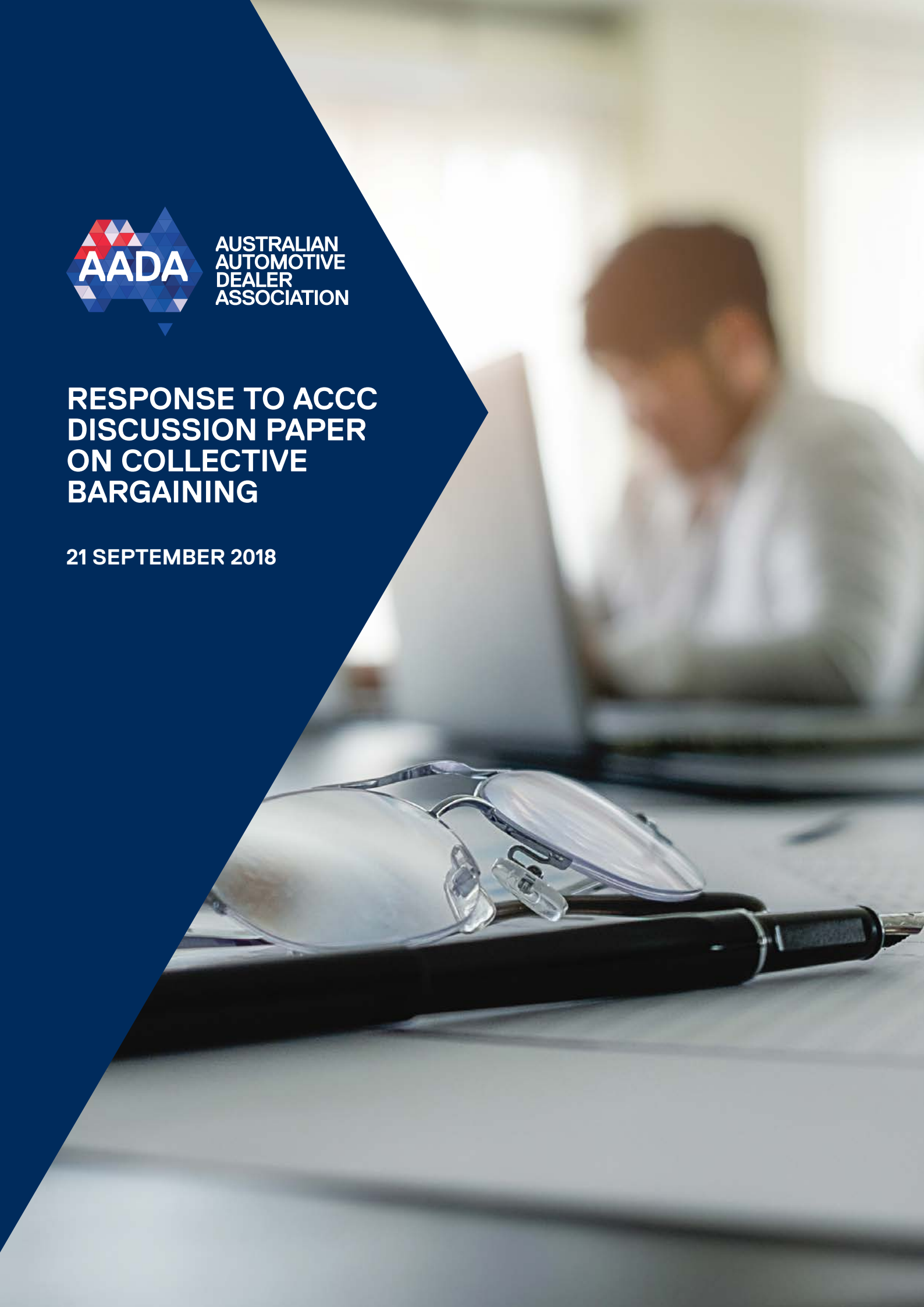




AUSTRALIAN
AUTOMOTIVE
DEALER
ASSOCIATION

RESPONSE TO ACCC DISCUSSION PAPER ON COLLECTIVE BARGAINING

21 SEPTEMBER 2018



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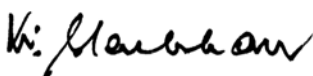
FOREWORD

The Australian Automotive Dealer Association (AADA) is pleased to lodge this submission to the ACCC on its discussion paper on “Collective bargaining Class exemption”.

The AADA supports the ACCC proposal for the introduction of a Collective Bargaining Class Exemption. Our support reflects our long-established advocacy regarding the relationships between new car dealers and the offshore vehicle manufacturers, and is built around two key points:

- We strongly believe that all franchisees should be able to bargain collectively with their franchisor, regardless of the size or corporate structure.
- We consider that collective bargaining should be part of the standard arrangements for interactions between franchisees and their franchisor rather than an extraordinary recourse when relationships turn bad.

We urge the ACCC to consider the points we have made and would welcome the opportunity to meet with the Commission and elaborate on our submission.



