



# Determination

## Application for merger authorisation

lodged by

AP Eagers Limited

in respect of

its proposal to acquire Automotive Holdings Group Limited.

Authorisation number: MA1000018

25 July 2019

Commissioners: Sims, Keogh, Cifuentes, Court, Ridgeway.

## Contents

Abbreviations and definitions .....	iii
Summary .....	iv
1. The application for merger authorisation .....	1
2. Background.....	2
The parties .....	2
The acquirer – AP Eagers .....	3
The target - AHG .....	5
The Proposed Acquisition .....	5
The combined dealer group in Newcastle and Hunter Valley region.....	7
3. Overview of the new car retailing industry .....	8
Arrangements between dealers and manufacturers – dealer agreements and KPIs.....	9
Retail prices and buying a new car.....	10
New car sales and aftermarket services .....	12
4. Consultation .....	13
Initial consultation on AP Eagers’ merger authorisation application .....	14
Market feedback letter.....	15
Draft divestiture undertaking offered by AP Eagers .....	15
5. Timing .....	15
6. ACCC assessment.....	16
The authorisation test.....	16
Relevant areas of competition .....	17
New and used cars.....	17
New car retailing - geographic areas .....	18
Spare parts.....	22
Servicing .....	23
Other areas of competition .....	24
Future with and without .....	24
Competition analysis .....	24
New car retailing in the Newcastle and Hunter Valley region.....	25
Spare parts.....	29
Servicing .....	31

New car retailing in other geographic areas.....	32
The supply of trucks and buses in Melbourne.....	33
Acquisition of dealerships.....	34
Other areas of competition .....	34
Public benefits and public detriments .....	35
Submissions.....	35
ACCC view.....	36
7. Section 87B undertaking .....	37
8. Length of authorisation.....	38
9. Determination.....	38
The application.....	38
The authorisation test.....	39
Conduct for which the ACCC grants authorisation.....	39
Length of authorisation.....	39
Date authorisation comes into effect .....	39

## Abbreviations and definitions

AAAA	Australian Automotive Aftermarket Association
ACCC	Australian Competition and Consumer Commission.
the Act	<i>Competition and Consumer Act 2010.</i>
AHG	Automotive Holdings Group Limited (ACN 111 470 038).
AP Eagers	AP Eagers Limited (ACN 009 680 013).
Dealership	means a site or number of sites operated under a single dealer agreement with a new vehicle importer.
Dealership Site	means a specific site, location or show room, or part thereof, operated under a dealership agreement with a new vehicle importer. A single Dealership may operate under a number of Dealership Sites.
Divestiture Undertaking	The executed divestiture undertaking that is set out at <u>Attachment A</u> .
The Newcastle and Hunter Valley region	The area encompassing metropolitan Newcastle (comprising Central Newcastle, Cardiff, Gateshead and Bennetts Green), Maitland/Rutherford, Cessnock, Singleton and Port Stephens.
PMA	Primary Market Area.
RRP	Recommended retail price.



## Summary

The ACCC has decided to grant conditional authorisation to AP Eagers Limited (**AP Eagers**) to acquire all of the ordinary shares in Automotive Holdings Group Limited (**AHG**) that it does not already own (the **Proposed Acquisition**).

A combined AP Eagers and AHG new car dealership group would represent around 12 per cent of new vehicle sales in Australia. The ACCC considers the relative size and breadth of the combined dealership group at a national level would not raise competition concerns given AP Eagers will continue to face a large number of competitors.

However, the ACCC also looked at local regions where AP Eagers and AHG both operate car dealerships. The ACCC was concerned about the impact of the Proposed Acquisition on competition in the Newcastle and Hunter Valley region. To resolve this concern, the ACCC has accepted a court enforceable undertaking from AP Eagers to sell all of its existing new car dealerships and related businesses in the Newcastle and Hunter Valley region to an ACCC approved purchaser. After the Proposed Acquisition, AP Eagers would own and operate the existing AHG dealerships in the Newcastle and Hunter Valley region.

Authorisation is conditional on AP Eagers complying with the undertaking to divest provided at [Attachment A](#) to this Determination.

### **Background – the merger authorisation test and process**

AP Eagers lodged a merger authorisation application for the Proposed Acquisition on 29 April 2019. Authorisation provides legal protection under competition law for the parties to complete a proposed acquisition.

The ACCC may grant authorisation to a proposed acquisition if it is satisfied that it would not result in a substantial lessening of competition (the '**substantial lessening of competition limb**'), or that the likely public benefit from the proposed acquisition outweighs the likely public detriment (the '**net public benefit limb**').

The ACCC's role in assessing AP Eagers' merger authorisation application is therefore to assess the Proposed Acquisition's likely effect on competition, as well as the public benefits and public detriments likely to result if it were to proceed.

### **The Proposed Acquisition**

AP Eagers and AHG are the two largest automotive dealership networks in Australia. They supply new and used cars, trucks and buses, as well as related products and services such as car repair and servicing, authorised car parts, insurance and finance.

AP Eagers seeks ACCC authorisation to acquire all of the ordinary shares in AHG that it does not already own. AP Eagers is the largest shareholder of AHG, holding 28.84 per cent of AHG's listed securities as at 5 April 2019. AP Eagers considers the Proposed Acquisition 'creates an opportunity for growth through geographical and portfolio diversification'. It considers the proposal is not likely to result in a substantial lessening of competition in any market and is likely to result in estimated annual savings of \$13.5 million.

## **An overview of the public consultation process and divestiture undertaking**

The ACCC initially invited submissions from over 270 parties. Over 20 public submissions are available from the ACCC's [Merger authorisations public register](#).

Following the initial consultation period, the ACCC provided a 'market feedback letter' to AP Eagers and interested parties. This letter summarised the issues raised by interested parties, and set out the ACCC's preliminary concerns about the impact of the Proposed Acquisition on competition in new car retailing in the Newcastle and Hunter Valley region.

AP Eagers subsequently offered the ACCC a draft undertaking to sell its existing new car dealerships and related businesses in the Newcastle and Hunter Valley region.

The ACCC invited submissions from interested parties to inform its assessment of AP Eagers' proposed undertaking.

### **Assessment**

AP Eagers and AHG have overlapping car dealership business operations in the following locations:

- Newcastle and the Hunter Valley region of New South Wales – AP Eagers owns 16 Dealership Sites and AHG owns 20. There are 42 other competing dealerships.
- Brisbane – AP Eagers has 23 Dealership Sites and AHG owns 18. There are 136 other competing dealerships.
- Melbourne – AP Eagers owns four Dealership Sites and AHG owns 27. There are approximately 221 other competing dealerships.
- Sydney – AP Eagers owns five Dealership Sites and AHG owns 18. There are approximately 260 other competing dealerships.

### *Impact on competition in new car retailing*

The ACCC considers that competition in new car retailing principally occurs at the regional or local level. This view derives from the limited willingness of consumers to travel when shopping for new cars and the lack of transparency around potential discounts and final prices available from dealers unless consumers go to a dealership.

Nevertheless, the ACCC has considered whether the Proposed Acquisition may affect competition in new car sales and related activities solely by virtue of the combined dealership group's *relative* national size and geographic breadth. In this context, the combined AP Eagers and AHG dealership group would represent around 12 per cent of new vehicle sales in Australia. The ACCC considers the combined dealership group is unlikely to have a detrimental impact on competition nationally, largely because car manufacturers do not offer significant volume discounts to larger car retail networks.

However, the ACCC considers that without the Divestiture Undertaking, the Proposed Acquisition raises significant competition concerns in new car retailing in the Newcastle and Hunter Valley region.

The Proposed Acquisition would remove AP Eagers' closest and largest competitor and create an enlarged dealership group in the Newcastle and Hunter Valley region which would be considerably larger than the next largest competitor in the region. In metropolitan Newcastle alone, considering only the top ten selling car brands, a combined AP Eagers and

AHG dealership group would operate 17 out of 22 (77 per cent) new car dealerships. It would operate 46 per cent of car dealerships in the broader Newcastle and Hunter Valley region.

The ACCC considers that dealerships with common ownership will compete less strongly with each other to win sales.

While there would be a number of potential constraints (such as consumers comparing prices online, or manufacturer oversight of dealers through sales targets and other policies) on the combined dealership group's ability to increase prices in the Newcastle and Hunter Valley region, the ACCC considers none of these is sufficient to remove its ability to increase prices because:

- consumers would find it difficult to detect and respond to a regional price rise (through less vigorous discounting from the recommended retail price), and as such, are less likely to explore purchases outside the Newcastle and Hunter Valley region
- manufacturers have limited visibility over final prices negotiated by dealers for their cars and are unlikely to seek to constrain the combined car dealership group from increasing prices, provided overall sales volumes do not fall substantially and
- other dealers in the Newcastle and Hunter Valley region are likely to compete less vigorously on price.

Therefore, the ACCC is not satisfied that the Proposed Acquisition would not substantially lessen competition because it would provide a combined AP Eagers and AHG dealership group with the ability and incentive to impose a regional price rise across its car dealerships in the Newcastle and Hunter Valley region by reducing the level of discounting offered to consumers.

In Brisbane, Melbourne and Sydney, the ACCC considers there would be sufficient alternative dealers such that a combined AP Eagers and AHG dealership group is not likely to result in a substantial lessening of competition in these areas.

#### *Impacts in other areas of competition*

The ACCC also considered the impact of the Proposed Acquisition in relation to a number of other products and services, including car servicing, supply of spare parts, the supply of trucks and buses in Melbourne and the supply of insurance and financial services. The only place where there was potential for significant concern was in the Newcastle and Hunter Valley region, but these concerns are addressed by the divestiture undertaking.

#### *Balance of public benefits and detriments*

While the ACCC may grant merger authorisation where it is satisfied that at least one limb of the test is met, for completeness, the ACCC has also outlined the public benefits claimed by AP Eagers and submissions from interested parties. Based on the information before it, without the Divestiture Undertaking, the ACCC is not satisfied that the likely public benefits from the Proposed Acquisition outweigh the likely public detriment, including from a lessening of competition in the Newcastle and Hunter Valley region.

#### *ACCC accepts Divestiture Undertaking*

In order to address the ACCC's competition concerns in the Newcastle and Hunter Valley region, AP Eagers offered the ACCC a court enforceable undertaking to sell its existing new

car dealerships and related businesses in this region to an ACCC approved independent purchaser.

On 24 July 2019 the ACCC accepted a court enforceable undertaking from AP Eagers, which is provided at [Attachment A](#) to this Determination. The key requirements include:

- the divestiture of AP Eagers' existing new car retailing dealerships and related business sites
- the transfer of all necessary assets, consents and personnel
- the appointment of an independent auditor to audit and report upon AP Eagers' compliance with its undertaking and
- at the option of an ACCC approved purchaser, a transitional technical assistance agreement and/or a transitional supply agreement for any goods or services that are required.

With AP Eagers' compliance with the Divestiture Undertaking, the ACCC is satisfied that the Proposed Acquisition would not be likely to substantially lessen competition in any market.

### **ACCC grants authorisation**

The ACCC grants authorisation to AP Eagers to acquire all of the ordinary shares in AHG that it does not already own on condition that it complies with the Divestiture Undertaking set out at [Attachment A](#) to this Determination.

If no application for review is made to the Australian Competition Tribunal, this authorisation commences on 16 August 2019. Authorisation is granted for 12 months until 16 August 2020, and will lapse if the Proposed Acquisition is not completed by that date.

# 1. The application for merger authorisation

- 1.1. On 29 April 2019 AP Eagers Limited (**AP Eagers**) lodged an application (**MA1000018**) with the Australian Competition and Consumer Commission (**ACCC**) seeking authorisation to acquire all of the ordinary shares in Automotive Holdings Group Limited (**AHG**) that it does not already own (the **Proposed Acquisition**).<sup>1</sup>
- 1.2. This would be a merger of Australia's two largest automotive retailers.
- 1.3. Acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market are prohibited by section 50 of the Act. Parties can lodge applications for 'authorisation' with the ACCC, seeking legal protection to complete a proposed acquisition.

## **Merger authorisation – overview of the process and test**

Authorisation is a public process where the ACCC may grant protection (called an 'authorisation') from legal action under section 50 of the Act for mergers or acquisitions in certain circumstances.<sup>2</sup>

The ACCC may grant authorisation if it is satisfied that either:

- the proposed acquisition would not be likely to substantially lessen competition or
- the likely public benefit from the proposed acquisition outweighs the likely public detriment, including where the proposed acquisition does lessen competition.

The ACCC has the power to grant merger authorisation where it is satisfied that at least one 'limb' of the authorisation test is met.

The ACCC conducts a public consultation process when it receives an application for merger authorisation. Interested parties are invited to make submissions about the proposed acquisition, including commenting on the likely effect on competition, and whether the public benefit from the proposed acquisition outweighs the public detriment.

The Act requires the ACCC to make a decision (called a 'determination') about an application within 90 days, unless the applicant agrees to an extension of this timeframe.<sup>3</sup> If the ACCC does not reach a decision within 90 days, the ACCC is taken to have denied authorisation.<sup>4</sup>

The ACCC can decide to grant authorisation, deny authorisation, or grant authorisation subject to conditions (including imposing a condition to give or comply with an undertaking under section 87B of the Act).<sup>5</sup>

When the ACCC grants authorisation, neither the ACCC nor third parties can take action under the Act to prevent or overturn the acquisition.

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<sup>1</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 6.

<sup>2</sup> Detailed information about the authorisation process is available in the ACCC's [Merger Authorisation Guidelines](#).

<sup>3</sup> Section 90(12) of the Act.

<sup>4</sup> Section 90(10B) of the Act.

<sup>5</sup> Sections 88(3), 88 (4) of the Act.

1.4. AP Eagers submits that the Proposed Acquisition ‘creates an opportunity for growth through geographical and portfolio diversification’.<sup>6</sup> AP Eagers seeks authorisation of the Proposed Acquisition on the basis that ‘it will not have the effect or the likely effect of substantially lessening competition in any market in contravention of section 50 of the Act.’<sup>7</sup> In its Bidder’s Statement, AP Eagers considers the Proposed Acquisition would result in an estimated \$13.5m per annum in savings.<sup>8</sup> AP Eagers’ application did not contain extensive submissions about likely public benefits from the Proposed Acquisition.

## 2. Background

### The parties

2.1. AP Eagers and AHG are both automotive retail groups. They sell cars, truck and buses and provide a range of ancillary services through their authorised dealerships across Australia.<sup>9</sup> They are the two largest networks of car dealerships in Australia, with AP Eagers holding a 5.2 per cent national share of all new vehicle sales and AHG 6.7 per cent.<sup>10</sup>

2.2. AP Eagers and AHG are both active in the following activities:<sup>11</sup>

- retailing of new vehicles – this includes new car and commercial vehicles (trucks and buses) sales to customers, and sales or leasing to fleet customers
- used vehicle wholesaling and retailing through various distribution channels – for example, authorised dealerships, used car yards, car advertising platforms and auction houses
- the supply of car servicing and maintenance services – this includes routine post sale vehicle maintenance, servicing and diagnostic testing
- the provision of third party financing – the parties supply finance products to consumers through two channels (on behalf of banks and the finance companies of vehicle manufacturers, and finance brokerage)
- the sale of car insurance to consumers on behalf of insurance companies and other financiers
- the sale of ‘manufacturer-branded’ spare car parts – the parties supply replacement car parts through their authorised dealerships to consumers and independent repairers
- the supply of smash repair services and
- sale of car care products – products and services at the point of sale of new vehicles including, window tinting, fabric protection and extended warranties.

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<sup>6</sup> AP Eagers’ merger application for authorisation MA1000018, 29 April 2019, p. 14.

<sup>7</sup> AP Eagers’ merger application for authorisation MA1000018, 29 April 2019, p. 6.

<sup>8</sup> AP Eagers’ merger application for authorisation MA1000018, 29 April 2019, Annexure 2.1.3, *AP Eagers Bidders Statement*, p. 17.

<sup>9</sup> AP Eagers’ merger application for authorisation MA1000018, 29 April 2019, p. 29.

<sup>10</sup> AP Eagers’ merger application for authorisation MA1000018, 29 April 2019, p. 7.

<sup>11</sup> AP Eagers’ merger application for authorisation MA1000018, 29 April 2019, pp. 6, 16 – 18; AHG submission, 29 May 2019, p. 2.

2.3. Table 1 provides an estimate of the national market shares for AP Eagers and AHG. A combined AP Eagers and AHG dealer group would represent around 12 per cent of new vehicle sales in Australia and 8.5 per cent of the national retail and wholesale supply of replacement parts.

**Table 1: AP Eagers and AHG market share estimates:<sup>12</sup>**

Product / Service	National market total	AP Eagers share	AHG estimated share	Merged entity share
<b>New vehicle sales*</b>	1,153,111 units	5.2%	6.7%	<b>11.9%</b>
<b>Used vehicle sales*</b>	3,000,000 units	1.5%	1.9%	<b>3.4%</b>
<b>Finance products*</b>	\$35.7bn	2.5%	3.5%	<b>6.1%</b>
<b>Servicing and repairs*</b>	\$12.23bn	2.1%	2.7%	<b>4.7%</b>
<b>Retail and wholesale replacement parts sales*</b>	\$14.08bn	3.7%	4.8%	<b>8.5%</b>

\* The sources, assumptions and methodology used by AP Eagers in relation to each of the above product and service areas is provided in Annexure 8.4.1 of its merger application for authorisation MA1000018. On 29 May 2019 AHG confirmed that the figures in this table are consistent with its own market share estimates.<sup>13</sup>

2.4. AP Eagers and AHG both operate authorised car dealerships. An **authorised dealership** is a business which has a franchise or 'dealership agreement' with a motor vehicle manufacturer giving it the right to act, within a defined geographic area (called the 'Primary Market Area' (**PMA**), as the primary distributor of the manufacturer's vehicles and authorised replacement parts and provider of authorised car servicing and repairs.<sup>14</sup>

2.5. Further detail about the commercial relationship between car manufacturers and dealerships is provided from paragraph 3.7.

### **The acquirer – AP Eagers**

2.6. Founded in 1913, AP Eagers is an ASX-listed automotive retail group with its main operations in Queensland, Adelaide, Darwin, Melbourne, Sydney, the Newcastle and Hunter Valley Region of New South Wales, and Tasmania.<sup>15</sup>

2.7. In total, AP Eagers represents 26 car brands and 10 truck/bus brands, which operate from 108 new car dealerships and 33 new truck and bus dealerships across

<sup>12</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 7.

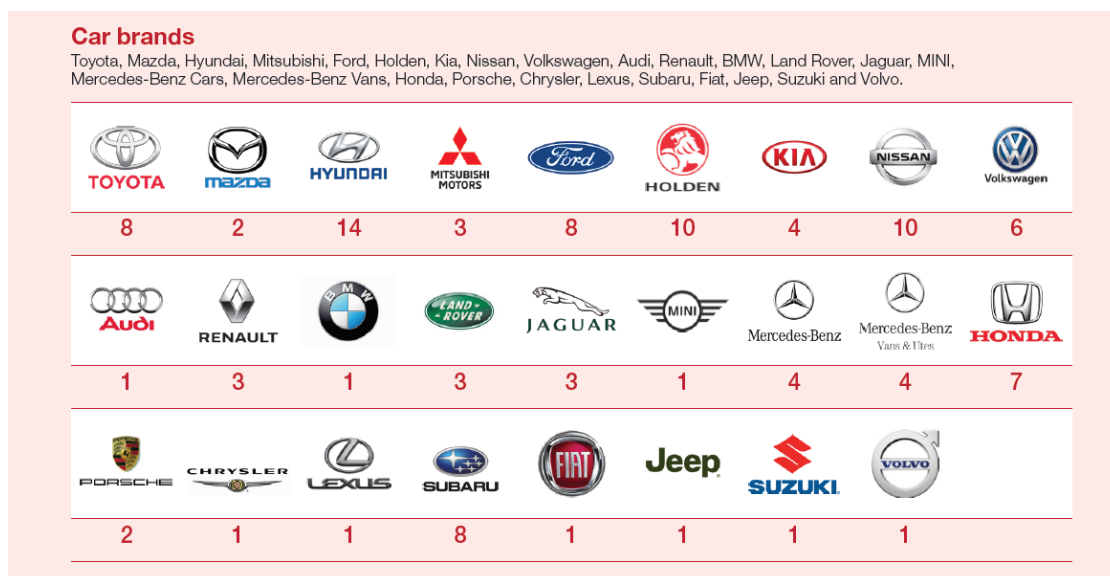
<sup>13</sup> AHG submission, 29 May 2019, p. 1.

<sup>14</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 7.

<sup>15</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, *Bidders Statement*, Annexure 2.1.3, p. 24.

