



Australian Automotive Dealer Association Ltd.

ACN: 167 598 085

The Sir Jack Brabham Automotive Centre of Excellence

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Dear Sir

**THE SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN
AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION LTD (AADA)
ACN 167 598 085**

We welcome the opportunity to provide input on the Government's commitment to transform the Australian Small Business Commissioner into a Small Business and Family Enterprise Ombudsman (the Ombudsman) to be a Commonwealth-wide advocate for smaller enterprises. In particular, we note the Treasury is seeking input from interested parties on the nature and scope of the four key responsibilities of the Ombudsman role and how best to provide the Ombudsman with appropriate powers to deliver benefits to Australian small businesses.

The AADA was registered under the *Corporations Act 2001* in Queensland on 17 January 2014 to represent franchised new car dealers in Australia. There are over 1500 new car dealers in Australia that operate something in the order of 2600 new vehicle outlets. Dealerships range from family-owned small businesses in the regions to larger businesses and public companies operating in the regions, capital cities and across the States and Territories.

The *Australian Consumer Law (ACL)* and *Franchising Code of Conduct* (the Code) regulate, to a certain extent, the conduct of manufacturers (OEMs) towards the 4100 odd franchisees carrying on business in Australia under motor vehicle dealership agreements. A motor vehicle dealer carrying on business in Australia is "small" when compared to a global motor vehicle manufacturer.



EXECUTIVE SUMMARY

AADA does not believe any useful policy purpose would be served by restricting a key responsibility of the Ombudsman as a Commonwealth-wide advocate for small businesses and family enterprises to a “definition” of small business and family enterprise. The inconsistency and complexity of definitions of small business found in income tax and other legislation both in Australia and overseas should not be carried over to limit access to the Ombudsman as advocate. Rather, access to the Ombudsman by a business should be based on relative size of that business in commercial dealings with a larger party.

AADA submits that in the case of an industry sector, a representative and approved industry body or other entity be authorised by legislation to assist a party in dealing with a dispute before the Ombudsman on a confidential basis. Such an industry body or entity should also be permitted to bring forward industry specific issues for mediation and advocacy where it is found necessary to modify the commercial behaviour of industry participants. This “shield of protection” would encourage small businesses and family enterprises to bring issues forward for resolution without fear of reprisals and assist the Ombudsman in compiling information on issues requiring reporting and advocacy.

We also submit that the Government in the development of the Ombudsman framework build in a level of confidentiality to enable the Ombudsman to receive and advocate on issues to facilitate the evolution of the meanings of misuse of market power, obligation to act in good faith, acting in legitimate commercial interests and unconscionable conduct.



SUBMISSION

Background

We appreciate the acknowledgement by the Hon Bruce Billson MP, Minister for Small Business that “Small businesses and family enterprises are a vital part of the economy” and face challenges in dealing with larger businesses and, in the case of motor vehicle dealers, global foreign manufacturers operating in multiple jurisdictions. The Australian new car market is small by global standards with annual sales of just over 1.1 million units in 2013 or 1.4 per cent of the 82 million passenger and commercial vehicles sold globally that year.

AADA’s comments are provided against the background of this discussion paper, proposed amendments to the Code and *Competition and Consumer Act 2010* (CCA Act) effective 1 January 2015, Competition Policy Review 2014, and enactment of the *Motor Dealers and Repairers Act 2013* (NSW) (MDR Act) and draft regulations, the *Fair Trading (Motor Vehicle Industry Dispute Resolution Code) Regulations 2014* (SA) (MVIDRC) and commencement of Federal Court proceedings by the Australian Competition and Consumer Commission (ACCC) against Coles for unconscionable conduct.

Meaning of small business and family enterprise

AADA does not believe any useful policy purpose would be served by restricting a key responsibility of the Ombudsman as a Commonwealth-wide advocate for small businesses and family enterprises to a “definition” of small business and family enterprise. A myriad of definitions of small business based on thresholds and concessions is to be found in income tax and other legislation both in Australia and overseas jurisdictions. The inconsistency and complexity of definitions arising from past policy decisions should not be carried over to limit the advocacy role of the Ombudsman. Rather, if a significance imbalance of market power exists giving rise to unfair contract terms and unjust or unconscionable conduct the affected business or industry group should not be restricted by “size” or “definition” in bringing the matter to the attention of the Ombudsman for assistance and advocacy. Relative size is the key issue.

Key responsibilities of the Ombudsman

The Government has outlined the key responsibilities of the Ombudsman are to be:

- concierge for dispute resolution;
- Commonwealth-wide advocate for small businesses and family enterprises;
- contributor to the development of small business friendly Commonwealth laws and regulations; and
- single entry-point agency through which Commonwealth assistance and information regarding small business can be accessed.



