retail to the extent necessary to ensure the supplier's representation in a market***
5. ***Consideration to be given by each state/territory government as to whether suppliers should be prevented from selling motor vehicles at retail***
6. ***Suppliers to be prevented from direct selling to buyers at prices below those available to the supplier's franchised dealer network***
7. ***Prohibit unilateral variation of franchise agreements by franchisors***
8. ***Outlaw 'take it or leave it' contracts***
9. ***Outlaw termination of contracts at will without just cause***
10. ***Franchised motor vehicle dealers to have the inalienable right to sell more than one brand of motor vehicle***
11. ***Suppliers to provide a minimum of five years tenure in their franchise agreements***
12. ***The matter of competition in the new motor vehicle market to be referred to the ACCC for review to determine whether the changes which have been observed in the market have led to a reduction in both inter- and intra-brand competition***
13. ***Create a 'small business as consumers' division of the ACCC***
14. ***Appoint a Small Business Ombudsman***
15. ***Business purchases of used goods from unregistered sellers for the purpose of resale should trigger an actual input tax credit in the same way as a purchase from a registered seller. "Notional" input credits should apply only in respect of transactions between associated parties.***

Items 1 to 14 are relevant to the Review of the Trade Practices Act.

## Consultant's Report

Sirius Consulting's report on these issues of concern to the Review is hereby provided as an attachment to this submission. There are a number of key points about the report that should be emphasised. The key, as is stated in the Executive Summary is that *"inadequacies in relevant legislation and regulation have led to the franchisors exploiting this position of dominance via inequitable franchise agreements and in some cases a total absence of good faith in dealing with their franchisees"*.

The Sirius report also draws attention to the following matters of grave concern to those who operate businesses in the new car market:

- . the substantial lessening of intra-brand competition as a result of the activities of Inchcape plc in relation to its Subaru franchise (page 35)
- . the likely creation of regional monopolies and the resultant substantial lessening of competition resulting from Ford's failing Retail Joint Ventures (page 41);
- . the consideration of the relevant elements of AADA's Charter of Fairness (page 50); and
- . the current deficiencies of the Franchising Code of Conduct as it relates to the business of new motor vehicle retailing (page 60).

## Conclusions and Recommendations

Sirius Consulting's report has proposed that AADA consider the following recommendations:

- . amend Section 46 of the TPA to reverse the onus of proof and insert an effects test;
- . amend Section 51AC to specify the behaviour that would be deemed to be unconscionable and a breach of good faith;
- . amend Section 45 of the TPA to provide a safe harbour for small businesses to collectively negotiate with a franchisor;
- . amend the Franchising Code to provide greater protection to a franchisee in relation to termination and transfer;
- . create a new Car Code within the franchising Code to import the U.S.A. type restrictions on manufacturer involvement in the industry;

- . set up an industry Ombudsman with powers to impose dispute resolution upon franchisees and franchisors.
- . establish a standard dealer agreement to apply to all manufacturer dealer arrangements and which can be departed from only in certain specified circumstances.

The arguments in support of these proposals are set out at pages 65-70 of the report.

For its part AADA remains committed to supporting the principles set down in its Charter of Fairness and recommends that the review give the elements of the Charter the most careful consideration.

### **Fair Trading Coalition**

AADA has sought to raise with the Review matters of specific concern to franchised motor vehicle dealers. There are a number of other issues that have been formally raised for consideration by the Review by the Fair Trading Coalition (FTC). AADA supports the submission made by the FTC and believes that the matters canvassed therein should be given close and careful consideration.

**AADA NATIONAL SECRETARIAT  
C/O MOTOR TRADES ASSOCIATION OF AUSTRALIA  
39 BRISBANE AVENUE  
BARTON ACT 2600**

**15 JULY 2002**