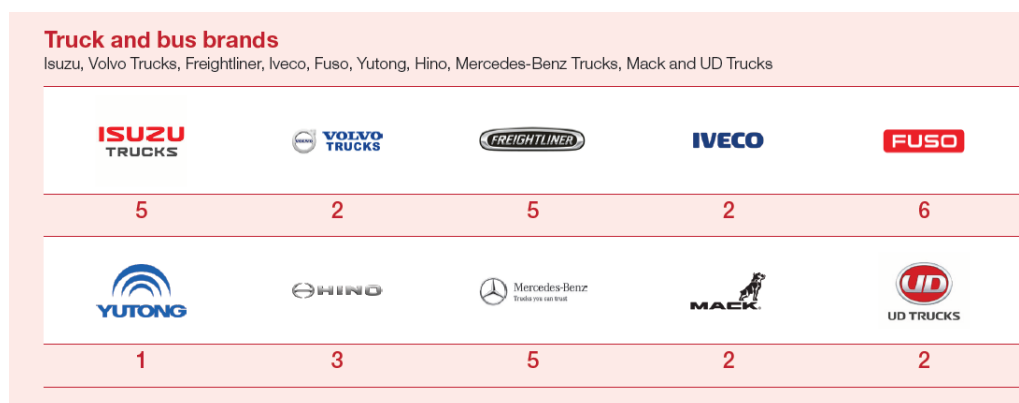
Australia.<sup>16</sup> Figures 1 and 2 provide an overview of the car and truck brands in AP Eagers' portfolio and the number of dealerships, which include 21 of the top 22 selling car brands, and 8 of the 10 top selling truck and bus brands in Australia, as at the end of 2018.<sup>17</sup>

**Figure 1: overview of AP Eagers automotive brands and dealerships:<sup>18</sup>**



- 2.8. Since lodging the application for merger authorisation, the number of dealerships (and brands) within AP Eagers' automotive group has changed from time to time. On 30 April 2019 AP Eagers completed its acquisition of the 'Adelaide BMW' and 'Adelaide Mini' dealerships.<sup>19</sup> On 15 May 2019 AP Eagers advised that the sale of the business assets of Audi Centre Sunshine Coast and Volvo Cars Sunshine Coast (the sole Audi and Volvo car dealerships operated by AP Eagers in Australia) was due to be completed on 17 May 2019.<sup>20</sup>

**Figure 2: overview of AP Eagers' truck and bus brands:<sup>21</sup>**



<sup>16</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, *Bidders Statement*, Annexure 2.1.3, p. 24; Supplementary Statement to the application for authorisation (MA1000018) p. 1-2, 7 May 2019; *Fourth Supplementary Bidders Statement*, pp. 2-3.

<sup>17</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, *Bidders Statement*, Annexure 2.1.3, p. 24.

<sup>18</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, *Bidders Statement*, Annexure 2.1.3, p. 24..

<sup>19</sup> See AP Eagers' Supplementary Statement to the application for authorisation (MA1000018), 7 May 2019 at <https://www.accc.gov.au/public-registers>.

<sup>20</sup> AP Eagers Limited, *Fourth Supplementary Bidders Statement*, pp. 2-3.

<sup>21</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, *Bidders Statement*, Annexure 2.1.3, p. 27.



## The target - AHG

2.9. AHG is an ASX-listed diversified automotive retailing and logistics group across Australia and New Zealand. In Australia, it operates in New South Wales, Victoria, Queensland and Western Australia. It has a small number of car dealerships in New Zealand.<sup>22</sup> AHG is Australia's largest automotive retailer, representing 26 car brands and 10 commercial, truck and bus brands. AHG reports it has 148 car franchises and 33 truck and bus franchises, across 95 new car dealerships and 11 new truck dealerships in Australia.<sup>23</sup>

## The Proposed Acquisition

2.10. AP Eagers seeks to acquire the remaining shares in AHG that it does not already own. AP Eagers currently owns 28.84 per cent of AHG's total issued share capital.<sup>24</sup>

2.11. AP Eagers and AHG are the two largest networks of automotive dealerships in Australia and combined, they would represent around 12 per cent of new vehicle sales in Australia. The next two largest car dealership groups each have a 1-2 per cent market share.<sup>25</sup>

2.12. Table 3 lists the number of dealerships currently operated by AP Eagers and AHG for the top ten selling car brands in Australia.

**Table 3: Top 10 car brands by new vehicle sales in Australia (2018):<sup>26</sup>**

Top 10 brands <sup>1</sup>	National market share <sup>1</sup>	Number of new dealership locations in Australia		
		AHG <sup>2</sup>	AP Eagers	Merged Group
Toyota <sup>3</sup>	18.8%	7	8	15
Mazda	9.7%	6	2	8
Hyundai	8.2%	8	14	22
Mitsubishi	7.4%	11	3	14
Ford	6.0%	10	8	18
Holden	5.3%	10	10	20
Kia	5.1%	9	4	13
Nissan	5.0%	14	10	24
Volkswagen <sup>3</sup>	4.9%	7	6	13
Honda	4.5%	1	7	8
<b>Total – Top 10</b>	<b>74.8%</b>	<b>83</b>	<b>72</b>	<b>155</b>

2.13. Nationally, a combined AP Eagers and AHG dealer group would represent 33 car brands in approximately 229 Dealership Sites, including all of the top 26 leading car brands in 2018. The combined group would represent 12 truck and bus brands from 68 dealerships across Australia. Collectively, these leading 26 brands represent 95.5 per cent of total new vehicle sales in Australia.<sup>27</sup>

2.14. Looking at the local regions where AP Eagers and AHG both currently operate car dealerships, the main areas of overlap between AP Eagers and AHG are in the Newcastle and Hunter Valley region, Melbourne, Sydney, and Brisbane. A combined AP Eagers and AHG dealership group in the Newcastle and Hunter Valley region

<sup>22</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, pp. 9, 22.

<sup>23</sup> AHG submission, 29 May 2019, p. 2.

<sup>24</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 11.

<sup>25</sup> IBIS World Industry Report G3911, *Motor Vehicle Dealers in Australia*, June 2019, pp. 23-24.

<sup>26</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, *Bidders Statement*, Annexure 2.1.3, p. 16.

<sup>27</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, *Bidders Statement*, Annexure 2.1.3, p. 16.

would operate a higher proportion of Dealership Sites than in any other local region in Australia.

2.15. In particular:

- In the *Newcastle and Hunter Valley region*, AP Eagers owns 16 Dealership Sites and AHG owns 20 Dealership Sites. There are 42 other competing dealerships. The situation in the Newcastle and Hunter Valley region is described in further detail from paragraph 2.17.<sup>28</sup>
- In *Brisbane*, AP Eagers owns 23 Dealership Sites and AHG owns 18 Dealership Sites. They both compete with other nearby mass-market vehicle dealerships. There are 136 other competing dealerships in Brisbane.<sup>29</sup>
- In *Melbourne*, AP Eagers owns four Dealership Sites (including Mercedes Commercial – Utes and Vans), AHG owns 27 Dealership Sites, and there are approximately 221 competing dealerships. A combined AP Eagers and AHG dealership group would control four of the eight prestige dealerships in the Doncaster area. However, there are competing prestige dealers within 10 km.<sup>30</sup>  
  
In addition, in Melbourne AP Eagers has six commercial vehicle (truck/bus) Dealership Sites, and AHG has four. There are 39 other commercial vehicle dealerships in Melbourne.<sup>31</sup>
- In Sydney, AP Eagers owns a single cluster of five Dealership Sites which are not close to AHG dealerships. AHG owns 18 Dealership Sites. There are approximately 260 competing dealerships.<sup>32</sup>

2.16. The locations of AP Eagers' and AHG's new car dealerships across Australia, as well as their truck and bus dealerships, are shown in Tables 4 and 5 respectively.

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<sup>28</sup> These figures are based on AP Eagers' merger application for authorisation MA1000018, 29 April 2019, Annexes 04.01 and 04.02; and a submission from AHG, *AHG – passenger car and truck dealerships and brands in Australia*, 22 May 2019, and cross-checked against online material where required. The ACCC has counted two Volkswagen locations as separate dealership sites. AP Eagers lists these as a single dealership in the Divestiture Undertaking. The ACCC observed that some independently-owned dealerships in this list stock very low numbers of new cars and may be less of a constraint on a combined AP Eagers and AHG. Dealerships that predominantly sell utes and vans, but do offer SUVs, are also included.

<sup>29</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, Annexure 10.02, p. 10.

<sup>30</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 50.

<sup>31</sup> This number was compiled by the ACCC from AP Eagers' submission, 3 July 2019, Annexure A.

<sup>32</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 50.

**Table 4: AP Eagers' and AHG new car dealerships in Australia:<sup>33</sup>**

Region	AP Eagers	AHG
New South Wales	20	41
Victoria	4	28
Tasmania	12	0
Queensland	47	20
South Australia	23	0
Northern Territory	2	0
Western Australia	0	36
<b>Australia</b>	<b>108</b>	<b>125</b>

**Table 5: AP Eagers' and AHG new truck and bus dealerships in Australia:<sup>34</sup>**

Region	AP Eagers	AHG
New South Wales	7	8
Victoria	9	2
Tasmania	8	0
Queensland	3	5
South Australia	6	0
Northern Territory	0	0
Western Australia	0	6
<b>Australia</b>	<b>33</b>	<b>21</b>

## The combined dealership group in the Newcastle and Hunter Valley region

2.17. In the Newcastle and Hunter Valley region,<sup>35</sup> AP Eagers and AHG are the two largest networks of dealerships and each other's most significant competitor. A combined AP Eagers and AHG dealership group would:<sup>36</sup>

- own 36 out of 78 (or 46 per cent) of the new car dealerships in this region
- be the sole dealer selling 7 car brands (out of the top ten brands) in metropolitan Newcastle (that is, Mazda, Hyundai, Ford, Kia, Nissan, Volkswagen and Honda)
- own 54 per cent of dealerships in the Newcastle and Hunter Valley region, if you only considered the top ten best selling car brands<sup>37</sup> in Australia.

<sup>33</sup> This table was compiled by the ACCC from AP Eagers' merger application for authorisation MA1000018, 29 April 2019, Annexes 04.01 and 04.02; and a submission from AHG, *AHG – passenger car and truck dealerships and brands in Australia*, 22 May 2019.

<sup>34</sup> This table was compiled by the ACCC from AP Eagers' merger application for authorisation MA1000018, 29 April 2019, Annexes 04.01 and 04.02; and a submission from AHG, *AHG – passenger car and truck dealerships and brands in Australia*, 22 May 2019.

<sup>35</sup> The ACCC did not reach a definitive view on which towns form part of Newcastle and the Hunter Valley Region for the purposes of analysing this merger. At its broadest, the ACCC considers this region would include metropolitan Newcastle (comprising Central Newcastle, Cardiff, Gateshead and Bennetts Green), Maitland/Rutherford, Cessnock, Singleton and Port Stephens.

<sup>36</sup> These figures are based on AP Eagers' merger application for authorisation MA1000018, 29 April 2019, Annexes 04.01 and 04.02; and a submission from AHG, *AHG – passenger car and truck dealerships and brands in Australia*, 22 May 2019, and cross-checked against online material where required. We have observed that some independently-owned dealerships in this list stock very low numbers of new cars and may be less of a constraint on a combined AP Eagers and AHG. Dealerships that predominantly sell utes and vans, but do offer SUVs, are also included.

2.18. In metropolitan Newcastle alone, a combined AP Eagers and AHG dealership group would operate 17 out of 22 (or 77 per cent) of the top ten best selling new car dealerships.<sup>38</sup>

### 3. Overview of the new car retailing industry<sup>39</sup>

3.1. The new car retailing supply chain in Australia involves the following businesses:

- **Car manufacturers** – usually large multinational firms that produce cars, parts and tools, and distribute their products through ‘authorised’ new car dealers. Practically all Australian new car distributors are subsidiaries of foreign car manufacturers and act as links between overseas manufacturers and their Australian authorised dealer networks.
- **New car authorised dealers** – are usually in franchise arrangements with car manufacturers to supply new cars and service and repair services. Authorised dealers range from small family-owned businesses to larger multi-dealership groups.<sup>40</sup>
- **Independent businesses** – that repair and service new cars, or produce or supply car parts and tools.

3.2. In 2016-17, approximately 1.1 million new vehicles were sold across Australia by more than 1500 new car dealers. Households and small businesses made up more than half of these purchases.

3.3. Dealers use bailment financing (also called ‘floor plan’ financing) to buy new cars from manufacturers. They purchase new cars and replacement parts from manufacturers in two ways:<sup>41</sup>

- individual dealers are allocated a certain number of new vehicles and parts by the manufacturer – the manufacturer maintains control over supply of vehicles across its entire authorised dealer network to ensure that vehicles and parts are fairly distributed throughout a manufacturer’s network. Dealers do have the ability to accept or decline an allocation, usually following extensive discussions with the manufacturer or
- dealers can order vehicles and parts from the manufacturer on an “as needs” basis. The wholesale price of vehicles ordered by dealers from the manufacturer is consistent across the national dealership network, regardless of the volume of vehicles and parts ordered, the volume of vehicles and parts previously allocated, or whether the dealer is part of a dealership group.

3.4. The ACCC’s *New Car Retailing Industry Market Study* found that, in addition to new car sales, manufacturers and authorised dealers earn significant revenues and profits from aftermarket sales, including repairs and servicing, and replacement parts. It also

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<sup>37</sup> AP Eagers’ merger application for authorisation MA1000018, 29 April 2019, Annexure 2.1.3, *Bidders Statement*, p. 16.

<sup>38</sup> These figures are based on AP Eagers’ merger authorisation application MA1000018, 29 April 2019, Annexes 04.01 and 04.02; and a submission from AHG, *AHG – passenger car and truck dealerships and brands in Australia*, 22 May 2019, and cross-checked against online material where required. We have observed that some independently-owned dealerships in this list stock very low numbers of new cars and may be less of a constraint on a combined AP Eagers and AHG. Dealerships that predominantly sell utes and vans, but do offer SUVs, are also included.

<sup>39</sup> Unless otherwise stated, information appearing in Section 3 of this Determination is obtained from the ACCC’s, *New Car Retailing Industry Market Study*, December 2017.

<sup>40</sup> AP Eagers merger application for authorisation MA1000018, 29 April 2019, p. 29.

<sup>41</sup> AP Eagers’ merger application for authorisation MA1000018, 29 April 2019, p. 38.

reported that car manufacturers and authorised dealers earn higher profit margins from the sale of replacement parts, and for authorised dealers, from repair and servicing new cars, than from the sale of new cars themselves.<sup>42</sup>

- 3.5. Dealers also provide the following related goods and services at the point of sale of new cars:<sup>43</sup>
- car care products (from third parties) – including window tinting, fabric protection and extended warranties and
  - financing and insurance products – dealers are typically appointed by or act as agents to sell finance and insurance products on behalf of banks, car manufacturers and insurance companies for a commission.
- 3.6. Independent repairers operate outside manufacturer authorised supply chains and in competition with authorised dealer service centres, parts suppliers and vertically aligned smash repairers. Independent repairers need to do business with authorised dealers in order to gain access to authorised spare parts, as well as the information, data and tools, to repair and service modern cars.

## Arrangements between dealers and manufacturers – dealer agreements and KPIs

- 3.7. A **dealer agreement** between a car manufacturer and car dealerships set out how the manufacturer and car dealership conduct business, the expected standards and processes a dealer must meet, and the dealer's PMA.<sup>44</sup> Dealer agreements typically have a duration of one to five years and expire unless a new agreement is reached.<sup>45</sup>
- 3.8. Dealers do not individually negotiate terms of dealer agreements with manufacturers, although they do negotiate through the manufacturer's National Dealer Council.<sup>46</sup> These dealer councils comprise elected representatives from the dealer network for that manufacturer's brand. Representatives provide feedback to the manufacturers on a range of network specific issues, including 'key performance indicator' (**KPI**) programs and dealer agreements.<sup>47</sup>
- 3.9. The terms and conditions in dealer agreements vary across manufacturers. Key areas prescribed in agreements include:
- specifications of the dealer's facilities (that is, showrooms and service facilities)
  - dealership ownership arrangements
  - dealer management and performance criteria/indicators (that is, car sales, servicing and customer satisfaction targets)
  - dealer obligations relating to car sales, service and authorised parts
  - expectations for customer service and support, including how manufacturer warranty claims are dealt with and costs are shared

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<sup>42</sup> ACCC market study, *New Car Retailing Industry*, The final report and submissions are available at <https://www.accc.gov.au/focus-areas/market-studies/new-car-retailing-industry-market-study>.

<sup>43</sup> AP Eagers' merger application for authorisation MA100018, 29 April 2019, p. 45.

<sup>44</sup> AP Eagers' merger application for authorisation MA100018, 29 April 2019, p. 29.

<sup>45</sup> ACCC market study, *New Car Retailing Industry*, December 2017, p. 32.

<sup>46</sup> AP Eagers' merger application for authorisation MA100018, 29 April 2019, pp. 29, 30.

<sup>47</sup> AP Eagers' merger application for authorisation MA100018, 29 April 2019, p. 34.

- conditions relating to multi-franchising and change of use of premises/facilities
  - the geographic area (postcodes) where the dealer has primary rights to represent the brand and sales targets for that area and
  - any other special conditions that may apply to a given dealer.
- 3.10. Manufacturers influence competition between dealerships through the use of, among other things, performance criteria in dealer agreements to drive sales. Mitsubishi submits that sales target KPIs are used by manufacturers to seek to increase their market shares against other manufacturers.<sup>48</sup>
- 3.11. Toyota submits that it implements measures to ensure there is competition between its network of Toyota dealers. One such measure is that 'any particular automotive retail group...is precluded from holding a number of franchises that would inhibit such competition.'<sup>49</sup>
- 3.12. AP Eagers submits that, due to the way manufacturers incentivise dealers through dealer agreements, a dealer's priority is to sell the highest volume of cars possible in order to unlock payments associated with meeting and exceeding key performance criteria (**KPI payments**).<sup>50</sup> As such, the achievement of sales targets, set by the car manufacturers, underpins the economic model that dealerships work under.<sup>51</sup> AP Eagers submits that dealerships generally need to achieve at least 80 to 90 per cent (or in some cases more) of its sales targets to be eligible to receive KPI payments.<sup>52</sup> Failure to achieve manufacturer targets within dealer agreements 'may constitute a breach of the dealership agreement.'<sup>53</sup>
- 3.13. The ACCC understands that each manufacturer structures its KPIs differently, however targets are often related to the number of vehicles sold. Manufacturers also set sales targets for customers within the dealer's PMA and customer satisfaction targets.

## Retail prices and buying a new car

- 3.14. Manufacturers set recommended retail prices (**RRP**) for their cars, and car dealerships negotiate deals with consumers below the RRP taking into account a number of factors, for example the value of a trade-in vehicle.
- 3.15. Submissions from new car dealers and manufacturers confirm that customers generally do not pay RRP for new cars, and discounting by dealers is common, although information about the levels of discounting by dealerships is not readily available.
- 3.16. In addition, consumers usually buy new cars from their local dealer or next closest dealer for a particular brand. They generally do not travel particularly far to buy a new car. Further detail about the distance which Newcastle and Hunter Valley consumers generally travel to buy a new car is provided at paragraphs 6.22 to 6.29.
- 3.17. When buying a new car, the ACCC understands that consumers are increasingly conducting research online before approaching a dealership. The ACCC conducted a

<sup>48</sup> Submission from Mitsubishi, 23 May 2019, p. 1.

<sup>49</sup> Submission from Toyota Motor Corporation Australia, 28 May 2019, p. 3.

<sup>50</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 36.

<sup>51</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 30.

<sup>52</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 31.

<sup>53</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 64.

consumer survey as part of its *New Car Retailing Industry Market Study* which indicated that:<sup>54</sup>

- 55 per cent of new car buyers surveyed spent from one week to a month researching their purchase
- new car buyers most commonly used information on the manufacturers' website to inform their decisions (65 per cent), followed by in-person consultation at the dealership (54 per cent). New car buyers also indicated that they visited a median of two dealers and considered a median of two car models.

3.18. The findings of this consumer research was also confirmed by AP Eagers and a number of dealers who note that while the majority of new car sales occur in person at a dealership, most sales involve customers conducting broad searching and comparison of new car prices online over a wide geographic region – for example, by using aggregator sites such as carsales.com.au or carsguide.com.au.<sup>55</sup>

3.19. While some consumers call car dealers to obtain price quotes, it is likely that in many cases a 'customer may not get the best idea of price by calling dealers. To get the best price they would need to visit each dealer.'<sup>56</sup>

3.20. Suttons (a new car dealer in Sydney) submits that:

...the internet makes it easy for consumers to cross shop between dealerships in different areas....Consumers can easily negotiate with dealerships over the phone and online to make a deal, regardless of location.<sup>57</sup>

3.21. An independent authorised car dealer<sup>58</sup> in the Hunter Valley region submits that:

Customers increasingly research online and know what car or cars they are interested in buying before visiting the dealership in person. Dealers no longer sell cars they 'price a deal.'<sup>59</sup>

3.22. Another new car dealer in the Newcastle and Hunter Valley region also submits that it is difficult to estimate the average level of discounting by dealerships. It considers there are no two customers or deals that are the same. As well as the cost of the car to the dealer and the cost to prepare the car for sale, there are a lot of factors that influence the final discount offered – for example, looking at total drive-away price, changeover costs when a trade-in is involved, and finance, insurance and other sales opportunities that a sale might represent to a car dealer.<sup>60</sup>

3.23. A former dealership owner submitted that everyone has a different approach to responding to online and telephone enquiries. A dealer will generally quote RRP based on 'drive-away, no more to pay'. A dealer will tell the customer to come in and see what they can do and to assess and value their trade-in as part of a "changeover" price. Dealers can use all types of techniques to get potential buyers in. Some dealers

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<sup>54</sup> ACCC market study, *New Car Retailing Industry*, December 2017, p. 37.

<sup>55</sup> AP Eagers' merger authorisation application for authorisation MA1000018, 29 April 2019, p. 57.

<sup>56</sup> Submission from a new car retailer in the Newcastle and Hunter Valley region, 5 June 2019, p. 2.