David Blackhall
Chief Executive Officer



BACKGROUND

The AADA is the peak industry advocacy body exclusively representing franchised new car Dealers in Australia. Our members total around 1,500 franchised new car Dealers that, together, operate some 3,500 new vehicle outlets.

New car Dealers in Australia are franchised to the global automotive manufacturer brands or Original Equipment Manufacturers (OEMs). The automotive retail sector in Australia is one of the most competitive in the world. Around 72 brands offer more than 400 models for sale in a relatively small market of about 1.2 million units annually (less than 1.5 per cent of global demand). The competition means there is significant pressure on the Australian subsidiaries of the global automotive manufacturers and by extension their franchised new car Dealer networks to achieve sales targets. In short, success in this highly competitive industry is by no means assured and franchised new car Dealers often run on razor thin profit margins.

A modern well-run dealership will generally achieve a net profit of around 2% to revenue, but research from 2015 shows that almost 20% of all franchised new car Dealers failed to make a profit. Dealers who enter into a franchise agreement (Dealer Agreement) with OEMs are given the exclusive right to market and sell new vehicles and associated services within a specific geographic location. In return, Dealers are bound by these Dealer Agreements, the terms of which are very much skewed in favour of the OEM.

Because of the franchised nature of our business, our submission is limited to the elements of the discussion paper dealing with franchising.

AADA - RESPONSE TO THE ACCC DISCUSSION PAPER ON COLLECTIVE BARGAINING

1. Should a class exemption allow collective bargaining by all franchisees with their franchisor, regardless of their size or other factors?

New car Dealers range in size and complexity from small, rural, family businesses, to publicly-listed companies operating dozens of sites across multiple brands. The one thing they have in common is that they are all franchisees, in contracted relationships with franchisors that are very large, overseas-based Manufacturers.

However, even the smallest of new car Dealers are likely to miss out on protections that other franchisees enjoy under Australian Consumer Law against unfair contract terms because of the small business thresholds, such as the maximum 20 employees, contained in the legislation. Furthermore, even when protections exist against opportunistic conduct by franchisors, the Franchising Code of Conduct contains no specific requirements prohibiting unfair conduct, or the master/servant relationship that still exists in the automotive Dealer industry.

A provision for collective bargaining by new car Dealers in franchise relationships with overseas car Manufacturers would go some way to balancing the off-kilter power relationship that currently exists between the two parties.

It is important to note that, even if new car Dealers are objectively somewhat-large organisations, they pale into insignificance in comparison with their franchisor, which could be, for example Volkswagen, a

company that last year had net revenues in excess of US\$260 billion. This amount exceeds the annual Gross State Product for Western Australia.

We contend that the requirement for collective bargaining stems, not from the objective size of the businesses involved, but from the relative power/size relationship between the franchisee and the franchisor.

2. Should all groups of franchisees be eligible for a class exemption in relation to negotiations with their franchisor, including group mediation, regardless of franchisee size and without any other limitations on membership of the bargaining group?

New car dealerships span a wide spectrum of sizes and structures. These range from small family businesses that operate a single dealership in rural centres, to very large publicly-listed organisations with annual revenues of many millions of dollars. The one factor the group has in common is their relationship to their franchisor.

Consequently, the one limitation on membership of the bargaining group is that they should all be franchisees of the same franchisor. This arrangement would enable meaningful discussions and action to take place on matters that affect the whole group, such as the features of the contracts binding the two parties together.

3. If not, what characteristics should determine whether a group of franchisees is able to use the collective bargaining class exemption to negotiate with their franchisor?

In our view, the ability to bargain collectively with the franchisor should not be seen as an extraordinary recourse when relationships become fraught, but as a standard arrangement that enables parties to franchising arrangements to manage those arrangements in ways that are not handicapped by the parties' wildly differing levels of size, power or resources.

4. What other issues specific to collective bargaining by franchisees with their franchisor should be considered in developing the class exemption?

As noted above, the new car dealership business model is one characterised by vastly-differing size, power and resources between franchisee and franchisor. This remains the case whether the franchisee is a small family business, or a publicly-listed company operating dozens of sites.

Consequently, the class exemption should ensure that the protections under Australian Consumer Law that apply to the smallest of franchisees, should apply to all franchisees included in the class exemption, regardless of objective size, complexity or annual revenue.

ADDITIONAL COMMENTS

The AADA supports the proposal for the introduction of 'class exemption' provisions to competition laws. We believe that such exemptions should be drafted in as broad and inclusive terms as feasible.

In the case of franchising, we believe that the 'class exemption' should be drafted to cover the whole of the franchising business, not just 'new car Dealer' franchises, as the franchisor could also have franchise agreements with new truck dealerships, farm machinery dealerships, and even motorcycle dealerships. In such circumstances, we believe it important to all franchisees working with a franchisor should have access to the same class exemption to achieve the overall public benefits that this proposal aims to achieve.



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