Concierge for dispute resolution

We support the concept of the Office of the Ombudsman as concierge for dispute resolution but note concerns regarding unfair market practices are likely to be referred to the ACCC. Resolution and mediation of disputes are contained in Part 4 of the draft Code released on 2 April 2014 and we would support the appointment of the Ombudsman as mediation advisor in respect of disputes arising under franchise agreements. This should be subject to resolution of any conflict of interest concerns and perceptions about acting in roles as an impartial mediator and advocate for small businesses. Resolution of these disputes under the Code are business to business (B2B) transactions where the nature of the dispute or industry concern is the issue rather than access to the Ombudsman determined by of a definition of “size”.

The power to settle disputes, investigate, make determinations and report both to the Minister and the Parliament should be supported by legislation.

Commonwealth-wide advocate

AADA supports the Commonwealth-wide advocacy role of the Ombudsman as an independent advocate who can act as a conduit for, and representative of, issues facing small business individually and across industry sectors. The advocacy role should be extended to the Australian Government and industry with legislative powers to monitor, investigate, recommend and report to the Minister and the Parliament on issues affecting the administrative and compliance burden on small businesses and the inherent power imbalances in contract arrangements between small and larger businesses.

We draw your attention to situations where a party (and employees of the party) with superior bargaining powers engages in unjust and/or unconscionable conduct using the protection of its “legitimate commercial interests” as justification for its behaviour. This imbalance of power effectively prevents a small business or family enterprise from bringing the matter for mediation or to commence legal proceedings for fear of the commercial reprisals and the costs involved. Such “bullying” behaviour should not be tolerated and the affected party could be afforded a “shield of protection” through industry representation.

AADA submits that in the case of an industry sector, a representative and approved body be authorised by legislation to assist a party in dealing with a dispute on a confidential basis. Such an industry body should also be authorised to bring forward industry specific issues for mediation and advocacy where it is found necessary to modify industry participant behaviour. This would facilitate the identification of issues and regulatory burdens affecting small businesses and family enterprises. We draw your attention to the MDR Act and the MVIDRC.

We submit that legislation be drafted to allow the Ombudsman to deal with the above matters.



Contributor to Commonwealth laws and regulations

The role of the Ombudsman as a contributor to Commonwealth laws and regulations should include legislative powers to identify, investigate, report and make recommendations to the Minister and the Parliament to reduce current and future regulatory burdens. The Ombudsman's advocacy and mediation roles are complementary to this role and allow for current and emerging issues to be identified and tabled.

Single entry-point

The establishment of a single entry-point to make it easier for small businesses and family enterprise to engage with, and access Commonwealth Government small business programmes, support and information is supported. The establishment of a single entry-point should be brought to the attention of the community to maximise its effectiveness. Careful consideration of the framework and adoption of best practice is required to encourage utilisation, eliminate duplication, and manage expectation. The effectiveness of the model adopted should be continually monitored for reporting purposes to the Minister and other interested parties.

Method of appointment of Ombudsman

The Ombudsman should be statutorily appointed for a period up to five years on the advice of the Minister for Small Business and should not preclude the engagement of a public servant with the necessary attributes. Former players often turn out to be the best referees and coaches. Interim administrative arrangements could be in place to ensure a transition of a person prior to the enactment of legislation.

COMPETITION LAW

The framework in which the Ombudsman is to operate, mediate and advocate should be developed after taking into consideration the lack of understanding by small businesses and family enterprises of, and the absence of statutory principles as to the meaning of:

- misuse of market power
- obligation to act in good faith;
- acting in legitimate commercial interests; and
- unconscionable conduct.

This lack of understanding, costs associated with mediation and/or commencement of legal proceedings, fear of reprisals including cancellation of contracts, and lack of confidentiality and protection have prevented small businesses and family enterprises in bringing these issues forward for resolution. This has prevented, in our view, an evolution of the meaning of the above terms in the small business sector.

Legislative mechanisms should be included in the statutory framework to allow small businesses, family enterprises and their representative industry bodies to bring forward such issues to the Ombudsman under a "shield of protection". The Ombudsman should then be in a position to advocate for necessary change.



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AADA and other interested parties are closely following the ACCC proceedings in the Federal Court of Australia against Coles for unconscionable conduct. The ACCC alleges that Coles used undue pressure and unfair tactics in negotiating with suppliers, provided misleading information and took advantage of its superior bargaining position.

The commitment by the ACCC to maintain confidentiality was, in our view, an important factor and should be considered in the development of a framework to enable the Ombudsman to receive and advocate on issues to facilitate the evolution of the meaning misuse of market power, obligation to act in good faith, acting in legitimate commercial interests and unconscionable conduct.

We appreciate the commitment by the Hon Bruce Billson MP, Minister for Small Business in advancing the Government's agenda for support of small businesses and family enterprises.

Please contact me on 03 9576 9944 if you require clarification of any matters raised.

Yours faithfully

Patrick Tessier
Chief Executive Officer