<sup>57</sup> Submission from Suttons, 24 May 2019, p. 1.

<sup>58</sup> Throughout this Determination, some submissions from specific interested parties have been de-identified following requests, and ACCC decisions, to exclude this information from the public register.

<sup>59</sup> Submission from an independent authorised motor dealer in the Hunter Valley region, 2 May 2019, p. 1.

<sup>60</sup> Submission from a new car retailer in the Newcastle and Hunter Valley region, 6 June 2019, p. 3.



will not give a price over the phone, but will say 'come in and we'll see what we can do', in order to get the customer into the dealership.<sup>61</sup>

3.24. A car manufacturer also submits that 'customers use online searches as leverage and will pressure a dealer to price match.'<sup>62</sup> It also submits that:<sup>63</sup>

- vehicles tend to be sold at a heavy discount off the RRP, with new car retailing being an extremely narrow margin business and
- the majority of new car sales involve a trade in.

3.25. AP Eagers advises that:

While dealers can sell below the OEM's [manufacturers'] RRP, differences in advertised retail prices on new cars are limited as the margins available remain small relative to the price of the vehicle. Greater advertised pricing variants occur with near-new and demonstrator vehicles which is where dealers often aggressively compete.<sup>64</sup>

3.26. Toyota submits that it has 'no visibility over pricing and discounting' offered by car dealers.<sup>65</sup> In particular, it submits:

Toyota Australia sets recommended retail prices (above which dealers should not sell vehicles) and also may invite dealers to participate in retail offers (nationally or regionally) however dealers are encouraged to compete on price and therefore discounting.<sup>66</sup>

## New car sales and aftermarket services

3.27. The ACCC's 's *New Car Retailing Industry Market Study* identified that a key feature of the new car retailing industry is the relationship between sales of new cars and sales in aftermarkets, such as car servicing and repair and replacement parts. High margins from the sale of authorised replacement parts contribute significantly to manufacturers' and authorised dealers' profits. In addition, authorised dealers earn a significant proportion of their overall profit from servicing new cars. The ACCC's Market Study outlined that it is common for authorised dealers to discount new car prices to maximise sales in aftermarket services.

3.28. Manufacturers set the wholesale price of spare parts. While some consumers will only get their cars serviced by an authorised dealer, many consumers view independent repairers as an acceptable or preferable alternative to authorised dealers in car servicing and repair. When a customer first brings in a car for a repair or service at an independent workshop, the independent repairer needs access to diagnostic tools and information (including software and codes) to scan a car's computer system and identify the faults that need servicing. Following this, there are a range of part options available for the consumer to choose from, including:<sup>67</sup>

- 'aftermarket parts' – new 'non-branded' parts
- reconditioned parts – a small number of components can be recovered and reconditioned for continued use where it is safe and cost effective to do so

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<sup>61</sup> Submission from a former dealership owner, 3 July 2019, p. 3.

<sup>62</sup> Submission from an original equipment manufacturer and importer, 17 May 2019, pp. 2-3.

<sup>63</sup> Submission from an original equipment manufacturer and importer, 17 May 2019, pp. 2-3.

<sup>64</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 60.

<sup>65</sup> Submission from Toyota Motor Corporation Australia, 28 May 2019, p. 3.

<sup>66</sup> Submission from Toyota Motor Corporation Australia, 28 May 2019, p. 3.

<sup>67</sup> Submission from the Australian Automotive Aftermarket Association, 17 May 2019, pp. 2-3.



- car company branded 'authorised' parts and
  - parts that are manufactured by the same business that produces the car company branded parts, but under their own brand name.
- 3.29. Independent repair workshops access car manufacturer branded parts and diagnostics tools from authorised dealerships. 'Aftermarket parts' are sourced from distributors and resellers or sometimes directly from aftermarket parts manufacturers.<sup>68</sup>
- 3.30. The Australian Automotive Aftermarket Association (**AAAA**) submits that it can sometimes be difficult for independent repairers to obtain timely supply from authorised dealers of manufacturer branded parts and the supporting installation software and codes. In particular, the AAAA submits:
- If the local dealer of a particular brand refuses to supply parts, or is slow to provide these parts or does not assist in providing the installation codes, an independent repairer will seek out an alternative authorised dealer of the same vehicle brand. In the metropolitan area, sourcing alternative dealers is not difficult. In rural and regional areas this can become quite a challenge.<sup>69</sup>
- 3.31. The ACCC's *New Car Retailing Industry Market Study* concluded that the vertical relationships in the authorised supply chains and manufacturers' ownership of critical data, tools and information, mean that manufacturers and their dealer networks have the ability and incentive to impede competition in aftermarkets. For example, by limiting access to the information and data required by independent repairers to repair and service new cars.

#### *Mandatory Scheme for sharing motor vehicle service and repair information*

- 3.32. The ACCC's *New Car Retailing Industry Market Study* recommended a mandatory scheme be introduced for car manufacturers to share technical information with independent repairers, on commercially fair and reasonable terms. The ACCC highlighted that a mandatory scheme should provide independent repairers with access to the same technical information that car manufacturers make available to their own authorised dealers and preferred repairer networks (including environment, safety and security-related information).
- 3.33. In February 2019 the Australian Government released a consultation paper on key elements of a mandatory scheme for the sharing of motor vehicle service and repair information and the establishment of a Service and Repair Information Sharing Advisory Committee. The Australian Government intends to implement a scheme in 2019.<sup>70</sup>

## 4. Consultation

- 4.1. The ACCC tests the claims made by the applicant in support of an application for merger authorisation through an open and transparent public consultation process.
- 4.2. Before the ACCC releases a determination in relation to an application for merger authorisation, the ACCC provides feedback to the applicant about the issues raised in

<sup>68</sup> Submission from the Australian Automotive Aftermarket Association, 17 May 2019, p. 3.

<sup>69</sup> Submission from the Australian Automotive Aftermarket Association, 17 May 2019, p. 3.

<sup>70</sup> The Treasury consultation paper, *Mandatory scheme for the sharing of motor vehicle service and repair information*, February 2019, available at <https://treasury.gov.au/consultation/c2019-t358022>. Accessed 18 July 2019.

submissions from interested parties. This feedback also identifies any issues of concern to the ACCC at that time and invites submissions on issues raised.

- 4.3. In this matter, the ACCC invited submissions at three different stages – immediately after the application was lodged, in response to the ACCC’s market feedback letter of 24 June 2019, and to consult on a draft divestiture undertaking offered by AP Eagers.
- 4.4. All public submissions by the applicant and interested parties have been published on the ACCC’s [Merger authorisations public register](#). The ACCC also received a number of submissions and data sets that were partly or wholly confidential. Accordingly, throughout this Determination, information and submissions from some interested parties has been de-identified.
- 4.5. The ACCC has taken into account submissions and information received from AP Eagers and interested parties. An overview of the parties that provided submissions to the ACCC at the various stages of the consultation process is provided below.
- 4.6. The views of interested parties and AP Eagers are outlined in further detail where relevant in this Determination.

### Initial consultation on AP Eagers’ merger authorisation application

- 4.7. The ACCC invited submissions from over 270 interested parties including dealerships, financiers, fleet customers, car and truck/bus manufacturers, industry associations and online car sale platforms.
- 4.8. ACCC officers also visited Newcastle and the Hunter Valley, including visits to AP Eagers and AHG dealerships.
- 4.9. The ACCC received 20 public submissions from interested parties, including competing new car dealerships, car manufacturers, industry associations and a car hire and fleet management business.
- 4.10. In particular, the ACCC received submissions from the following **competing new car dealerships**: a car dealer in Queensland; three car dealers in the Newcastle and Hunter Valley region; Fennessy’s; and Suttons.
- 4.11. The ACCC received submissions from the following **car manufacturers**: Honda; Toyota Motor Corporation Australia; Suzuki Auto Company; Hyundai Motor Company Australia; Jaguar Land Rover; Mitsubishi Motors Australia; and an anonymous car manufacturer.
- 4.12. Further, the ACCC received submissions from the following **industry associations**: the AAAA; Victorian Automobile Chamber of Commerce; Federal Chamber of Automotive Industries; and Motor Traders Association of NSW.

## Market feedback letter

- 4.13. On 24 June 2019 the ACCC provided a market feedback letter to AP Eagers and interested parties. The ACCC's market feedback letter is available on the ACCC's [Merger authorisations public register](#).
- 4.14. The ACCC had preliminary concerns about the impact of the Proposed Acquisition on competition in new car retailing in the Newcastle and Hunter Valley region. Due to the combined dealership group's large market share in this region, the ACCC considered that consumers could pay more for new cars as a result of less vigorous discounting between the combined AP Eagers and AHG car dealerships across this region.
- 4.15. The ACCC considered that its preliminary competition concerns in the Newcastle and Hunter Valley region could be addressed by the divestiture of dealerships by AP Eagers or the combined dealership group.
- 4.16. The ACCC also identified that it was continuing to consider whether the Proposed Acquisition would reduce competition in the supply of authorised parts and the provision of servicing of new cars in areas within the Newcastle and Hunter Valley region.
- 4.17. The ACCC received four public submissions following the market feedback letter from Jaguar Land Rover, Kia Motors, a former dealership owner and a commercial vehicle dealership in Victoria.

## Draft divestiture undertaking offered by AP Eagers

- 4.18. The ACCC received a submission from AP Eagers on 3 July 2019. While AP Eagers does not agree that the Proposed Acquisition would be likely to substantially lessen competition, to address the ACCC's preliminary competition concerns, it offered to give a court enforceable undertaking to divest its new car retailing dealerships and related business sites in the Newcastle and Hunter Valley region.
- 4.19. On 5 July 2019 the ACCC invited submissions on the draft divestiture undertaking proposed by AP Eagers. Submissions were due on 12 July 2019. The ACCC received one submission during this period from Fennessy's.

## 5. Timing

- 5.1. The ACCC has a period of 90 days in which to make a Determination in respect of an application for merger authorisation. Otherwise, the ACCC is deemed to have denied authorisation. The Act allows for the time period to be extended by agreement from an applicant for merger authorisation.<sup>71</sup>

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<sup>71</sup> Section 90(12) of the Act.

5.2. An outline of the key stages in the ACCC's assessment of this merger authorisation application is provided below:

29 April 2019	Lodgement of merger application for authorisation and supporting submission.
1 May 2019	Public consultation process begins.
17 May 2019	Closing date for submissions from interested parties.
24 June 2019	ACCC releases market feedback letter
3 July 2019	Submissions in response to market feedback letter due. AP Eagers provided a submission, which included a draft divestiture undertaking.
5 July 2019	ACCC commenced market consultation on the draft divestiture undertaking proposed by AP Eagers.
12 July 2019	Closing date for submissions relating to the draft divestiture undertaking proposed by AP Eagers.
24 July 2019	ACCC accepts Divestiture Undertaking.
25 July 2019	ACCC Determination

## 6. ACCC assessment

### The authorisation test

6.1. The test for granting merger authorisation is set out in section 90(7) of the Act. The ACCC may grant authorisation for a proposed acquisition if it is satisfied in all the circumstances that:

- the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition (**substantial lessening of competition limb**) or
- the proposed acquisition would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed acquisition (**net public benefit limb**).

6.2. The ACCC may grant merger authorisation where it is satisfied that at least one limb of the test is met.

6.3. AP Eagers seeks authorisation of the Proposed Acquisition on the basis that it will not have the effect or the likely effect of substantially lessening competition in any market in contravention of section 50 of the Act. AP Eagers' application did not contain extensive submissions about likely public benefits from the Proposed Acquisition.

## Relevant areas of competition

- 6.4. To assess the effect of a proposed acquisition the ACCC identifies the relevant areas of competition likely to be impacted.
- 6.5. The ACCC considers that the most relevant areas of competition between AP Eagers and AHG are the retail supply of new cars, spare parts, and repairs and servicing to consumers in the geographic areas where they both operate new car dealerships. These geographic areas are the Newcastle and Hunter Valley region, where there is significant overlap; Brisbane, where there is some overlap; and Sydney and Melbourne, where there is minimal overlap.
- 6.6. AP Eagers and AHG are also both active in a number of other areas of competition. They both operate truck and bus dealerships in Melbourne and are active in the acquisition of car and truck dealership franchises, supply and acquisition of properties on which dealerships may operate, the wholesale and retail supply of used cars, and the supply of insurance and financial services.

### New and used cars

- 6.7. The ACCC considers that new and used cars are generally in separate markets.

#### *Submissions*

- 6.8. AP Eagers submits that there is a broader market for the retail supply of new and used cars with a high level of substitutability between different vehicle types, brands and makes.<sup>72</sup> It submits that used cars also place significant downwards pressure on the price of new cars.<sup>73</sup>
- 6.9. Hyundai submits that there is a limit to which new and used vehicles can be considered substitutable due to the different supply and demand characteristics of the two products. For example, dealers acquire used cars through different channels, including trade-ins and private sales, while they only acquire new cars from a manufacturer.<sup>74</sup> On the demand side, new cars can provide buyers with peace of mind, added warranties and servicing plans which may not be available with used cars.<sup>75</sup>
- 6.10. A former dealership owner submits that new car buyers want the experience and certainty of a new car. New car buyers may look at late model, low mileage used cars with the balance of a new car warranty, but will not look at high mileage used cars or cars outside warranty.<sup>76</sup>

#### *ACCC's view*

- 6.11. AP Eagers and AHG both supply new and used cars. However, most used car dealers are not authorised new car dealers.
- 6.12. The ACCC considers that there are separate relevant product markets for new and used cars. There may be some limited substitutability between very low-mileage used cars and new cars, but in general new and used cars are not close substitutes due to their significantly different supply and demand characteristics.

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<sup>72</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 70.

<sup>73</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 56.

<sup>74</sup> Submission from Hyundai 28 May 2019 p. 11; Submission from Suttons 24 May 2019 paragraph 27.

<sup>75</sup> Submission from Hyundai 28 May 2019 pp. 11-12.

<sup>76</sup> Submission from a former dealership owner 3 July 2019 p. 5.

6.13. Peace of mind and trust are major reasons why consumers buy new cars rather than used cars. Price is the main reason why consumers buy used cars. Consumers who prefer new cars are unlikely to consider most used cars to be a suitable substitute.

### **New car retailing - geographic areas**

6.14. The ACCC considers it appropriate to assess the impact of the Proposed Acquisition nationally as well as in the regions where AP Eagers and AHG both operate dealerships. These regions are the Newcastle and Hunter Valley region, Brisbane, Melbourne and Sydney.

6.15. For reasons set out at paragraphs 6.22 to 6.29, the ACCC considers that new car dealers in the Newcastle and Hunter Valley region are in a distinct geographic market which is separate from Sydney or the Central Coast.

6.16. Due to the relatively limited overlap between AP Eagers and AHG and large number of competing dealers in each of Brisbane, Melbourne and Sydney, the ACCC does not consider it necessary to precisely define relevant markets in each of these areas. The remainder of this assessment focusses on new car retailing in the Newcastle and Hunter Valley region where aggregation between AP Eagers and AHG is greatest.

#### *Submissions from AP Eagers*

6.17. AP Eagers submits that the relevant market is national or at least state based for each of the retail supply of new and used vehicles, commercial vehicles and repairs and servicing.<sup>77</sup> However, its submission focussed on the extent to which dealerships in different population centres compete. AP Eagers submits that:

- a significant number of customers purchase vehicles outside their local area. An AP Eagers' commissioned economic report (**RBB Report**) states that, on the basis of AP Eagers' sales data, 21 per cent of consumers in a Newcastle region-based PMA purchased their new car from a Dealership Site located outside of the Newcastle region and 10 per cent of consumers from the Newcastle region purchased a new car from a dealership in Sydney.<sup>78</sup>
- the RBB Report also states that the geographic market includes the Sydney region if enough customers would travel there in the event of a moderate price increase.<sup>79</sup> It is logical to suggest that if prices were to rise, an increasingly significant number of customers would source new vehicles from outside the Newcastle and Hunter Valley region.<sup>80</sup>
- consumers are willing to shop around and travel to make savings. The RBB Report states that, if new car prices in Newcastle were to increase by 5-10 per cent, the proportion of customers in the Newcastle region prepared to travel to purchase a new car would likely increase.<sup>81</sup>

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<sup>77</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 55 (new car retailing), p. 70 (used vehicles), p. 74 (commercial vehicles) and p. 76 (repairs and servicing).

<sup>78</sup> AP Eagers' merger application for authorisation MA1000018, Annexes 10.3 (Deloitte report) and 10.4 (RBB Economics report).

<sup>79</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, Annex 10.4 (RBB Economics Report).

<sup>80</sup> Submission from AP Eagers 3 July 2019 p. 5.

<sup>81</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, Annexes 10.3 (Deloitte report) and 10.4 (RBB Economics report).

- the internet facilitates price comparison and therefore encourages competition between dealers located in disparate areas, including Sydney and Central Coast dealerships imposing a constraint on dealerships in the Newcastle/Hunter region.
- motor vehicles are portable by nature with low transportation costs as a proportion of total purchase price.
- there are no meaningful regulatory barriers preventing customers purchasing outside their local area.

#### *Submissions from interested parties*

6.18. Interested parties made submissions expressing a range of views about how far consumers will travel to buy a new car. Some dealers and manufacturers submit that consumers are willing to travel some distance to purchase a new car.<sup>82</sup> However, other interested parties submit that customers are only prepared to travel moderate distances and that customers in Newcastle and the Hunter Valley tend not to travel outside that region.<sup>83</sup>

6.19. The following dealers and manufacturers submit that consumers are willing to travel to purchase a new car:

- Suttons, a Sydney dealer, submits that customers would drive for a few hours to purchase a new car.
- a former dealership owner submits that customers will travel to get a better deal.<sup>84</sup>
- an original equipment manufacturer and importer submits that consumers will travel further if the price difference is too great. Consumers may be more willing to travel at the budget end of the new car market.<sup>85</sup>
- Jaguar Land Rover submits that consumers are prepared to travel a significant distance to purchase the right vehicle at the right price. Consumers in the Newcastle and Hunter Valley region are prepared to travel 80-150km to the Central Coast or Sydney. Some consumers may be willing to travel interstate.<sup>86</sup>
- Mitsubishi submits that customers would be likely to travel from Newcastle to Sydney if there was significant value (large price discount).<sup>87</sup>
- Suzuki Auto submits that if the deal is right, consumers will travel, or use the deal in the other location to negotiate with the local dealership. Customers prefer convenience and service, and are time poor, but will forgo this if there is a perceived saving. Suzuki Auto submits that the distance customers are willing to travel depends on whether they are based in metropolitan, regional or rural areas.<sup>88</sup>

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<sup>82</sup> Submissions from Suttons, 24 May 2019; a former dealership owner, 3 July 2019; an original equipment manufacturer and importer, 17 May 2019; Jaguar Land Rover, 30 May 2019; Mitsubishi, 23 May 2019; and Suzuki Auto Co, 24 May 2019.

<sup>83</sup> Submission from an independent authorised motor dealer in the Hunter Valley Region, 2 May 2019, paragraph 4; an automotive retailer operating in the Newcastle and Hunter Valley region, 6 June 2019, p. 1; a new car retailer in the Newcastle Hunter Valley region, 5 June 2019, pp. 1-2; Suttons, 24 May 2019, paragraph 2; and an independent authorised motor dealer in the Hunter Valley Region 2 May 2019 paragraph 4; Hyundai, 28 May 2019 p. 13; and confidential submissions from several other manufacturers.

<sup>84</sup> Submission from a former dealership owner, 3 July 2019, p. 3.

<sup>85</sup> Submission from an original equipment manufacturer and importer, 17 May 2019, paragraph 10.

<sup>86</sup> Submissions from Jaguar Land Rover, 30 May 2019, Appendix 1, paragraph 3.3 and 28 June 2019 p. 1.

<sup>87</sup> Submission from Mitsubishi, 23 May 2019, p. 2.

<sup>88</sup> Submission from Suzuki Auto Co, 24 May 2019, paragraph 3.

6.20. The following submissions and other information available to the ACCC support the view that customers would only travel moderate distances, and that customers in the Newcastle and Hunter Valley region tend not to travel outside that region:

- a recent consumer survey<sup>89</sup> found that the furthest distance travelled to a dealership by buyers in the study was 42kms. Consumers surveyed indicated that they would be happy to travel up to 70kms to visit a dealership that offered a better price, value for money or had the exact vehicle model desired in stock.
- several manufacturers made confidential submissions broadly consistent with the distances identified in the consumer survey.
- sales data obtained from AP Eagers' and AHG's Newcastle dealers strongly supports the conclusion that the vast majority of sales are to local customers.
- submissions were consistent that consumers conduct extensive online research before buying a new car. The ACCC understands that consumers make enquiries with dealers significantly further away than the distance they travel to buy a car. However, market research indicates that they generally only visit one to two dealers before making a purchase.<sup>90</sup>
- Hyundai submits that the geographic market is more narrowly defined than stated in AP Eagers' application. Hyundai submits dealers in regional areas retain a high proportion of customers and that regional consumers prefer to shop locally to maintain the servicing relationship with their local dealership.<sup>91</sup>
- an independent authorised motor dealer in the Hunter Valley Region submits that the region is a well-insulated area where dealers are focussed on keeping people shopping locally. Customers inside the Hunter Valley will generally not travel outside this area to purchase.<sup>92</sup>
- an automotive retailer operating in the Newcastle and Hunter Valley region submits that the distance consumers are willing to travel depends on perceived cost savings.<sup>93</sup>
- a new car retailer in the Newcastle and Hunter Valley region submitted that people will shop locally, but will travel for a big discount. The dealer does not think many people want to travel to Sydney to purchase. The dealer suggested that almost all of its sales were to customers in the Newcastle/Maitland/Lake Macquarie region.<sup>94</sup>
- Suttons, a Sydney dealer, submits that a minimal number of consumers currently travel from the Newcastle and Hunter Valley region to Sydney to buy a new car.<sup>95</sup>

6.21. Several interested parties submit that pricing for new cars is opaque. While manufacturers' recommended retail prices (**RRP**) are transparent, submissions were consistent that virtually no cars are sold at the RRP. The RRP was described as an offer<sup>96</sup> or starting point<sup>97</sup> for further negotiations. Despite this, most new cars

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<sup>89</sup> *The Journey to Vehicle Ownership 2017 report* by Carsales/IPSOS <https://www.mediamotive.com.au/wp-content/uploads/2018/08/Journey-To-Vehicle-Ownership-Whitepaper-1.pdf>; accessed 28 June 2019.

<sup>90</sup> *The Journey to Vehicle Ownership 2017 report*.

<sup>91</sup> Submission from Hyundai, 28 May 2019, p. 13.

<sup>92</sup> Submission from an independent authorised motor dealer in the Hunter Valley Region, 2 May 2019, paragraph 4.

<sup>93</sup> Submission from an automotive retailer operating in the Newcastle and Hunter Valley region, 27 May 2019, p. 2.

<sup>94</sup> Submission from a new car retailer in the Newcastle Hunter Valley region, 5 June 2019, p. 2.

<sup>95</sup> Submission from Suttons, 24 May 2019, p. 1.

<sup>96</sup> Submission from Suttons, 24 May 2019, p. 1.



advertised online are listed at or around the RRP. While some dealers are prepared to make sales online or by phone, most dealers stated that each deal was considered on its merits, a dealer's best price may not be made available over the phone and that phone calls are treated as an opportunity to convince prospective buyers to visit their dealership.<sup>98</sup>

#### *ACCC's view*

- 6.22. The ACCC considers it appropriate to consider the likely effect on competition nationally as well as in regions where AP Eagers and AHG both operate dealerships which are the Newcastle and Hunter Valley region, Brisbane, Melbourne and Sydney.
- 6.23. The ACCC considers that Newcastle and Hunter Valley dealerships are in a separate relevant market to dealerships located in Sydney or the Central Coast. Dealerships located in Sydney or the Central Coast are likely to impose a weak constraint on dealerships in the Newcastle and Hunter Valley region. The general view of dealers in the Newcastle and Hunter Valley region was that Newcastle and the Hunter Valley was the region where they competed, they considered their key competitors to be other dealers in that region and that they did not consider Sydney to be part of the same market.<sup>99</sup>
- 6.24. Only a relatively small proportion of consumers from the Newcastle and Hunter Valley region currently travel to the Central Coast or Sydney to buy a new car. Further, the ACCC considers that only a limited proportion of consumers in the Newcastle and Hunter Valley region would travel in response to higher prices or reduced services locally.
- 6.25. The ACCC understands that average dealer margins on new car sales are generally higher in Newcastle than in Sydney. If consumers in Newcastle and the Hunter Valley region were willing to travel to Sydney or the Central Coast to purchase a new car, the ACCC would expect that a higher proportion would already do so.
- 6.26. AP Eagers submits that any lack of movement of customers in purchasing outside a dealership's PMA is a function of price transparency and mobility amongst consumers. AP Eagers submits that consumers may secure the best price from their local dealer without needing to travel significant distances.<sup>100</sup>
- 6.27. However AP Eagers' view is not supported by the material and submissions before the ACCC. Rather, the ACCC considers that there is limited price transparency because new car sale prices are typically negotiated in person and dealers are generally unwilling to provide their best (lowest) price over the telephone or internet and advertised prices are usually at or around RRP. Therefore, even where consumers conduct research online or make enquiries with dealerships outside their local area, they may be unable to accurately assess the best offers available elsewhere against offers made by local dealers in person. Submissions from some dealers indicate that phone calls are treated as an opportunity to convince buyers to visit their dealership in person.<sup>101</sup>

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<sup>97</sup> Submission from an original equipment manufacturer and importer, 17 May 2019, paragraph 24.

<sup>98</sup> Submission from a new car retailer in the Newcastle Hunter Valley region, 5 June 2019, p. 2; submission from an automotive retailer who operates within the Newcastle and Hunter Valley Region, 6 June 2019, p. 4.

<sup>99</sup> Submissions from a new car retailer in the Newcastle Hunter Valley region, 5 June 2019, pp. 1-2; an independent authorised motor dealer in the Hunter Valley Region, 2 May 2019, paragraphs 1-4.

<sup>100</sup> Submission from AP Eagers, 3 July 2019, p. 5.

<sup>101</sup> Submission from a new car retailer in the Newcastle Hunter Valley region, 5 June 2019, p. 2; submission from an automotive retailer who operates within the Newcastle and Hunter Valley Region, 6 June 2019, p. 4.

- 6.28. Because research is unlikely to be as effective as negotiating in person at a dealership, it is difficult for consumers to have certainty that they are likely to get a better offer elsewhere until they commit considerable time and expense to travel. Even if consumers think they may get a better offer elsewhere, the size of any discount is unknown. Consumers may ultimately decide to avoid the inconvenience and uncertain payoff from travelling, and buy from their local dealer.
- 6.29. Accordingly, the ACCC considers that the Newcastle and Hunter Valley region constitutes a relevant market encompassing metropolitan Newcastle (comprising Central Newcastle, Cardiff, Gateshead and Bennetts Green), Maitland/Rutherford, Cessnock, Singleton and Port Stephens.<sup>102</sup>

## Spare parts

### *Submissions*

6.30. AP Eagers submits that:<sup>103</sup>

- there is a relevant market for automotive parts. It is not necessary to distinguish between 'OEM parts', which are supplied by new vehicle manufacturers, and 'aftermarket parts'.
- there are two areas of supply: wholesale (distribution by a manufacturer to dealerships within its network) and retail (distribution by dealerships to customers outside the network). Manufacturers adopt a range of distribution models – either supplying all of their dealers, or appointing certain dealers as the wholesale supplier of replacement parts in certain regions. Where manufacturers appoint dealers, appointed dealers may supply to other dealers or independent repairers. Non-appointed dealers may choose which wholesale supplier they buy from. Non-appointed dealers may also on-sell to independent repairers.
- the supply of parts is national in scope, although some suppliers operate regional warehouses to ensure speedy retail supply of spare parts to trade customers (repairers).

6.31. The Australian Automotive Aftermarket Association (**AAAA**) submits that sourcing of OEM branded parts from authorised dealerships is not as predictable, reliable and transparent as the sourcing of aftermarket parts. The ability to order parts relies on the goodwill and relationships with the dealerships. If a local dealer refuses or delays the supply of parts or installation codes, the independent repairer will find an alternative authorised dealer of the same brand. In metropolitan areas, it is not difficult to find alternative authorised dealers, however in rural or regional areas it can become a challenge.<sup>104</sup>

### *ACCC view*

6.32. The ACCC notes that manufacturers operate a range of different models for distribution of OEM parts. The manufacturer's chosen distribution model may affect the price and availability of spare parts by affecting the wholesale options available to independent repairers and some dealers. However, ultimately consumers buy spare parts.

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<sup>102</sup> It may be argued that there are separate markets within the region, such as a separate metropolitan Newcastle market, but this would not alter the ACCC's assessment of this application for merger authorisation.

<sup>103</sup> AP Eagers' merger application for authorisation MA100018, 29 April 2019, p. 86.

<sup>104</sup> Submission from the Australian Automotive Aftermarket Association, 17 May 2019 p. 3-5.

- 6.33. The ACCC considers that many consumers consider OEM parts and aftermarket parts substitutable. On the other hand, some consumers prefer to use OEM parts over other parts, which reduces the closeness of substitution overall.
- 6.34. The ACCC considers that parts suppliers compete in the geographic areas where they can reliably and transparently ensure reasonably timely delivery of spare parts.
- 6.35. While the ACCC does not consider it necessary to define relevant markets for the supply of spare parts, since the competition analysis would be unchanged, the ACCC considers it likely that suppliers of spare parts in Sydney compete with suppliers in Newcastle, at least to some degree.

## Servicing

### *Submissions*

- 6.36. AP Eagers submits that the market for the supply of car servicing and repair services is broadly national or state based and cannot be confined to narrow population centres.<sup>105</sup> But within the Newcastle and Brisbane regions, a combined AP Eagers and AHG will still be constrained by a number of other competitors in the region.
- 6.37. Interested parties submit that consumers prefer to have their cars serviced in close proximity to their workplace or home.<sup>106</sup> Consumers do not generally travel outside their local region to get their car serviced.<sup>107</sup> Hyundai submits that the distance which consumers are willing to travel varies depending on the availability of alternative transport to/from the dealership, such as proximity to a bus or train line to the central business district and whether the dealership offers loan cars or shuttle buses.<sup>108</sup>
- 6.38. The main factors influencing consumers' decision to have their car serviced at a dealership are the availability of capped price servicing<sup>109</sup> and perceived warranty benefits.<sup>110</sup> A consumer survey conducted as part of the ACCC's *New Car Retailing Final Report* found that 86 per cent of consumers have their new cars serviced by an authorised dealer during the manufacturer's warranty period.<sup>111</sup> Some manufacturers reported lower servicing rates, and that their retention rate drops over time.<sup>112</sup>
- 6.39. Fenessey's, a dealer in regional Western Australia, submits that regional and rural dealers are essential to ensure that manufacturers are able to perform certain repairs required to meet their warranty obligations.<sup>113</sup>
- 6.40. The Federal Chamber of Automotive Industries submits that there is extensive competition between dealers and independent repairers in new car servicing. Independent repairers account for over 80 per cent of service and repair businesses in the Australian market.<sup>114</sup>

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<sup>105</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 76.

<sup>106</sup> Submissions from an automotive retailer in the Newcastle and Hunter Valley region submission 27 May paragraphs 11-14 and 6 June 2019 p. 1-2; Toyota 28 May 2019 p. 7; Hyundai, 28 May 2019, pp. 10, 23-24.

<sup>107</sup> Submission from Suttons, 24 May 2019, p. 2.

<sup>108</sup> Submission from Hyundai, 28 May 2019, pp. 23-24.

<sup>109</sup> Submission from Toyota, 28 May 2019, p. 7.

<sup>110</sup> ACCC, *New Car Retailing Industry Market Study Final Report*, 14 December 2017, p. 42.

<sup>111</sup> ACCC, *New Car Retailing Industry Market Study Final Report*, 14 December 2017, p. 42.

<sup>112</sup> According to manufacturer and dealership servicing retention data provided to the ACCC on a confidential basis.

<sup>113</sup> Submission from Fenessey's, 23 May 2019, p. 2.

<sup>114</sup> Submission from the Federal Chamber of Automotive Industries, 16 May 2019, p. 1.

## ACCC view

- 6.41. The ACCC considers that for servicing it is appropriate to assess the Proposed Acquisition in relation to local geographic areas where AP Eagers and AHG both operate dealerships.
- 6.42. While the ACCC does not consider it necessary to precisely define markets for repairs and servicing. Local areas for servicing are likely to be smaller than markets for new car retailing. Most consumers have a strong preference to have their car serviced close to home or work because it is more convenient. Consumers generally do not travel significant distances to have their vehicles serviced and are unlikely to travel as far to have their car serviced as they would be willing to when purchasing a new car. Further, AP Eagers itself refers to the large numbers of car repairers available to consumers in the Newcastle and Brisbane regions.<sup>115</sup>
- 6.43. Manufacturers generally specify service period and work to be performed during particular services. Although manufacturers often encourage owners to have cars serviced by an authorised dealer, car owners are not required to do so and servicing by a qualified independent repairer will not affect an owner's warranty against defects.
- 6.44. The ACCC considers that a dealership's most direct competitor for servicing new cars is the closest same brand dealership. As cars age, consumers become more willing to have their car serviced by independent repairers.

## Other areas of competition

- 6.45. The ACCC has assessed the Proposed Acquisition in relation to a number of other areas of competition between AP Eagers and AHG.<sup>116</sup> These include the supply of trucks and buses in Melbourne, the acquisition of dealerships, the supply of dealer sites, and the supply of insurance and financial services. Since the ACCC has not identified likely competition issues in these areas, it is not necessary to precisely define relevant markets.

## Future with and without

- 6.46. In applying the authorisation test, the ACCC compares the likely future with the proposed acquisition that is the subject of the authorisation to the likely future in which the proposed acquisition does not occur.
- 6.47. The ACCC considers that in the future without the Proposed Acquisition, AP Eagers and AHG would likely continue to separately operate their respective car dealership networks.

## Competition analysis

- 6.48. A combined AP Eagers and AHG new car dealership group would represent around 12 per cent of new vehicle sales in Australia. The ACCC considers the relative size and breadth of the combined dealership group at a national level would not raise competition concerns given AP Eagers will continue to face a large number of competitors.

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<sup>115</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 76.

<sup>116</sup> Further detail is set out in the ACCC's market feedback letter of 24 June 2019.

- 6.49. The ACCC has also looked at local regions where AP Eagers and AHG both operate car dealerships. The ACCC is not satisfied that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in the supply of new cars in the Newcastle and Hunter Valley region.
- 6.50. With the Divestiture Undertaking, the ACCC considers the Proposed Acquisition is not likely to have the effect of substantially lessening competition in any other area of competition between AP Eagers and AHG.

### **New car retailing in the Newcastle and Hunter Valley region**

- 6.51. Although AP Eagers has provided a divestiture undertaking, it submits that the Proposed Acquisition is not likely to substantially lessen competition in the retail supply of new cars in the Newcastle and Hunter Valley region.
- 6.52. This section sets out submissions from AP Eagers and other interested parties, and provides the ACCC's views about why the divestiture is necessary for the ACCC to be satisfied that the relevant statutory test for granting merger authorisation is met.<sup>117</sup>

#### *Summary of ACCC's views*

- 6.53. The Proposed Acquisition would remove AP Eagers' closest and largest competitor and create a dealership group in this region which would be considerably larger than the next largest competitor. The ACCC considers that dealerships with common ownership are less likely to compete strongly with each other to win sales. The Proposed Acquisition may also lead other dealers in the region to compete less vigorously on price.
- 6.54. There are a number of potential constraints on the combined dealership group's ability to increase prices in the Newcastle and Hunter Valley region. However, the ACCC considers that none of these are likely to be sufficient to prevent the combined group from raising prices.
- 6.55. Consumers would find it difficult to detect and respond to a regional price rise such that they would switch to purchase from dealerships located outside the Newcastle and Hunter Valley region. Manufacturers have limited visibility over prices charged by dealers for their vehicles and are unlikely to constrain the combined dealership group from increasing prices (for example, by reducing discounting), provided volumes do not fall substantially.
- 6.56. Available data on margins and sales volumes indicates that there is scope for the combined dealership group to raise prices in the Newcastle and Hunter Valley region and still maintain sales volumes, meeting consumer expectations by still selling below the manufacturer's RRP. Accordingly, the ACCC is not satisfied that Proposed Acquisition would not be likely to substantially lessen competition by providing the combined dealership group with the ability and incentive to impose a regional price rise across its dealerships in the Newcastle and Hunter Valley region by reducing the level of discounting.

#### *Removal of AP Eagers' closest competitor*

- 6.57. The Proposed Acquisition would remove AP Eagers' closest and largest competitor in the Newcastle and Hunter Valley region. AHG is also the only other large dealership group in the region.

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<sup>117</sup> Section 90(7) of the Act.

- 6.58. Other dealers in the Newcastle and Hunter Valley submit that AP Eagers and AHG compete strongly for sales and aggressively chase volume.<sup>118</sup> Data available to the ACCC supports the view that AP Eagers and AHG each pursue a volume based sales strategy. This means that AP Eagers and AHG are two of the most aggressive discounters.
- 6.59. As the two largest new car retailers in the Newcastle and Hunter Valley region, AP Eagers and AHG compete with each other for customers and are likely to be the closest and strongest competitive constraint on each other.
- 6.60. The combined group would have a significant share of dealerships in the Newcastle and Hunter Valley region (36 of 78 dealerships) and a higher share of volume and value of sales, since many of these dealerships sell the most popular and highest selling brands.<sup>119</sup>
- 6.61. Although AP Eagers has undertaken to divest its existing dealerships in the Newcastle and Hunter Valley region, it disagrees with the ACCC's position with respect to new car retailing in the Newcastle and Hunter Valley region.<sup>120</sup> AP Eagers submits that the undertaking is intended to secure ACCC approval to enable the Proposed Acquisition to proceed quickly.

#### *Competition between AP Eagers' dealerships*

- 6.62. AP Eagers submits that its dealers currently compete with each other and will continue to compete in the future with the Proposed Acquisition:<sup>121</sup>
- the structure and terms of dealer agreements and KPI payments encourages dealers which are part of the same dealership group to compete with each other.<sup>122</sup> Achieving manufacturer KPIs is essential to the profitability and viability of all dealerships.
  - AP Eagers' dealerships will continue to face competitive pressure such that its dealerships in the Newcastle and Hunter Valley region are unable to raise prices (or reduce discounting) without jeopardising their ability to achieve KPIs.<sup>123</sup> If AP Eagers' dealers attempted to raise prices, dealers from other regions would have the opportunity to target the Newcastle and Hunter Valley region.
  - Incentives and KPI targets are set by manufacturers based on standardised frameworks. Dealers have limited ability to change targets. Certain manufacturers require individual investment from the dealer principal running the dealership.
  - AP Eagers operates a decentralised model that incentivises intra-group competition.<sup>124</sup> It is not practical to implement a policy such as sharing sales within its group for a small segment of its business such as Newcastle and the Hunter Valley.<sup>125</sup>

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<sup>118</sup> Submissions from an automotive retailer who operates within the Newcastle and Hunter Valley region, 6 June 2019 p. 2-4; a new car retailer in the Newcastle Hunter Valley region, 6 June 2019 p. 2.

<sup>119</sup> The combined dealership group would have 77 per cent of the highest selling brands in Newcastle and 53 per cent in the broader Newcastle and Hunter Valley region.

<sup>120</sup> Submission from AP Eagers, 3 July 2019, p. 2.

<sup>121</sup> Submission from AP Eagers, 3 July 2019, p. 2.

<sup>122</sup> Submission from AP Eagers, 3 July 2019, p. 4.

<sup>123</sup> Submission from AP Eagers, 3 July 2019, p. 4.

<sup>124</sup> Submission from AP Eagers, 3 July 2019, p. 6.

<sup>125</sup> Submission from AP Eagers, 3 July 2019, p. 6.

- 6.63. Interested parties made submissions on the extent to which dealers within the same dealership group compete:
- Mitsubishi and Suttons each consider that the Proposed Acquisition would be unlikely to increase the combined group's ability to share sales because each dealership is run independently.<sup>126</sup>
  - A dealership owner and operator submits that its multiple Dealership Sites do not have an incentive to compete against and do not quote against each other, stating that doing so would be competing against itself.<sup>127</sup>
  - Hyundai submits that the level of competition between dealerships owned by separate corporate groups is more intense than competition between dealerships under the same corporate ownership.<sup>128</sup>
- 6.64. The ACCC considers that the Proposed Acquisition is likely to reduce the incentive for dealers owned by the combined group to compete against each other.
- 6.65. The ACCC understands that manufacturers' focus is primarily on sales volumes, and that most manufacturers do not have visibility over the actual price a new car is sold for. Provided volumes and market share levels do not materially change, manufacturers would be unlikely to be aware of, or concerned if prices rose following the Proposed Acquisition.
- 6.66. While there appears to be a degree of competition between commonly owned dealers, fierce competition between them would not be in the commercial interests of the owner. Fierce competition would likely have the effect of reducing margins without increasing overall volumes. In this situation, the ACCC considers that the common owner would have an incentive to seek to limit the extent of rivalry between those dealerships. Having acquired its main competitor in the Newcastle and Hunter Valley region, AP Eagers would have greater incentive to direct its dealers not to discount as heavily, knowing the risk of losing sales is reduced.
- 6.67. The ACCC considers that there are no material impediments to AP Eagers adjusting its decentralised model if there is a commercial incentive to do so. AP Eagers' decentralised model is an internal policy only.
- 6.68. The ACCC considers that the combined group's dealer principals and sales managers would know that competing with each other would ultimately affect the combined group's revenue and profit. This knowledge would likely reduce their incentive to discount in order to win business from each other. It is likely that dealer principals within a group would be motivated to compete most strongly against competing groups, rather than each other.
- 6.69. Increasing the combined dealership group's concentration in a regional market would likely lead to reduced discounting and competition.

#### *Competition from other dealers*

- 6.70. There is limited price transparency for consumers meaning that consumers would likely find it difficult to detect a regional price rise such that they would switch to purchase from dealerships located outside the Newcastle and Hunter Valley region. There are several reasons why prices are not transparent. Most consumers do not

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<sup>126</sup> Submission from AP Eagers, 3 July 2019, p. 7.

<sup>127</sup> Submission from a dealership owner and operator, 2 May 2019 (confidential submission).

<sup>128</sup> Submission from Hyundai, 28 May 2019, p. 18.

purchase new cars frequently and, when making a purchase, they typically negotiate prices in person. Dealers are generally unwilling to provide their best (lowest) price over the telephone or internet. Therefore, although some consumers may be willing to travel to buy a new car at a lower price, they may be unable to accurately assess the best offers available elsewhere against offers made by local dealers in person. Consumers may ultimately decide to avoid the inconvenience and uncertain payoff from travelling, and buy from their local dealer. Accordingly, consumer willingness to travel outside their region is unlikely to sufficiently constrain the combined dealership group from raising prices in the Newcastle and Hunter Valley region.

- 6.71. Further, the branding of dealerships is generally not reflective of the ownership group, creating an illusion of competition. For example, AP Eagers owns three Ford dealers in the Newcastle and Hunter Valley region, but they operate under different names (Kloster Ford, Cardiff Ford and Highway Ford). Many consumers are unlikely to know that these dealerships are all owned by AP Eagers. Consumers who visit two or three dealerships in the region to try to get a sense of the best price they could obtain may believe those dealerships are in competition when they are in fact commonly owned.
- 6.72. It is also likely that other dealerships in the region would compete less vigorously on price. Dealers do not face the same price transparency issues that consumers do. Dealers regularly negotiate with consumers to sell new cars and review reports about the volumes of new cars sold. These reports enable dealers to relatively quickly assess the relationship between discounts offered and volumes. Further, dealers would have the ability to relatively quickly detect any changes in their competitors' discounting strategy and respond accordingly. If the combined dealership group stopped discounting so aggressively, other dealers in the region are likely to become aware of that and reduce their discounting also to increase the margin they earn on each car sold rather than making low margins on a potentially larger volume of sales.

#### *Constraint from manufacturers*

- 6.73. AP Eagers submits that manufacturers would constrain the combined dealership group from raising prices in the Newcastle and Hunter Valley region. Achieving manufacturer-set KPIs is essential to the profitability and viability of all dealerships. It submits that given the competitive pressure that the combined group's dealerships will continue to face it is highly unlikely that its dealerships in the Newcastle and Hunter Valley region could raise prices (or reduce discounting) without jeopardising their ability to achieve KPIs.<sup>129</sup>
- 6.74. The ACCC acknowledges that manufacturers may partially constrain the combined dealership group. However the ACCC considers that manufacturers are unlikely to prevent the combined group from raising prices across its dealerships in the Newcastle and Hunter Valley region. If they did raise prices, the combined dealership group's sales volumes would not be significantly impacted. As noted above, the combined group would own a significant proportion of dealerships in the Newcastle and Hunter Valley region and have strong representation of dealerships selling the highest selling brands. It would be the only supplier of a number of brands. The Proposed Acquisition would give the combined group the ability and incentive to raise prices across its dealership network without substantially reducing sales volumes.
- 6.75. Since there is limited price transparency for consumers for reasons noted above, they would find it difficult to detect a price rise across the dealerships owned by the combined dealership group. Due to difficulties in determining the best available price for a particular car, a price increase is likely to have limited impact on demand and

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<sup>129</sup> Submission from AP Eagers, 3 July 2019, p. 4.



total volumes. Consumers are unlikely to travel to dealerships outside of the Newcastle and Hunter Valley region in response to a regional price rise.

#### *The divestiture*

- 6.76. The ACCC considers that the undertaking offered by AP Eagers to divest its new car retailing and associated related business sites in the Newcastle and Hunter Valley region is capable of resolving the ACCC's competition concerns in relation to the Newcastle and Hunter Valley region.
- 6.77. The ACCC considers that the divestiture would maintain competition between the dealership sites to be acquired by AP Eagers and the Dealership Sites to be divested that would otherwise be lost as a result of the Proposed Acquisition. Further, the terms of the divestiture are sufficient to create an effective, long term competitor for new car retailing and related supplies and services in the Newcastle and Hunter Valley region.

#### **Spare parts**

- 6.78. With the Divestiture Undertaking, the ACCC considers that the Proposed Acquisition would not be likely to have the effect of substantially lessening competition in relation to the supply of spare parts.

#### *Submissions*

- 6.79. AP Eagers submits that the Proposed Acquisition is unlikely to substantially lessen competition in either the wholesale or retail supply of spare parts.
- In relation to wholesale supply, manufacturers will continue to constrain a combined AP Eagers and AHG. Manufacturers set their preferred distribution model which may include appointing one or more dealerships to supply parts to other dealerships, and have a high level of control in respect of maximum pricing and required service levels.<sup>130</sup> It is in the best interests of manufacturers to ensure that parts and relevant computer codes are readily available, as the restriction of parts distribution would negatively impact brands.<sup>131</sup>
  - Trade customers have access to national pricing tools to facilitate price discovery. If the combined dealership group attempted to raise prices, this would be quickly recognised by customers who would consider alternative suppliers.<sup>132</sup>
  - In relation to retail supply to consumers, spare parts are available from other dealerships, OEMs have an incentive to ensure that their spare parts are made available to customers to the same extent as other brands, there are available substitutes in the form of aftermarket and second hand parts and parallel imports and trade customers can and do shop around to ensure competition between dealerships.<sup>133</sup>

#### *ACCC view*

- 6.80. With AP Eagers' divestiture undertaking, the ACCC considers that the Proposed Acquisition would not be likely to have the effect of substantially lessening competition in relation to the supply of spare parts.

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<sup>130</sup> Submission from AP Eagers, 3 July 2019, p. 6.

<sup>131</sup> Submission from AP Eagers, 3 July 2019, p. 9.

<sup>132</sup> Submission from AP Eagers, 3 July 2019, p. 9-10, 12.

<sup>133</sup> AP Eagers merger authorisation application MA1000018, 29 April 2019, p. 76.

- 6.81. The Proposed Acquisition would reduce the number of suppliers of spare parts in Newcastle and the Hunter Valley region, Brisbane, Melbourne and Sydney. The ACCC understands that AP Eagers and AHG both supply spare parts at different levels of the supply chain, including to independent repairers, other dealers and directly to consumers.
- 6.82. The impact of the Proposed Acquisition is likely to be small in Brisbane, Melbourne and Sydney due to the relatively modest aggregation of dealerships in these cities.
- 6.83. Any impact of the Proposed Acquisition on the supply of parts would be greatest in the Newcastle and the Hunter Valley region, where the aggregation of dealership numbers would be the greatest. However, the proposed undertaking will likely address competition issues in the supply and installation of spare parts which may otherwise result from an aggregation of dealerships in the Newcastle and Hunter Valley region.
- 6.84. Without the proposed undertaking, the Proposed Acquisition would reduce the number of dealership suppliers of spare parts for some brands where APE and AHG have all the dealerships within the region. However the effect on competition is mitigated because:
- the price of spare parts is relatively transparent. Spare parts are generally not discounted like cars. Buyers can readily discover price and decide to source parts from outside the region.
  - buyers of spare parts have alternative dealer and non-dealer suppliers that may constrain the combined dealership group, including those located in Sydney and the Central Coast. To the extent these suppliers are able to deliver reliable, cost effective and same-day delivery of spare parts to the Newcastle and Hunter Valley region, this would be a constraint.
  - the Proposed Acquisition will not reduce the number of available suppliers of aftermarket parts, which many consumers consider are close substitutes.
  - the Proposed Acquisition is unlikely to provide the combined dealership group with the ability to foreclose other dealers' access to spare parts or computer access codes. For brands where the combined dealership group is an appointed regional spare parts distributor, the ACCC considers that manufacturers have an incentive for their spare parts to be made available to dealers. The ACCC considers that manufacturers would likely constrain attempts by the combined group to foreclose other dealers' access to spare parts.
- 6.85. It appears that manufacturers do not have the same incentive to ensure their spare parts and computer access codes are made available to independent repairers. The ACCC also understands that some parts will not operate until they have been programmed into the car's computer systems and that this can only be done at an authorised dealer. As a result, without the Divestiture Undertaking, the Proposed Acquisition has the potential to make it harder for independent repairers in the Newcastle and Hunter Valley region to be able to install these types of spare parts due to a reduction in the number of independently owned dealerships they could approach. However, the proposed undertaking will likely address competition issues in the supply of spare parts which may otherwise result from an aggregation of dealerships in the Newcastle and Hunter Valley region.

## Servicing

6.86. With AP Eagers' Divestiture Undertaking, the ACCC is satisfied that the Proposed Acquisition would not be likely to have the effect of substantially lessening competition in relation to servicing.

### *Submissions*

6.87. AP Eagers submits that:<sup>134</sup>

- consumers may choose to repair or service their cars at any dealership for their brand of cars or a large number of alternative repair and service providers which are not affiliated with any particular brand.
- other repairers are currently strong and vigorous competitors with new car dealerships. AP Eagers included a list of service repair competitors with its application.<sup>135</sup> Their competitive position is likely to be strengthened later in 2019 by the government's mandatory code for the sharing of motor vehicle service and repair information.
- new car manufacturers influence the price and quality of repairs and servicing provided by dealerships through capped price servicing programs.

6.88. The AAAA submits that its members do encounter difficulties in accessing OEM parts, however this is primarily due to car manufacturers' policies or individual dealership attitudes to the independent repair sector. AAAA submits that the mandatory industry code is likely to address a number of concerns, including limiting car manufacturers' ability to impose industry wide policies to restrict independent repairers' access to certain parts and data. AAAA submits that, while there is no evidence that AP Eagers or AHG have imposed a parts supply policy across their current dealerships, a larger group of dealerships operating umbrella policies could lessen competition if it adopted more restrictive parts supply policies.<sup>136</sup>

### *ACCC view*

6.89. The ACCC considers that the proposed acquisition is unlikely to substantially lessen competition in relation to repairs and servicing. The proposed acquisition may reduce the number of competing authorised dealers for some brands in certain areas. However, in all areas where AP Eagers and AHG compete, there are many independent repairers that compete with dealerships to repair and service cars.

6.90. In the Newcastle and Hunter Valley region, the ACCC considers that the proposed divestiture undertaking will address potential competition issues in repairs and servicing which may otherwise result from an aggregation of dealerships.

6.91. However, without the proposed undertaking the ACCC considers that independent repairers will continue to compete with the combined dealership group. In particular:

- the introduction of the mandatory industry code is important to ensure that independent repairers do not face restrictions on access to spare parts and computer codes. The mandatory code should make independent repairers better able to compete with dealerships in servicing cars.
- although a significant proportion of consumers choose to have their car serviced and repaired by authorised dealerships while their car is in warranty, as new cars

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<sup>134</sup> AP Eagers' merger application authorisation MA1000018, 29 April 2019, p. 75.

<sup>135</sup> AP Eagers' merger application authorisation MA1000018, 29 April 2019, Annex 10.6.

<sup>136</sup> Submission from the Australian Automotive Aftermarket Association, 17 May 2019, p. 5.

age, a greater proportion of consumers choose to using independent repairers instead.

## **New car retailing in other geographic areas**

6.92. The ACCC considers that the proposed acquisition is unlikely to substantially lessen competition in new car retailing nationally or in Brisbane, Melbourne or Sydney.

### *Market concentration*

6.93. Nationally, the combined dealership group would have approximately 12 per cent of new car sales. The combined dealership group may have greater bargaining power with manufacturers, however manufacturers generally did not express concerns about this. The ACCC considers that any ability for the combined dealership group to negotiate better terms or conditions with manufacturers is likely to reflect transaction cost savings and hence greater efficiency.

6.94. In Sydney, Melbourne and Brisbane, the ACCC considers that the level of aggregation from the Proposed Acquisition and the combined group's share of dealerships will be relatively small. The ACCC considers that there are likely to be sufficient alternative dealers in each these areas to maintain effective competition:<sup>137</sup>

- in Sydney, AP Eagers owns a cluster of five dealerships (which are not close to any AHG dealerships), AHG owns 18 dealerships, and there are approximately 260 competing dealerships.
- in Brisbane, the combined group would have 41 dealerships and there are 136 other competing dealerships.
- in Melbourne, the parties have 31 dealerships. AP Eagers owns four, AHG owns 27, and there are approximately 221 other dealerships. The combined dealership group will control four of the eight prestige dealerships in the Doncaster area, however there are competing prestige dealerships within 10km.

### *National effects*

6.95. The ACCC has considered whether the Proposed Acquisition is likely to affect competition in new car sales and/or related areas of competition solely by virtue of the combined entity's *relative* national size and geographic breadth, as reflected by its volume or value shares of national new car sales and/or related products and services, and its presence in most states. There are several ways in which national effects on competition could play out in the event the Proposed Acquisition proceeded. These are, broadly: monopsony power, informational advantages and representation on dealer councils.

6.96. Regarding monopsony power, information obtained by the ACCC indicates that larger dealer groups do not benefit from lower wholesale prices for new cars, except in circumstances where a larger group agrees to take a significant volume of excess (or unsuitably located) stock from manufacturers. It is unclear how frequently such opportunities arise and the typical number of cars involved. However, in general, it would not appear to be in manufacturers' long term interests to offer significant discounts to larger dealer groups – at least while their shares of national sales remained relatively low – as this may undermine the viability of their remaining dealers.

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<sup>137</sup> Submission from AP Eagers, 27 May 2019, Annex 4.1; AHG submission, 29 May 2019, Item 11.

- 6.97. Regarding informational advantages, brands sold by both AP Eagers and AHG dealerships largely overlap, with non-overlapping brands generally consisting of those that are less popular. Therefore, the ACCC considers it unlikely that the Proposed Acquisition would result in the combined dealership group obtaining significant *additional* information such as sales strategies of other brands that it could use to its advantage in ways that would reduce competition.
- 6.98. Finally, regarding representation on dealer councils, both AP Eagers and AHG dealerships are already represented on many brands' dealer councils. Further, it does not appear that membership of a dealer council confers any material financial or informational benefit on members.

#### *Rationalisation of Dealership Sites in Brisbane and Melbourne*

- 6.99. A Queensland Motor Dealer submits that the Proposed Acquisition will result in further rationalisation of Dealership Sites in Brisbane and Melbourne. It submits that AP Eagers and AHG are currently relocating dealerships in these cities to Brisbane Airport and Essendon Fields in Melbourne. Dealers who cannot get land in these areas will find it hard to compete. The Dealer submits that the Proposed Acquisition will negatively affect consumer choice in the long term by enabling AP Eagers to accelerate its rationalisation strategy.<sup>138</sup>
- 6.100. The ACCC considers that, to the extent that further rationalisation of dealerships in Brisbane or Melbourne occurs following the Proposed Acquisition, any effect is likely to be small in line with the relatively small aggregation of dealerships in these cities. The ACCC considers that manufacturers are likely to closely monitor dealership closures and have the ability and incentive to respond to any proposed closures which are contrary to their brand or distribution strategy. Accordingly, the ACCC is satisfied that the Proposed Acquisition would not be likely to have the effect of substantially lessening competition due to Dealership Site rationalisation in Brisbane or Melbourne.

#### **The supply of trucks and buses in Melbourne**

- 6.101. AP Eagers submits that there is unlikely to be any substantial lessening of competition in relation to the supply of commercial vehicles. There are a large number of suppliers, and dealers are subject to similar volume based targets as new car dealerships. Used trucks and buses also compete strongly with authorised truck and bus dealers. The main buyers are sophisticated and able to buy from dealers across Australia. There are modest barriers to entry, evidenced by the number of small independent suppliers of commercial vehicles space.<sup>139</sup>
- 6.102. Suttons submits that manufacturers typically handle large customers, such as Toll. Small and medium customers will generally seek quotes from dealerships or run tender processes.<sup>140</sup>
- 6.103. The ACCC considers that the Proposed Acquisition is unlikely to substantially lessen competition in the supply of truck and buses in Melbourne. The ACCC considers that there are a sufficient number of competing suppliers to constrain the combined dealership group.

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<sup>138</sup> Submission from a Motor Dealer from Queensland, 15 May 2019, paragraph 1.

<sup>139</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 74; Submission from AP Eagers, 3 July 2019 p 13-15, Annexure A.

<sup>140</sup> Submission from Suttons, 24 May 2019, p. 3.

## Acquisition of dealerships

6.104. Several authorised dealers submit that the Proposed Acquisition will reduce options and potential sale price for owners wanting to sell their dealerships. These dealers submit that AP Eagers and AHG are both large, national acquirers of dealerships. An automotive retailer who operates within the Newcastle and Hunter Valley Region submits that the size of the combined dealership group may also result in other potential acquirers, such as private equity groups, thinking twice about acquiring dealers in the region.<sup>141</sup>

6.105. The ACCC is satisfied that the Proposed Acquisition would not be likely to have the effect of substantially lessening competition for the acquisition of existing dealerships. Although the Proposed Acquisition will reduce the number of potential acquirers of dealerships, the ACCC understands that there are privately owned dealership groups that acquire other dealers, overseas acquirers and some private equity acquirers.

## Other areas of competition

6.106. The ACCC is satisfied that the Proposed Acquisition would not be likely to have the effect of substantially lessening competition in the following other areas where AP Eagers and AHG compete:

- the supply of used cars, where AP Eagers and AHG are both used car wholesalers and retailers, however the combined dealership group will continue to face competition from a range of other used car retailers. These include used car yards, auction houses and private sellers. Private sales in particular are a strong and growing competitive constraint due to the presence and continued growth of non-dealer internet platforms. There is minimal overlap between AP Eagers and AHG in used car wholesaling.
- the supply of dealer sites, where the Proposed Acquisition is unlikely to provide the combined dealership group with the ability to tie up strategic sites in order to exclude competitors. The ACCC considers that, to the extent that this may occur, it is unlikely to be a consequence of the Proposed Acquisition.
- fleet sales, where the combined group will be constrained by other dealerships.
- supply of insurance and financial services, where the Proposed Acquisition will not substantially reduce the number of potential acquirers or sellers of financial services.

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<sup>141</sup> Submission from an automotive retailer who operates within the Newcastle and Hunter Valley region, 6 June 2019, p. 3; and a number of other confidential submissions.

## Public benefits and public detriments

6.107. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (**the Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>142</sup>

6.108. Similarly, the Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*<sup>143</sup>

6.109. Given the ACCC's acceptance of the Divestiture Undertaking the ACCC is satisfied that the substantial lessening of competition limb of the authorisation test is met, and does not therefore need to consider the second limb of the authorisation test.

6.110. For completeness, the ACCC has outlined the public benefits claimed by AP Eagers and submissions from interested parties on benefits and detriments.<sup>144</sup>

### Submissions

6.111. AP Eagers submits that the Proposed Acquisition will deliver a number of benefits, including:

- *Productive efficiencies*: the merged firm will be able to pursue operational and corporate synergies to deliver cost savings and drive performance of dealership businesses through improved benchmarking, thereby delivering enhanced customer services experiences and better outcomes for customers. This will allow the merged group to be better placed to respond to the rapidly evolving motor vehicle retailing market and to pursue future growth opportunities while continuing to deliver competitive prices for the benefit of customers. AP Eagers estimates that productive and operational efficiencies would result in an estimated \$13.5m per annum in savings.<sup>145</sup>
- *Management benefits* associated with providing AHG shareholders with the opportunity to benefit from AP Eagers' proven management expertise, participate in the potential upside from AP Eagers' future growth strategy and potentially benefit from the greater scale and long term prospects of a larger business.

6.112. AP Eagers submits that the Proposed Acquisition is unlikely to result in public detriments.

6.113. Most interested parties did not specifically make submissions on whether the Proposed Acquisition would result in public benefits. Several dealerships submit that the Proposed Acquisition will result in a large dealership group which will obtain

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<sup>142</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

<sup>143</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>144</sup> AP Eagers' submissions on public benefits were made prior to offering the proposed divestiture.

<sup>145</sup> AP Eagers application for merger authorisation MA1000018, 29 April 2019, Annexure 2.1.3 (AP Eagers Bidder's Statement).

volume discounts when purchasing inputs.<sup>146</sup> In relation to sales to large fleet customers, Fenessey's submits that having a network of dealerships is an advantage.<sup>147</sup>

- 6.114. An automotive retailer operating in the Newcastle and Hunter Valley region submits that there are other advantages in operating a network of dealers covering multiple brands. Some services such as vehicle storage, reduced inventory costs, marketing related savings, and lower operational costs through shared services. Some efficiencies may be achieved by shifting resources between brands in response to fluctuating demand.<sup>148</sup>
- 6.115. Suzuki Auto Co and a Queensland Motor Dealer each submit that there is likely to be some rationalising of facilities, particularly Brisbane Auto Mall near Brisbane Airport and in Melbourne with clustering near Essendon Fields.<sup>149</sup>
- 6.116. Hyundai submits that claimed public benefits should be given less weight as they may not be passed on to consumers.<sup>150</sup> It submits that to the extent that savings and efficiencies may be achieved, they are likely to be retained by the combined dealership group. The combined group will not face competition from any dealer group with similar size and scale advantages. If there were such a dealer group, the combined group would be forced to pass on the savings.
- 6.117. Hyundai submits that there is a risk of public detriments in regional Australia whereby the merged firm could use its size, scale benefits and market power to target other dealers with a view to reducing the number of independent dealers in Australia.<sup>151</sup>

### **ACCC view**

- 6.118. The ACCC notes that AP Eagers has not provided any underlying material or calculations to support its claimed efficiencies.
- 6.119. Based on the information before it, without the Divestiture Undertaking, the ACCC is not satisfied that the likely public benefit from the Proposed Acquisition outweighs the likely public detriment, including from a lessening of competition in the Newcastle and Hunter Valley region.

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<sup>146</sup> For example, submissions from an automotive retailer operating in the Newcastle and Hunter Valley region, 27 May 2019 p. 4 and 6 June 2019 p. 2.

<sup>147</sup> Submission from Fenessey's, 23 May 2019, p. 1-2.

<sup>148</sup> Submission from an automotive retailer operating in the Newcastle and Hunter Valley region, 27 May 2019, paragraph 7.

<sup>149</sup> Submissions from Suzuki Auto Co, 24 May 2019, paragraph 16; and a Motor Dealer in Queensland, 15 May 2019, p. 2.

<sup>150</sup> Submission from Hyundai, 28 May 2019, p. 13-14, 25.

<sup>151</sup> Submission from Hyundai, 28 May 2019, p. 13-14, 25.



## 7. Section 87B undertaking

- 7.1. The ACCC accepted a Divestiture Undertaking from AP Eagers to remedy the ACCC's competition concerns in relation to new car retailing, the supply of spare parts and car servicing in the Newcastle and Hunter Valley region. A copy of the Divestiture Undertaking is at [Attachment A](#) to this Determination.
- 7.2. Pursuant to the Divestiture Undertaking, AP Eagers will divest all of its existing new car dealerships and related business sites in the Newcastle and Hunter Valley region, subject to consent by the car manufacturers. The sites to be divested are outlined in the table below.

**Table 6: AP Eagers' dealerships and related sites to be divested**

Dealership/site	Dealership/site
1. Cardiff Ford	2. Kloster Hyundai
3. Cardiff Honda	4. Kloster Mini Garage
5. Cardiff Hyundai	6. Kloster Mitsubishi
7. Cardiff Nissan	8. Kloster Nissan
9. Highway Ford	10. Kloster Suzuki
11. Highway Hyundai	12. Kloster Volkswagen <sup>152</sup>
13. Kloster BMW	14. Kloster Ford (service site)
15. Kloster Ford	16. Kloster Parts
17. Kloster Honda	18. Kloster Volkswagen (warehousing)

- 7.3. Key aspects of AP Eagers' Divestiture Undertaking are summarised below:
- The divestiture of the divestiture business comprising all of AP Eagers' new car retailing dealerships and related business sites in the Newcastle and Hunter Valley region to an ACCC approved purchaser.
  - ACCC approved purchaser entering into long term leases of the AP Eagers owned land the sites are located on and the transfer of the leases of third party owned land (subject to third party consents).
  - The transfer of all necessary assets (including unsold new vehicle and parts stock, fittings, fixtures and equipment on site), consents and personnel that a purchaser would require to effectively operate the divestiture business, and the transfer of licences/permits.
  - The appointment of an independent auditor to audit and report upon AP Eagers' compliance with their undertaking, including a role to oversee the ongoing operation of the divestiture business until completion of the divestiture to the approved purchaser.
  - At the option of an ACCC approved purchaser, a transitional technical assistance agreement to supply any technical assistance that is required by the purchaser, in order to operate the divestiture business.

<sup>152</sup> The ACCC has counted two Volkswagen locations as separate Dealership Sites. AP Eagers lists these as a single dealership in the Divestiture Undertaking.

- At the option of an ACCC approved purchaser, a transitional supply agreement for any goods or services that are required in order for the approved purchaser to be established as a viable, effective, stand-alone, independent and long-term competitor for new car retailing and related supplies and services in the Newcastle and Hunter Valley region.

7.4. The ACCC considers that the divestiture of AP Eagers' new car retailing and associated related business sites in the Newcastle and Hunter Valley region is capable of resolving the ACCC's competition concerns in relation to the Newcastle and Hunter Valley region. It addresses these concerns by maintaining competition between the Dealership Sites to be acquired by AP Eagers and the Dealership Sites to be divested that would otherwise be lost as a result of the Proposed Acquisition. Further, the terms of the divestiture are sufficient to create an effective, long term competitor for new car retailing and related supplies and services in the Newcastle and Hunter Valley region.

7.5. On 5 July 2019 AP Eagers announced that it had entered into a Heads of Agreement with the Tony White Group for the sale of the sites.

## 8. Length of authorisation

8.1. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>153</sup> The ACCC will generally grant a merger authorisation for a period of no longer than twelve months from the date of the determination. In order to have the legal protection conferred by the merger authorisation, the authorised party will need to complete the relevant acquisition during the period and notify the ACCC once the acquisition has been completed.

8.2. In this instance, the ACCC has decided to grant authorisation for 12 months.

## 9. Determination

### The application

9.1. On 29 April 2019 AP Eagers lodged an application (MA1000018) with the ACCC seeking authorisation under subsection 88(1) of the Act.

9.2. AP Eagers seeks authorisation to acquire all of the ordinary shares in AHG that it does not already own.<sup>154</sup>

9.3. On 6 May 2019 the ACCC accepted a divestiture undertaking from AP Eagers, pursuant to section 87B of the Competition and Consumer Act 2010 (the Act), that it would not complete the Proposed Acquisition while the ACCC is considering the application.<sup>155</sup>

### Section 87B Divestiture Undertaking

9.4. On 24 July 2019 the ACCC accepted a court enforceable undertaking<sup>156</sup> from AP Eagers (and its subsidiaries) to sell its existing new car retailing businesses in the Newcastle and Hunter Valley region. The executed divestiture undertaking is set out at [Attachment A](#), and forms part of this Determination.

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<sup>153</sup> Subsection 91(1).

<sup>154</sup> AP Eagers' merger application for authorisation MA1000018, 29 April 2019, p. 6.

<sup>155</sup> In accordance with section 89(1AA) of the Act.

<sup>156</sup> Subsection 87B(1A) of the Act.

- 9.5. AP Eagers offered a divestiture undertaking following the ACCC's market feedback letter of 24 June 2019 which outlined the ACCC's preliminary concerns about the impact of the Proposed Acquisition on competition in new car retailing in Newcastle and the Hunter Valley region.
- 9.6. The divestiture, via share or asset sale, is to be completed within a defined period to an ACCC approved purchaser. AP Eagers will retain the AHG new car retailing and related businesses in the Newcastle and Hunter Valley region.

### The authorisation test

- 9.7. Under subsection 90(7) of the Act, the ACCC must not grant authorisation unless it is satisfied that either:
- (a) the proposed acquisition would not be likely to have the effect of substantially lessening competition, or
  - (b) the likely public benefit resulting from the proposed acquisition outweighs the likely resulting public detriment.
- 9.8. For the reasons outlined in this Determination, including the ACCC's acceptance of the Divestiture Undertaking, the ACCC is satisfied, in all the circumstances, that the Proposed Acquisition would not be likely to substantially lessen competition.

### Conduct for which the ACCC grants authorisation

- 9.9. The ACCC grants authorisation MA1000018 to enable AP Eagers to acquire all of the ordinary shares in AHG that it does not already own.
- 9.10. The authorisation is subject to the condition that AP Eagers and the other entities set out in clause 1.1 of the Divestiture Undertaking comply with the Divestiture Undertaking.

### Length of authorisation

- 9.11. The ACCC grants authorisation MA1000018 for 12 months until 16 August 2020.

### Date authorisation comes into effect

- 9.12. This Determination is made on 25 July 2019. If no application for review of the Determination is made to the Australian Competition Tribunal the authorisation it will come into force on 16 August 2019.

**Attachment A**

## Undertaking to the Australian Competition and Consumer Commission

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Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by AP Eagers Limited (ACN 009 680 013), PPT Investments Pty Ltd (ABN 80 000 868 860), PPT Holdings No 1 Pty Ltd (ABN 13 078 207 333), PPT Holdings No 2 Pty Ltd (ABN 13 078 207 397) and PPT Holdings No 3 Pty Ltd (ABN 30 078 207 468)

## Contents

<b>1</b>	<b>Person giving the Undertaking .....</b>	<b>3</b>
<b>2</b>	<b>Background .....</b>	<b>3</b>
<b>3</b>	<b>Commencement of this Undertaking.....</b>	<b>5</b>
<b>4</b>	<b>Cessation of Ongoing Obligations.....</b>	<b>5</b>
<b>5</b>	<b>Divestiture of the Divestiture Business .....</b>	<b>6</b>
<b>6</b>	<b>Process for approving a proposed purchaser.....</b>	<b>9</b>
<b>7</b>	<b>Divestiture Business Protection.....</b>	<b>11</b>
<b>8</b>	<b>Independent Audit .....</b>	<b>13</b>
<b>9</b>	<b>Failure to divest the Divestiture Business within the Secondary Sale Period .....</b>	<b>18</b>
<b>10</b>	<b>Notification of key dates and ACCC requests for information.....</b>	<b>23</b>
<b>11</b>	<b>Disclosure of this Undertaking .....</b>	<b>24</b>
<b>12</b>	<b>Obligation to procure .....</b>	<b>24</b>
<b>13</b>	<b>No Derogation.....</b>	<b>25</b>
<b>14</b>	<b>Change of Control .....</b>	<b>25</b>
<b>15</b>	<b>Costs .....</b>	<b>25</b>
<b>16</b>	<b>Resolving inconsistencies .....</b>	<b>25</b>
<b>17</b>	<b>Notices.....</b>	<b>25</b>
<b>18</b>	<b>Defined terms and interpretation .....</b>	<b>26</b>
	<b>Schedule 1 – Dictionary and interpretation .....</b>	<b>31</b>
	<b>Schedule 2 – Proposed Purchaser Notice Form.....</b>	<b>36</b>
	<b>Schedule 3 – Undertaking Appointment.....</b>	<b>39</b>
	<b>Schedule 4 – Divestiture Business .....</b>	<b>42</b>
	<b>Confidential Schedule 5.....</b>	<b>46</b>
	<b>Confidential Schedule 6 .....</b>	<b>47</b>
	<b>Confidential Schedule 7.....</b>	<b>48</b>
	<b>Confidential Schedule 8.....</b>	<b>49</b>

**Confidential Schedule 9..... 50**

## 1 Person giving the Undertaking

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- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by AP Eagers Limited (ACN 009 680 013) of 5 Edmund Street, Newstead QLD 4006, PPT Investments Pty Ltd (ABN 80 000 868 860), PPT Holdings No 1 Pty Ltd (ABN 13 078 207 333), PPT Holdings No 2 Pty Ltd (ABN 13 078 207 397) and PPT Holdings No 3 Pty Ltd (ABN 30 078 207 468) (together referred to as **AP Eagers** in this Undertaking).

## 2 Background

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### The parties to the proposed acquisition

- 2.1 AP Eagers is an Australian publicly listed company (ASX:APE) that owns and operates 108 new car dealerships and 33 new truck and bus dealerships in Queensland, South Australia, Northern Territory, Victoria, New South Wales and Tasmania.
- 2.2 Automotive Holdings Group Limited (AHG) (ACN 111 470 038) is an Australian publicly listed company (ASX: AHG) that owns and operates 148 car franchises and 33 truck and bus franchises, across 95 new car dealerships and 11 new truck dealerships in Western Australia, Queensland, New South Wales and Victoria. AHG also operates a logistics business via its various Subsidiaries.

### The Proposed Acquisition

- 2.3 AP Eagers proposes to acquire all of the ordinary shares in AHG that it does not already own by way of an off-market takeover bid (the **Proposed Acquisition**). AP Eagers is the largest shareholder of AHG, holding 28.84 per cent of AHG's listed securities as at 5 April 2019.
- 2.4 On 29 April 2019, AP Eagers lodged an application for merger authorisation with the ACCC pursuant to s88 of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) (the **merger authorisation application**). Unless extended pursuant to the CCA, the ACCC has 90 days to make a determination on the merger authorisation application.
- 2.5 On 8 May 2019, the directors of AHG unanimously recommended that AHG shareholders accept AP Eagers' bid in the absence of a superior proposal, and that they should accept once the no material adverse change bid condition<sup>1</sup> has been waived.
- 2.6 AP Eagers has undertaken to waive the no material adverse change Bid Condition once a merger authorisation from the ACCC comes into force.

### The ACCC's assessment of the merger authorisation application

- 2.7 On 1 May 2019, the ACCC commenced public consultation on the merger authorisation application.
- 2.8 The ACCC undertook market inquiries and considered information provided by the parties to the Proposed Acquisition, industry participants, and others.

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<sup>1</sup> That is, the bid condition set out in paragraph 5 of Schedule 2 of AP Eagers' original bidder's statement dated 5 April 2019.



- 2.9 Pursuant to s90(7) of the CCA, the ACCC must not make a determination granting an authorisation under s88 of the CCA in relation to the Proposed Acquisition unless it is satisfied in all the circumstances that:
- (a) the Proposed Acquisition would not have the effect or likely effect of substantially lessening competition; or
  - (b) the Proposed Acquisition would result or be likely to result in a benefit to the public that would outweigh the detriment that would result or be likely to result from the Proposed Acquisition.
- 2.10 AP Eagers sought merger authorisation on the basis that the Proposed Acquisition would not have the effect or likely effect of substantially lessening competition.

#### **The ACCC's competition concerns**

- 2.11 The ACCC considers that without the Undertaking, the Proposed Acquisition raises significant competition concerns in new car retailing in the Newcastle / Hunter Valley region.
- 2.12 The Proposed Acquisition would remove AP Eagers' closest and largest competitor and create an enlarged dealership group in the Newcastle / Hunter Valley region which would be considerably larger than the next largest competitor in that region. In metropolitan Newcastle alone, considering only the top ten selling car brands, a combined AP Eagers and AHG dealership group would operate 17 out of 22 (or 77 per cent) of new car dealerships. In the broader Newcastle / Hunter Valley region, it would operate 46 per cent of new car dealerships.
- 2.13 The ACCC considers that the combined dealership group would have the ability and incentive to increase prices or reduce discounting for new cars in the Newcastle / Hunter Valley region.
- 2.14 While there would be potential constraints, the ACCC considers that none of these is sufficient to remove the combined group's ability or incentive to increase prices, in particular:
- (a) Competition between dealerships within the combined dealership group would not be sufficient to prevent a price rise.
  - (b) In relation to new car manufacturers' ability to constrain the actions of dealerships, manufacturers' focus is primarily on sales volumes and manufacturers have limited visibility over final prices negotiated by dealerships for their new cars. Therefore, manufacturers would be unlikely to constrain a price rise, provided overall sales volumes did not fall substantially.
  - (c) Limited price transparency means that consumers have limited ability to detect and respond to a regional price rise (especially where this is a decrease in discounting) and therefore are less likely to explore purchases outside the Newcastle / Hunter Valley region.

#### **The Undertaking remedy**

- 2.15 AP Eagers does not consider that the Proposed Acquisition would have the

effect, or be likely to have the effect, of substantially lessening competition in the supply of new cars in the Newcastle / Hunter Valley region. However, to address the ACCC's concerns set out above, AP Eagers has offered this Undertaking pursuant to section 87B of the Act.

- 2.16 The Undertaking requires AP Eagers to divest its current new car dealerships and related business sites and assets in the Newcastle / Hunter Valley region. It does not require divestment of the AHG sites, as these will be retained by AP Eagers after completion of the Proposed Acquisition.
- 2.17 The objective of this Undertaking is to address the ACCC's competition concerns, which it otherwise considers would be likely to arise as a consequence of the Proposed Acquisition. The Undertaking aims to achieve this objective by:
- (a) ensuring that the Divestiture Business is sold to an Approved Purchaser;
  - (b) creating or strengthening a viable, effective, stand-alone, independent and long term competitor for the supply of new cars in the Newcastle / Hunter Valley region;
  - (c) ensuring the purchaser of the Divestiture Business has all the necessary associated assets and rights to compete effectively with AP Eagers in the supply of new cars in the Newcastle / Hunter Valley region;
  - (d) maintaining the economic viability, marketability, competitiveness and goodwill of the Divestiture Business prior to divestiture; and
  - (e) providing for the effective oversight of AP Eagers' compliance with this Undertaking.

### **3 Commencement of this Undertaking**

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- 3.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by AP Eagers; and
  - (b) this Undertaking so executed is accepted by the ACCC
- (the Commencement Date).

### **4 Cessation of Ongoing Obligations**

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#### **Withdrawal**

- 4.1 AP Eagers may request withdrawal of this Undertaking pursuant to section 87B of the Act at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

#### **Revocation**

- 4.2 The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

**Waiver**

- 4.3 The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or extend the date by which any such obligation is to be satisfied.

**Survival**

- 4.4 Unless and until this Undertaking is withdrawn in accordance with clause 4.1, clauses 1, 2, 3, 4, 8, 10, 11, 12, 13, 14, 15, 16 and 17 survive completion of the obligations in clauses 5, 6, 7, 9 and Schedule 4 and Confidential Schedule 5.

**5 Divestiture of the Divestiture Business**

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**Divestiture**

- 5.1 AP Eagers must, in accordance with this Undertaking, divest, or cause the divestiture of, the Divestiture Business only to an Approved Purchaser.
- 5.2 In the event that clause 9 applies, AP Eagers must not authorise the Approved Divestiture Agent to divest the Divestiture Business to a purchaser other than an Approved Purchaser.
- 5.3 AP Eagers must divest, or cause the divestiture of, the Divestiture Business by:
- (a) **Share sale:** the sale of shares held in the companies that are associated with the conduct of the Divestiture Business relating to the relevant dealerships and holding the relevant assets as outlined in Schedule 4 to the Approved Purchaser, pursuant to the Approved Sale and Purchase Heads of Agreement (in the case of the Approved Purchaser(s) identified in Confidential Schedule 7) or for any other proposed purchaser, Approved Sale and Purchase Agreement and within the Initial Sale Period or the Secondary Sale Period, otherwise clause 9 applies; or  
**Asset sale:** the sale, assignment, transfer and/or licence of all of the assets in the Divestiture Business relating to the relevant dealerships as outlined in Schedule 4 to the Approved Purchaser, pursuant to the Approved Sale and Purchase Heads of Agreement (in the case of the Approved Purchaser(s) identified in Confidential Schedule 7) or for any other proposed purchaser, Approved Sale and Purchase Agreement and within the Initial Sale Period or the Secondary Sale Period, otherwise clause 9 applies;
  - (b) the sale or lease of the Owned Property to the Approved Purchaser pursuant to the Approved Sale and Purchase Heads of Agreement (in the case of the Approved Purchaser(s) identified in Confidential Schedule 7) or for any other proposed purchaser the Approved Lease Agreement and within the Initial Sale Period or the Secondary Sale Period in accordance with Confidential Schedule 8, otherwise clause 9 applies;
  - (c) the transfer or grant to the Approved Purchaser of all Consents pursuant to clauses 5.4 to 5.5;
  - (d) the transfer of any Transferred Personnel required pursuant to clauses 5.7 to 5.8;

- (e) compliance with any Approved Transitional Technical Assistance Agreement required pursuant to clauses 5.9 to 5.11; and
- (f) compliance with any Approved Transitional Supply Agreement required pursuant to clauses 5.12 to 5.14.

#### Consents

##### 5.4 AP Eagers must:

- (a) obtain or assist the Approved Purchaser to obtain as expeditiously as possible, all Consents as required before completion of the divestiture of the Divestiture Business;
- (b) comply with all requirements necessary to obtain any Consents, including by promptly providing all information necessary for the Consents to be given;
- (c) act in good faith in its negotiations with the Approved Purchaser in relation to obtaining any Consents;
- (d) promptly pay the costs and expenses of any third party reasonably incurred in providing the Consents; and
- (e) enter an agreement with the Approved Purchaser and approved by the ACCC, or vary any existing Approved Transitional Supply Agreement as required by the Approved Purchaser, in relation to any goods or services that are required for the operation of the Divestiture Business which may be affected by any failure to gain a Consent.

##### 5.5 If, seven Business Days before completion of the divestiture of the Divestiture Business, the Approved Purchaser fails to obtain or is unable to obtain one or more Consents, then AP Eagers must:

- (a) immediately provide to the ACCC in writing details of the:
  - (i) Consents that have not been obtained;
  - (ii) reasons why the Consents have not been obtained; and
  - (iii) information or material required to obtain the Consents.
- (b) continue to do everything in its power to satisfy clause 5.4 as soon as possible after the completion of the divestiture of the Divestiture Business (and until such time as clause 5.4 is satisfied).

##### 5.6 Even if AP Eagers has complied with clause 5.4 to 5.5, it remains a breach of this Undertaking if AP Eagers is unable to effect the divestiture of the Divestiture Business by reason of a failure to obtain Consents.

#### Transferred Personnel

##### 5.7 At the option of the Approved Purchaser, AP Eagers must transfer to the Approved Purchaser:

- (a) all employees; and

- (b) all service providers under a contract for service;

who are, in the view of the Approved Purchaser, required for the Approved Purchaser to maintain, operate or conduct effectively the Divestiture Business and who consent to the transfer of their employment or contract for service to the Approved Purchaser (**Transferred Personnel**), provided such employees are directly and predominantly involved in the operation or running of the Divestiture Business.

5.8 When fulfilling its obligations under clause 5.7, AP Eagers must:

- (a) encourage all Transferred Personnel to remain with the Divestiture Business, including offering incentives based on industry practice;
- (b) not directly or indirectly discourage any Transferred Personnel from any obligations to provide services to the Divestiture Business;
- (c) effective on the date of the divestiture of the Divestiture Business, release the Transferred Personnel from any obligations to provide services to AP Eagers;
- (d) effective on the date of the divestiture of the Divestiture Business, release the Transferred Personnel from any non-compete or similar restraint of trade obligation, to the extent that such an obligation would otherwise prevent the person from performing his or her contemplated role in relation to the Divestiture Business or Unsold Business; and
- (e) not procure, promote or encourage the transfer of any of the Transferred Personnel from the Approved Purchaser to AP Eagers for a period of 12 months after the completion of the divestiture of the Divestiture Business.

#### Technical Assistance

5.9 At the option of the Approved Purchaser, AP Eagers must supply to the Approved Purchaser, under an Approved Transitional Technical Assistance Agreement, any Technical Assistance that is required by the Approved Purchaser in order to operate the Divestiture Business.

5.10 AP Eagers must ensure that any Approved Transitional Technical Assistance Agreement, and any renewal or extension of an Approved Transitional Technical Assistance Agreement, provides for the supply of Technical Assistance:

- (a) on a transitional basis for a period that is nominated by the Approved Purchaser and approved in writing by the ACCC; and
- (b) at cost and otherwise on arm's length terms.

5.11 To avoid doubt, AP Eagers must seek prior written approval from the ACCC of any renewal or extension of an Approved Transitional Technical Assistance Agreement. Without limiting the ACCC's discretion, in making a decision on whether to approve a renewal or extension of an Approved Transitional Technical Assistance Agreement, the ACCC will have regard to the criteria set out in clauses 5.9 and 5.10.

### **Transitional Supply Agreements**

- 5.12 At the option of the Approved Purchaser, AP Eagers must ensure the continued supply by AP Eagers to the Approved Purchaser, under an Approved Transitional Supply Agreement, of any goods or services that are required by the Approved Purchaser in order for the Approved Purchaser to be established as a viable, effective, stand-alone, independent and long-term competitor in the supply of new vehicles in the Newcastle / Hunter Valley region.
- 5.13 AP Eagers must ensure that any Approved Transitional Supply Agreement and any renewal or extension of an Approved Transitional Supply Agreement:
- (a) is for a reasonable transitional period, to be nominated by the Approved Purchaser and approved in writing by the ACCC;
  - (b) provides for the supply of the included goods and services at cost price; and
  - (c) is on such terms other than price which are no less favourable to the Approved Purchaser than arm's length terms.
- 5.14 To avoid doubt, AP Eagers must seek prior written approval from the ACCC of any renewal or extension of an Approved Transitional Supply Agreement. Without limiting the ACCC's discretion, in making a decision on whether to approve a renewal or extension of an Approved Transitional Supply Agreement, the ACCC will have regard to the criteria set out in clauses 5.12 and 5.13.

## **6 Process for approving a proposed purchaser**

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### **Purchaser approved at the time the Undertaking was accepted**

- 6.1 At the time this Undertaking was accepted, the ACCC also considered information of the type required in a Proposed Purchaser Notice and approved the purchaser(s) identified in Confidential Schedule 7 as the Approved Purchaser(s) of the Divestiture Business.
- 6.2 ACCC approval of the purchaser(s) identified in Confidential Schedule 7 as the Approved Purchaser(s) of the Divestiture Business included approval of a signed heads of agreement as the Approved Sale and Purchase Heads of Agreement, a draft share sale agreement and a draft lease agreement which are to be finalised and executed on substantially similar terms as those drafts.

### **Secondary Sale Period**

- 6.3 AP Eagers must follow the process for securing ACCC approval for an Approved Purchaser in the Secondary Sale Period as outlined in clauses 6.4 to 6.6 below.

### **Potential purchasers**

- 6.4 AP Eagers must provide the ACCC and Approved Independent Auditor with:
- (a) the identity of any person who expresses an interest in acquiring the Divestiture Business;
  - (b) the status of negotiations with each person; and

- (c) a copy of each person's offer to acquire the Divestiture Business, where relevant;

after the end of the Initial Sale Period, within 10 Business Days of each person expressing the interest and/or providing an offer regardless of whether the person subsequently withdraws or is declined.

**Provision of a notice for a Proposed Purchaser**

- 6.5 To seek ACCC approval for a Proposed Purchaser, AP Eagers or the Approved Divestiture Agent must provide the ACCC with a notice in the form prescribed in Schedule 2 to this Undertaking (**Proposed Purchaser Notice**), including a draft sale and purchase agreement, a draft lease agreement, a draft transitional technical assistance agreement (where required by the Proposed Purchaser), and a draft transitional supply agreement (where required by the Proposed Purchaser).
- 6.6 The Proposed Purchaser Notice must be provided to the ACCC at least 20 Business Days prior to the end of the Secondary Sale Period.

**Approval of a Proposed Purchaser after the Initial Sale Period**

- 6.7 The ACCC shall have the discretion to approve or reject in writing the Proposed Purchaser identified in the Proposed Purchaser Notice, which includes consideration of:
  - (a) the draft sale and purchase agreement attached to the Proposed Purchaser Notice;
  - (b) any draft transitional technical assistance agreement attached to the Proposed Purchaser Notice, in accordance with the criteria in clauses 5.9 and 5.10; and
  - (c) any draft transitional supply agreement attached to the Proposed Purchaser Notice, in accordance with the criteria in clauses 5.12 and 5.13.
- 6.8 Without limiting the ACCC's discretion, in making the decision pursuant to clause 6.7, the factors to which the ACCC may have regard include whether the:
  - (a) draft sale and purchase agreement is consistent with this Undertaking;
  - (b) Proposed Purchaser will complete the transaction as contemplated by the draft sale and purchase agreement;
  - (c) Proposed Purchaser is independent of AP Eagers;
  - (d) Proposed Purchaser is of good financial standing;
  - (e) Proposed Purchaser has an intention to maintain and operate the Divestiture Business as a going concern;
  - (f) Proposed Purchaser is able to conduct the Divestiture Business effectively; and

- (g) divestiture of the Divestiture Business to the Proposed Purchaser will address any competition concerns of the ACCC, including in relation to the likely long-term viability and competitiveness of the Divestiture Business under the ownership of the Proposed Purchaser.
- 6.9 The ACCC may revoke an Approved Purchaser's status as the Approved Purchaser if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

## **7 Divestiture Business Protection**

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### **Protection of the Divestiture Business**

- 7.1 From the Commencement Date, AP Eagers must not sell or transfer its interest, or any assets comprising part of, or used in, the Divestiture Business (other than the sale of goods and services in the ordinary course of business) or make any Material Change, except in accordance with this Undertaking or (subject to the other terms of this Undertaking) as required to allow completion of the Proposed Acquisition.

### **AP Eagers' obligations in relation to the Divestiture Business prior to completion of divestiture**

- 7.2 Without limiting this clause 7, AP Eagers must, from the Commencement Date until completion of the divestiture of the Divestiture Business, take all steps available to it to:
- (a) ensure that the Divestiture Business is managed and operated in the ordinary course of business as a fully operational, competitive going concern and in such a way that preserves the economic viability, marketability, competitiveness and goodwill of the Divestiture Business at the Commencement Date;
  - (b) continue to provide access to working capital and sources of credit for the Divestiture Business in a manner which is consistent with the financing of the Divestiture Business before the Commencement Date;
  - (c) continue to provide administrative and technical support for the Divestiture Business in a manner which is consistent with the operation of the Divestiture Business before the Commencement Date and in accordance with any plans established before the Commencement Date;
  - (d) continue existing Agreements relating to the Divestiture Business with customers, suppliers and/or other third parties that are in place at the Commencement Date;
  - (e) renew or replace upon expiry Material Contracts for the provision of goods or services to the Divestiture Business on commercial terms favourable to the Divestiture Business;
  - (f) maintain the supply of those goods and services that are part of the Divestiture Business to existing customers in a manner consistent with the supply of those goods and services as at the Commencement Date;



- (g) maintain the standard of manufacture, distribution, promotion and sale of those products which form part of the Divestiture Business as at the Commencement Date; and
- (h) carry out promotion and marketing of the products which form part of the Divestiture Business in accordance with any plans established before the Commencement Date.
- (i) if a dealer principal which is part of the Divestiture Business resigns or leaves its dealership(s) prior to completion of the divestiture of the Divestiture Business, AP Eagers must, no later than one Business Day after that dealer principal no longer holds that role, commence the process described in Confidential Schedule 9.

#### **Personnel of AP Eagers**

7.3 If the Approved Purchaser elects, from the Commencement Date until completion of the divestiture of the Divestiture Business, AP Eagers must:

- (a) replace any
  - (i) Transferred Personnel; or
  - (ii) if the Transferred Personnel have not yet been identified, any personnel necessary for the operation of the Divestiture Business;  
who leave or will leave the Divestiture Business before divestiture;
- (b) not terminate or vary the terms of employment or engagement (or agree to do any of those things) of any of the
  - (i) Transferred Personnel; or
  - (ii) if the Transferred Personnel have not yet been identified, any personnel necessary for the operation of the Divestiture Business; and
- (c) not directly or indirectly procure, promote or encourage the redeployment of personnel necessary for the operation of the Divestiture Business as at the Control Date to any other business operated by AP Eagers.

7.4 As soon as practicable after the Commencement Date, AP Eagers must direct its personnel, including directors, contractors, managers, officers, employees and agents not to do anything inconsistent with AP Eagers' obligations under this Undertaking.

#### **AP Eagers' ongoing obligations in relation to the Divestiture Business**

7.5 To the extent AP Eagers has obligations in relation to the provision of transitional technical assistance or continued supply pursuant to clauses 5.9 to 5.14 of this Undertaking in relation to the Divestiture Business, AP Eagers must not sell, assign, transfer, and/or licence directly or indirectly any of the assets required by AP Eagers to fulfil such obligations without the prior written consent of the ACCC.

### **Confidential Information**

7.6 Subject to clause 7.7, AP Eagers must not, at any time from the Commencement Date, use or disclose any confidential information about the Divestiture Business gained through:

- (a) ownership and/or management of the Divestiture Business; or
- (b) fulfilling any obligations pursuant to this Undertaking.

7.7 Clause 7.6 does not apply to information that AP Eagers requires to:

- (a) comply with legal and regulatory obligations including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements; or
- (b) carry out its obligations pursuant to this Undertaking;

provided such information is only used for that purpose and is only disclosed to those officers, employees, contractors and advisers of AP Eagers who need to know the information to carry out the permitted purpose.

## **8 Independent Audit**

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### **Obligation to appoint an Approved Independent Auditor**

8.1 AP Eagers must appoint and maintain an Approved Independent Auditor to audit and report upon AP Eagers' compliance with this Undertaking.

### **Process for approving a Proposed Independent Auditor**

8.2 At least 15 Business Days before the Control Date, AP Eagers must provide the ACCC with a notice for a Proposed Independent Auditor in the form prescribed in Schedule 3 to this Undertaking (**Proposed Independent Auditor Notice**), including draft terms of appointment and a draft audit plan.

8.3 If clauses 8.16, 8.17 or 8.18 apply, AP Eagers must provide the ACCC with a Proposed Independent Auditor Notice within five (5) Business Days after the relevant event occurs, otherwise clause 8.8 applies.

8.4 The ACCC shall have the discretion to approve or reject in writing the Proposed Independent Auditor identified in the Proposed Independent Auditor Notice.

8.5 Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Independent Auditor, the factors to which the ACCC may have regard include whether the:

- (a) person named in the Proposed Independent Auditor Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Independent Auditor;
- (b) person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of AP Eagers;
- (c) draft terms of appointment and the draft audit plan are consistent with this Undertaking; and

- (d) draft terms of appointment and the draft audit plan are otherwise acceptable to the ACCC.

**Appointment of the Approved Independent Auditor**

8.6 After receiving a written notice from the ACCC of its approval of a Proposed Independent Auditor, the draft terms of appointment and draft audit plan, AP Eagers must by the Control Date:

- (a) appoint the person approved by the ACCC as the Approved Independent Auditor on the Approved Terms of Appointment; and
- (b) forward to the ACCC a copy of the executed Approved Terms of Appointment.

**Failure to appoint**

8.7 If the Approved Independent Auditor has not been appointed:

- (a) by the Control Date;
- (b) within 15 Business Days after the Approved Independent Auditor resigns or otherwise ceases to act as the Approved Independent Auditor pursuant to clause 8.16, 8.17, or 8.18; or
- (c) if the ACCC has not received a Proposed Independent Auditor Notice pursuant to clause 8.3;

then clause 8.8 applies.

8.8 If clause 8.7 applies, the ACCC at its absolute discretion may:

- (a) identify and approve a person as the Approved Independent Auditor, including approving the draft terms of appointment and draft audit plan; and/or
- (b) direct AP Eagers to appoint a person who the ACCC has deemed is an Approved Independent Auditor.

**Obligations and powers of the Approved Independent Auditor**

8.9 AP Eagers must procure that any proposed terms of appointment for the Approved Independent Auditor include obligations on the Approved Independent Auditor to:

- (a) maintain his or her independence from AP Eagers, apart from appointment to the role of Approved Independent Auditor, including not forming any relationship of the types described in paragraph 2(c) of Schedule 3 to this Undertaking with AP Eagers for the period of his or her appointment, unless otherwise approved by the ACCC,
- (b) conduct compliance auditing according to the Approved Audit Plan and oversee the ongoing operation of the Divestiture Business until completion of the divestiture to an approved purchaser;

- (c) where requested by the ACCC, assess the suitability of any Proposed Purchaser or potential purchaser of the Divestiture Business (except the Approved Purchaser(s) identified in Confidential Schedule 7) against the factors (as relevant) in clause 6.8;
  - (d) provide the following reports directly to the ACCC:
    - (i) a scheduled written Audit Report as described in clause 8.11;
    - (ii) an immediate report of any issues that arise in relation to the performance of his or her functions as Approved Independent Auditor or in relation to compliance with this Undertaking by any person named in this Undertaking; and
    - (iii) where requested by the ACCC, a report on the suitability of any Proposed Purchaser or potential purchaser of the Divestiture Business (except the Approved Purchaser(s) identified in Confidential Schedule 7) following an assessment under clause 8.9(c); and
  - (e) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Auditor under this Undertaking.
- 8.10 AP Eagers must procure that any proposed terms of appointment for the Approved Independent Auditor provide the Approved Independent Auditor with the authority to:
- (a) access the facilities, sites or operations of the Divestiture Business and AP Eagers' other businesses as required by the Approved Independent Auditor;
  - (b) access any information or documents that the Approved Independent Auditor considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC; and
  - (c) engage any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor.

#### **Compliance Audit**

- 8.11 The Approved Independent Auditor must conduct an audit and prepare a detailed report (**Audit Report**) that includes:
- (a) the Approved Independent Auditor's procedures in conducting the audit, or any change to audit procedures and processes since the previous Audit Report;
  - (b) a full audit of AP Eagers' compliance with this Undertaking;
  - (c) identification of any areas of uncertainty or ambiguity in the Approved Independent Auditor's interpretation of any obligations contained in this Undertaking;

- (d) all of the reasons for the conclusions reached in the Audit Report;
- (e) any qualifications made by the Approved Independent Auditor in forming his or her views;
- (f) any recommendations by the Approved Independent Auditor to improve:
  - (i) the Approved Audit Plan;
  - (ii) the integrity of the auditing process;
  - (iii) AP Eagers' processes or reporting systems in relation to compliance with this Undertaking; and
  - (iv) AP Eagers' compliance with this Undertaking; and
- (g) the implementation and outcome of any prior recommendations by the Approved Independent Auditor.

8.12 The Approved Independent Auditor is to provide an Audit Report to the ACCC and AP Eagers at the following times:

- (a) within 10 Business Days after the Control Date, at which time the Audit Report is to include the results of the initial audit and any recommended changes to the Approved Audit Plan, including the Approved Independent Auditor's proposed procedures and processes for conducting the audit (**Establishment Audit**);
- (b) every month from the date of the Establishment Audit until one month after the divestiture of the Divestiture Business is completed;
- (c) every three months after the date of provision of the last Audit Report pursuant to clause 8.12(b), until the ACCC confirms in writing to AP Eagers that it is satisfied that AP Eagers has fulfilled its obligations pursuant to this Undertaking; and
- (d) a final report due three months after the last report provided pursuant to clause 8.12(b).

8.13 AP Eagers must implement any recommendations made by the Approved Independent Auditor in Audit Reports, and notify the ACCC of the implementation of the recommendations, within 10 Business Days after receiving the Audit Report or such other period as agreed in writing with the ACCC.

8.14 AP Eagers must comply with any direction of the ACCC in relation to matters arising from the Audit Report within 10 Business Days after being so directed (or such other period as agreed in writing with the ACCC).

**AP Eagers' obligations in relation to the Approved Independent Auditor**

8.15 Without limiting its obligations in this Undertaking, AP Eagers must:

- (a) comply with and enforce the Approved Terms of Appointment for the Approved Independent Auditor;

- (b) maintain and fund the Approved Independent Auditor to carry out his or her functions including:
  - (i) indemnifying the Approved Independent Auditor for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Auditor of his or her functions as the Approved Independent Auditor except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Auditor;
  - (ii) providing and paying for any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor; and
- (c) not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor, including:
  - (i) directing AP Eagers personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 8;
  - (ii) providing access to the facilities, sites or operations of the Divestiture Business and AP Eagers' other businesses as required by the Approved Independent Auditor;
  - (iii) providing to the Approved Independent Auditor any information or documents he or she considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC;
  - (iv) not requesting any information relating to the compliance audit from the Approved Independent Auditor without such a request having been approved by the ACCC; and
  - (v) not appointing the Approved Independent Auditor, or have any Agreements with the Approved Independent Auditor, to utilise the Approved Independent Auditor's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Auditor ceases to act in the role of the Approved Independent Auditor.

**Resignation, revocation or termination of the Approved Independent Auditor**

- 8.16 AP Eagers must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor.
- 8.17 The ACCC may revoke an Approved Independent Auditor's status as the Approved Independent Auditor if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 8.18 The ACCC may approve any proposal by, or alternatively may direct, AP Eagers to terminate the appointment of the Approved Independent Auditor if in the ACCC's view the Approved Independent Auditor acts inconsistently with the

provisions of this Undertaking or the Approved Terms of Appointment.

## **9 Failure to divest the Divestiture Business within the Secondary Sale Period**

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### **Divestiture of the Unsold Business**

- 9.1 In the event that the divestiture of the Divestiture Business is not completed by the end of the Secondary Sale Period, the Divestiture Business becomes an unsold business (**Unsold Business**) and the provisions of this clause 9 apply.

### **Obligation to appoint an Approved Divestiture Agent**

- 9.2 From the end of the Secondary Sale Period, AP Eagers must appoint and maintain an Approved Divestiture Agent to effect the divestiture of the Unsold Business.

### **Process for approving a Proposed Divestiture Agent**

- 9.3 At least 15 Business Days prior to the end of the Secondary Sale Period, if the divestiture of the Divestiture Business has not been completed, AP Eagers must provide the ACCC with a notice for a Proposed Divestiture Agent in the form of Schedule 3 to this Undertaking (**Proposed Divestiture Agent Notice**) including draft terms of appointment, a draft share, asset or business sale agreement, and draft marketing and sale plan.
- 9.4 If clauses 9.14, 9.15 or 9.16 apply, AP Eagers must provide the ACCC with a Proposed Divestiture Agent Notice within five Business Days after the relevant event occurs, otherwise clause 9.9 applies.
- 9.5 The ACCC shall have the discretion to approve or reject in writing the Proposed Divestiture Agent.
- 9.6 Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Divestiture Agent, the factors to which the ACCC may have regard include whether the:
- (a) person named in Proposed Divestiture Agent Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Divestiture Agent;
  - (b) person named in the Proposed Divestiture Agent Notice or identified by the ACCC is sufficiently independent of AP Eagers;
  - (c) draft terms of appointment, draft share, asset or business sale agreement and draft marketing and sale plan are consistent with this Undertaking; and
  - (d) draft terms of appointment, draft share, asset or business sale agreement and draft marketing and sale plan are otherwise acceptable to the ACCC.

### **Appointment of the Approved Divestiture Agent**

- 9.7 After receiving written notice from the ACCC of its approval of the Proposed Divestiture Agent, the draft terms of appointment, draft share, asset or business

sale agreement and draft marketing and sale plan, AP Eagers must within two Business Days:

- (a) appoint the person approved by the ACCC as the Approved Divestiture Agent on the Approved Terms of Appointment; and
- (b) forward to the ACCC a copy of the executed Approved Terms of Appointment.

**Failure to appoint**

9.8 If the Approved Divestiture Agent has not been appointed:

- (a) within 10 Business Days after the Divestiture Business becomes an Unsold Business;
- (b) within 15 Business Days after the Approved Divestiture Agent resigns or otherwise ceases to act pursuant to clauses 9.14, 9.15 or 9.16; or
- (c) if the ACCC has not received a Proposed Divestiture Agent Notice pursuant to clause 9.4;

then clause 9.9 applies.

9.9 If clause 9.8 applies, the ACCC may, at its absolute discretion:

- (a) identify and approve a person as the Approved Divestiture Agent, includes approving the draft terms of appointment of the Approved Divestiture Agent, draft share, asset or business sale agreement and draft marketing and sale plan; and/or
- (b) direct AP Eagers to appoint a person who the ACCC has deemed is an Approved Divestiture Agent.

**Obligations and powers of the Approved Divestiture Agent**

9.10 AP Eagers must procure that any proposed terms of appointment for the Approved Divestiture Agent include obligations on the Approved Divestiture Agent to:

- (a) divest the Unsold Business only to an Approved Purchaser, at no minimum price;
- (b) maintain his or her independence from AP Eagers, apart from appointment to the role of Approved Divestiture Agent, including not form any relationship of the types described in paragraph 2(c) of Schedule 3 to this Undertaking with AP Eagers for the period of his or her appointment;
- (c) not use any confidential information gained through the divestiture of the Unsold Business other than for performing his or her functions as Approved Divestiture Agent;
- (d) follow the Approved Marketing and Sale Plan;



- (e) use his or her best endeavours to enter into a binding agreement for the divestiture of the Unsold Business as quickly as possible using the Approved Business Sale Agreement;
- (f) co-operate with the requests of any Approved Independent Auditor appointed pursuant to this Undertaking;
- (g) every 30 Business Days following appointment of the Approved Divestiture Agent, provide written reports directly to the ACCC which include:
  - (i) information regarding the implementation of the Approved Business Sale Agreement and the Approved Marketing and Sale Plan including any previous changes approved by the ACCC;
  - (ii) information regarding any suggested changes to any Approved Marketing and Sale Plan including any previous changes approved by the ACCC;
  - (iii) an account and explanation of all disbursements, fees and charges incurred by the Approved Divestiture Agent in undertaking his or her duties by month and to the date of the report;
  - (iv) a schedule of agreed fees of the Approved Divestiture Agent (including the fees of any adviser appointed under clause 9.11(d));
  - (v) the efforts made to sell the Unsold Business;
  - (vi) the identity of any advisers engaged;
  - (vii) the identity of any persons expressing interest in the Unsold Business; and
  - (viii) any other information required by the ACCC.
- (h) within 30 Business Days after the completion of the divestiture of the Unsold Business, provide a written report directly to the ACCC which includes a final accounting of:
  - (i) any moneys derived from the divestiture of the Unsold Business;
  - (ii) all disbursements, fees and charges incurred by the Approved Divestiture Agent in fulfilling his or her duties; and
  - (iii) all agreed fees of the Approved Divestiture Agent (including the fees of any adviser appointed under clause 9.11(d));
- (i) immediately inform the ACCC of:
  - (i) any issues that arise in relation to the implementation of the Approved Business Sale Agreement and any Approved Marketing and Sale Plan;

- (ii) non-compliance with this Undertaking by any person named in this Undertaking;
  - (iii) any offers for the Unsold Business;
  - (j) accept any offer for the Unsold Business upon instruction from AP Eagers given in accordance with clause 9.13(d); and
  - (k) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Divestiture Agent pursuant to this Undertaking.
- 9.11 AP Eagers must procure that any proposed terms of appointment for the Approved Divestiture Agent contain an irrevocable grant of power of attorney conferring all necessary power and authority on the Approved Divestiture Agent to:
- (a) negotiate with purchasers to divest the Unsold Business on terms considered by the Approved Divestiture Agent in his or her sole discretion to be consistent with this Undertaking and the Approved Marketing and Sale Plan;
  - (b) execute any Agreements with the Approved Purchaser required pursuant to clause 6.7;
  - (c) upon instruction pursuant to clause 9.13(d), complete the divestiture of the Unsold Business to the Approved Purchaser in accordance with the Approved Business Sale Agreement; and
  - (d) engage any external expertise, assistance or advice required by the Approved Divestiture Agent to perform his or her functions as the Approved Divestiture Agent.
- 9.12 Any irrevocable power of attorney granted pursuant to clause 9.11 will end upon resignation or termination of the Approved Divestiture Agent in accordance with clauses 9.14, 9.15 and 9.16, or in the event that the Unsold Business is divested in accordance with this Undertaking.

**AP Eagers' obligations in relation to the Approved Divestiture Agent**

- 9.13 Without limiting its obligations in this Undertaking, AP Eagers must from the end of the Secondary Sale Period:
- (a) comply with and enforce the Approved Terms of Appointment for the Approved Divestiture Agent;
  - (b) maintain and fund the Approved Divestiture Agent to carry out his or her functions; including:
    - (i) indemnifying the Approved Divestiture Agent for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Divestiture Agent of his or her functions as the Approved Divestiture Agent except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Divestiture Agent;

- (ii) providing and paying for any external expertise, assistance or advice required by the Approved Divestiture Agent to perform his or her functions as the Approved Divestiture Agent;
  - (iii) paying such fees as are agreed between the Approved Divestiture Agent and AP Eagers (but not fees contingent on the price to be obtained for the Unsold Business); and
  - (iv) if an agreement as to fees cannot be reached between the Approved Divestiture Agent and AP Eagers within 15 Business Days after the end of the Secondary Sale Period, AP Eagers agrees to pay such fees as are directed by the ACCC;
- (c) not interfere with, or otherwise hinder, the Approved Divestiture Agent's ability to carry out his or her functions as the Approved Divestiture Agent, including:
- (i) directing its personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 9;
  - (ii) providing access to the facilities, sites or operations of the Unsold Business as required by the Approved Divestiture Agent; and
  - (iii) providing to the Approved Divestiture Agent any information, documents or other assistance he or she considers necessary for carrying out his or her functions as the Approved Divestiture Agent or for reporting to or otherwise advising the ACCC;
- (d) within three Business Days after receiving notice from the ACCC pursuant to clause 6.7, AP Eagers must instruct the Approved Divestiture Agent to complete the divestiture of the Unsold Business to the Approved Purchaser in accordance with the documents approved by the ACCC pursuant to clause 6.7; and
- (e) other than in accordance with clause 9.13(d) of this Undertaking, not instruct the Approved Divestiture Agent to divest the Unsold Business.

**Resignation, revocation or termination of the Approved Divestiture Agent**

- 9.14 AP Eagers must immediately notify the ACCC in the event that an Approved Divestiture Agent resigns or otherwise stops acting as an Approved Divestiture Agent before the completion of the divestiture of the Unsold Business.
- 9.15 The ACCC may revoke an Approved Divestiture Agent's status as the Approved Divestiture Agent if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 9.16 The ACCC may approve any proposal by, or alternatively may direct, AP Eagers to terminate an Approved Divestiture Agent if in the ACCC's view the Approved Divestiture Agent acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.

## **10 Notification of key dates and ACCC requests for information**

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- 10.1 AP Eagers must notify the ACCC and each Undertaking Appointment in writing of:
- (a) the anticipated date of the Control Date, at least five Business Days before that date;
  - (b) the anticipated date of the completion of the divestiture of the Divestiture Business, at least five Business Days before that date;
  - (c) the occurrence of the Control Date, within one Business Day of that date; and
  - (d) the occurrence of the completion of the divestiture of the Divestiture Business, within one Business Day of that date.
- 10.2 The ACCC may direct AP Eagers in respect of its compliance with this Undertaking to, and AP Eagers must:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within AP Eagers' custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 10.3 Any direction made by the ACCC under clause 10.2 will be notified to AP Eagers, in accordance with clause 17.2.
- 10.4 In respect of AP Eagers' compliance with this Undertaking or an Undertaking Appointment's compliance with its Approved Terms of Appointment, the ACCC may request any Undertaking Appointment to:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within the Undertaking Appointment's custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 10.5 AP Eagers will use its best endeavours to ensure that an Undertaking Appointment complies with any request from the ACCC in accordance with clause 10.4.
- 10.6 Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 10.6 may be used by the ACCC for any purpose consistent with the exercise of its statutory

duties.

- 10.7 The ACCC may in its discretion:
- (a) advise any Undertaking Appointment of any request made by it under this clause 10.7; and/or
  - (b) provide copies to any Undertaking Appointment of any information furnished, documents and material produced or information given to it under this clause 10.7.
- 10.8 Nothing in this clause 10.7 requires the provision of information or documents in respect of which AP Eagers has a claim of legal professional or other privilege.

## **11 Disclosure of this Undertaking**

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- 11.1 AP Eagers and the ACCC agree that Schedule 5, Schedule 7, Schedule 8, and Schedule 9 will remain confidential until after the completion of the divestiture of the Divestiture Business or Unsold Business. All confidential schedules will remain confidential, subject to clause 11.2 below.
- 11.2 AP Eagers acknowledges that the ACCC may provide each Undertaking Appointment with a copy of this Undertaking which includes unredacted versions of Confidential Schedule 5, Confidential Schedule 6, Confidential Schedule 7, Confidential 8 and Confidential Schedule 9.
- 11.3 AP Eagers acknowledges that the ACCC may, subject to clause 11:
- (a) make this Undertaking publicly available;
  - (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
  - (c) from time to time publicly refer to this Undertaking.
- 11.4 Nothing in clause 11.1 or the confidential parts of this Undertaking referred to in clause 11.1 prevents the ACCC from disclosing such information as is:
- (a) required by law;
  - (b) permitted by section 155AAA of the Act;
  - (c) necessary for the purpose of enforcement action under section 87B of the Act; or
  - (d) necessary for the purpose of making such market inquiries as the ACCC thinks fit to assess the impact on competition arising in connection with this Undertaking.
- 11.5 Nothing in clause 11.1 or the confidential parts of this Undertaking referred to in clause 11.1 prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

## **12 Obligation to procure**

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- 12.1 Where the performance of an obligation under this Undertaking requires a

Related Body Corporate of AP Eagers to take or refrain from taking some action, AP Eagers will procure that Related Body Corporate to take or refrain from taking that action.

### **13 No Derogation**

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- 13.1 This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by AP Eagers of any term of this Undertaking.
- 13.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that AP Eagers does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

### **14 Change of Control**

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- 14.1 In the event that a Change of Control is reasonably expected to occur, AP Eagers must:
- (a) notify the ACCC of this expectation as soon as practicable; and
  - (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on AP Eagers pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified AP Eagers in writing that a section 87B undertaking under this clause is not required.

### **15 Costs**

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- 15.1 AP Eagers must pay all of its own costs incurred in relation to this Undertaking.

### **16 Resolving inconsistencies**

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- 16.1 To the extent there are any inconsistencies between this Undertaking and the Approved Sale and Purchase Heads of Agreement (and any related final sale and purchase agreement and lease agreement), any Approved Sale and Purchase Agreement, or any Approved Lease Agreement between AP Eagers and an Approved Purchaser as regards AP Eagers' obligations pursuant to this Undertaking, this Undertaking prevails.

### **17 Notices**

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#### **Giving Notices**

- 17.1 Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)  
Attention: Executive General Manager  
Merger and Authorisation Review Division

**With a copy sent to:** [mergersru@acc.gov.au](mailto:mergersru@acc.gov.au)  
Attention: Director, Remedies Unit  
Coordination and Strategy Branch  
Merger and Authorisation Review Division

- 17.2 Any notice or communication to AP Eagers pursuant to this Undertaking must be sent to:

Name: Denis Stark / Amanda Ellison  
Address: 5 Edmund Street, Newstead QLD 4006  
Email Address: [dstark@apeagers.com.au](mailto:dstark@apeagers.com.au) / [aellison@apeagers.com.au](mailto:aellison@apeagers.com.au)  
Fax number: +61 7 3608 7111

**With a copy sent to:**

Name: Jacqueline Downes / Felicity McMahon  
Address: Allens, Deutsche Bank Place, Level 28, 126 Phillip Street, Sydney, NSW 2000  
Email Address: [jacqueline.downes@allens.com.au](mailto:jacqueline.downes@allens.com.au) / [felicity.mcmahon@allens.com.au](mailto:felicity.mcmahon@allens.com.au)  
Fax number: +61 2 9230 5333

- 17.3 If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).
- 17.4 If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

#### **Change of contact details**

- 17.5 AP Eagers must notify the ACCC of a change to its contact details within three Business Days.
- 17.6 Any notice or communication will be sent to the most recently advised contact details and subject to clauses 17.3 and 17.4, will be taken to be received.

### **18 Defined terms and interpretation**

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#### **Definitions in the Dictionary**

- 18.1 A term or expression starting with a capital letter:
- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
  - (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

**Interpretation**

18.2 Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.



**Executed as an Undertaking**

Executed by AP Eagers Limited (ACN 009 680 013) pursuant to section 127(1) of the Corporations Act 2001 by:



Signature of director



Signature of a director/company secretary

**Martin Andrew Ward**

Name of director (print)

**Denis Gerard Stark**

Name of director/company secretary (print)

Date 19/7/19

Date 19/7/19

Executed by PPT Investments Pty Ltd (ABN 80 000 868 860) pursuant to section 127(1) of the Corporations Act 2001 by:



Signature of director



Signature of a director/company secretary

**Martin Andrew Ward**

Name of director (print)

**Denis Gerard Stark**

Name of director/company secretary (print)

Date 19/7/19

Date 19/7/19

Executed by PPT Holdings No 1 Pty Ltd (ABN 13 078 207 333) pursuant to section 127(1) of the *Corporations Act 2001* by:



Signature of director



Signature of a director/company secretary

**Martin Andrew Ward**

Name of director (print)

**Denis Gerard Stark**

Name of director/company secretary (print)

Date

19/7/19

Date

19/7/19

Executed by PPT Holdings No 2 Pty Ltd (ABN 13 078 207 397) pursuant to section 127(1) of the *Corporations Act 2001* by:



Signature of director



Signature of a director/company secretary

**Martin Andrew Ward**

Name of director (print)

**Denis Gerard Stark**

Name of director/company secretary (print)

Date

19/7/19

Date

19/7/19

Executed by PPT Holdings No 3 Pty Ltd (ABN 30 078 207 468) pursuant to section 127(1) of the *Corporations Act 2001* by:



Signature of director

Signature of a ~~director~~/company secretary

Martin Andrew Ward

Denis Gerard Stark

Name of director (print)

Name of ~~director~~/company secretary (print)

Date 19/7/19.


Date 19/7/19

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

24/7/19  
\_\_\_\_\_

Date

and signed on behalf of the Commission:

  
\_\_\_\_\_

Chair

24/7/19  
\_\_\_\_\_

Date

## Schedule 1 – Dictionary and interpretation

### 1 Dictionary

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**ACCC** means the Australian Competition and Consumer Commission.

**Act** means the *Competition and Consumer Act 2010* (Cth).

**Agreements** means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

**AHG** means Automotive Holdings Group (ACN 111 470 038).

**AP Eagers** means the entity referred to in clause 1.1 of this Undertaking.

**Approved Audit Plan** means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Independent Auditor will audit and report upon compliance with this Undertaking.

**Approved Business Sale Agreement** means the standard form contract for the divestiture of the Unsold Business which has been approved by the ACCC in accordance with the terms of this Undertaking.

**Approved Divestiture Agent** means the person approved by the ACCC and appointed under clause 9.7 of this Undertaking.

**Approved Independent Auditor** means the person approved by the ACCC and appointed under clause 8.6 of this Undertaking.

**Approved Lease Agreement** has the meaning in Confidential Schedule 8 of this Undertaking.

**Approved Marketing and Sale Plan** means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Divestiture Agent will market and effect the divestiture of the Unsold Business.

**Approved Purchaser** means the person approved by the ACCC under clause 6 of this Undertaking.

**Approved Sale and Purchase Agreement** means the contract approved by the ACCC in accordance with the terms of this Undertaking, by which AP Eagers will divest the Divestiture Businesses to the Approved Purchaser and the Approved Purchaser will acquire the Divestiture Business from AP Eagers.

**Approved Sale and Purchase Heads of Agreement** means the heads of agreement approved by the ACCC in accordance with the terms of this Undertaking, by which AP Eagers will divest the Divestiture Business to the Approved Purchaser(s) identified in Confidential Schedule 7 and the Approved Purchaser(s) identified in Confidential Schedule 7 will acquire the Divestiture Business from AP Eagers.

**Approved Transitional Supply Agreement** means any agreement, for the supply of goods or services (other than Technical Assistance) by AP Eagers to the Approved Purchaser, approved by the ACCC in accordance with the terms of this Undertaking.

**Approved Transitional Technical Assistance Agreement** means any agreement, for the supply of Technical Assistance by AP Eagers to the Approved Purchaser, approved by the ACCC in accordance with the terms of this Undertaking.

**Approved Terms of Appointment** means the terms of appointment for the Approved Independent Auditor or Approved Divestiture Agent, as applicable, as approved by the ACCC in accordance with the terms of this Undertaking.

**Associated Entity** has the meaning given by section 50AAA of the Corporations Act.

**Audit Report** has the meaning given to it in clause 8.11 of this Undertaking.

**Bid Conditions** means the conditions of the Proposed Acquisition set out in schedule 2 of AP Eagers' Bidder's Statement dated 5 April 2019 (as supplemented and varied from time to time).

**Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

**Change of Control** means:

- the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of AP Eagers to any other person or entity that may impact compliance with this Undertaking in its entirety; or
- the sale or transfer of any assets necessary, or which may be necessary, to enable AP Eagers to continue to comply with this Undertaking in its entirety.

**Commencement Date** means the date described in clause 3.1 of this Undertaking.

**Control Date** means the date on which AP Eagers' declares the Proposed Acquisition free from all of the Bid Conditions in accordance with section 650F of the Corporations Act.

**Consents** means any Government Consents or Third Party Consents.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Divestiture Business** means the items described in Schedule 4 to this Undertaking.

**Entities Connected** has the meaning given by section 64B of the Corporations Act.

**Establishment Audit** has the meaning given to it in clause 8.12(a) of this Undertaking.

**Government Consents** means any consents from any government agency required for the assignment, novation, sale, sub-licensing or transfer of any assets, licences, permits, approval or contracts required for the operation of the Divestiture Business.

**Initial Sale Period** is defined in Confidential Schedule 5 to this Undertaking.

**Material Change** means any change to the structure, attributes, extent or operations of the Divestiture Business or product or service sold by a Divestiture Business that may affect, or impact on, the competitiveness of the Divestiture Business.

**Material Contract** means any Agreement that is necessary for the operation of the

**Divestiture Business.**

**Original Equipment Manufacturer (OEM)** means a manufacturer or distributor of new motor vehicles.

**Owned Property** means the property described in the item titled Owned Property in Confidential Schedule 8.

**Proposed Acquisition** is defined in clause 2 of this Undertaking.

**Proposed Divestiture Agent** means a person named in a Proposed Divestiture Notice.

**Proposed Divestiture Agent Notice** has the meaning given to it in clause 9.3 of this Undertaking.

**Proposed Independent Auditor** means a person named in a Proposed Independent Auditor Notice.

**Proposed Independent Auditor Notice** has the meaning given to it in clause 8.2 of this Undertaking.

**Proposed Purchaser** means a person named in a Proposed Purchaser Notice.

**Proposed Purchaser Notice** has the meaning given to it in clause 6.5 of this Undertaking.

**Public Mergers Register** means the ACCC's public register of merger clearances, available at [www.accc.gov.au](http://www.accc.gov.au).

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au).

**Related Bodies Corporate** has the meaning given to it by section 50 of the *Corporations Act 2001* (Cth).

**Related Entities** has the meaning given to it by section 9 of the *Corporations Act 2001* (Cth).

**Related Parties** has the meaning given to it by section 228 of the *Corporations Act 2001* (Cth).

**Secondary Sale Period** is defined in Confidential Schedule 5 to this Undertaking.

**Subsidiary** has the meaning given by section 9 of the *Corporations Act*.

**Technical Assistance** includes advising on technical knowledge documentation, supporting the Approved Purchaser on acquiring specific assets necessary for the ongoing conduct of the Divestiture Business, providing staff with suitable experience and skills to assist and/or advice on technical issues, assisting in training for the Approved Purchaser's staff, and providing guidance on regulatory and legal aspects relating to the transfer of or application for licences.

**Third Party Consents** means any consent, from any entity that is not a government agency required for the assignment, novation, sale, sub-licensing or transfer of any assets, licences, permits, approval or contracts required for the operation of the Divestiture Business, provided in writing.

**Transferred Personnel** has the meaning given to it in clause 5.7 of this Undertaking.

**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

**Undertaking Appointment** means the Approved Independent Auditor or the Approved Divestiture Agent, as applicable.

**Unsold Business** has the meaning given to it in clause 9.1 of this Undertaking.

## **2 Interpretation**

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- 2.1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
  - (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
  - (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
  - (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
  - (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
  - (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
  - (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
  - (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
  - (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
  - (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
  - (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;

- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
  - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, AP Eagers will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
  - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.



## **Schedule 2 – Proposed Purchaser Notice Form**

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Please note in relation to information given on or in relation to this form, giving false or misleading information is a serious offence.

The completed form with requested documents attached may be provided to the ACCC using the following method:

### **Email**

Subject line: Proposed Purchaser Notice – AP Eagers section 87B Undertaking to the ACCC

Address: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)

Attention: Executive General Manager - Merger and Authorisation Review Division

With an email copy sent to:

Address: [mergersru@acc.gov.au](mailto:mergersru@acc.gov.au)

Attention: Director, Remedies Unit, Merger Coordination and Strategy Branch,  
Merger and Authorisation Review Division

1) In relation to the Proposed Purchaser, please provide the following information:

- (a) Name of the Proposed Purchaser:
- (b) Address:
- (c) Contact name:
- (d) Telephone number:
- (e) Other contact details:

2) Please attach a submission containing the following information to this form:

- (a) a description of the business carried on by the Proposed Purchaser including the locations in which the Proposed Purchaser carries on its business.
- (b) details of the Proposed Purchaser's experience in the relevant market/s.
- (c) the names of the [owner/s and the directors (delete any that do not apply)] of the Proposed Purchaser.
- (d) details of any of the following types of relationships between AP Eagers and the Proposed Purchaser or confirmation that no such relationship exists whether within Australia or outside of Australia:
  - (i) AP Eagers and the Proposed Purchaser are Associated Entities;
  - (ii) AP Eagers is an Entity Connected with the Proposed Purchaser;
  - (iii) the Proposed Purchaser is an Entity Connected with AP Eagers;

- (iv) AP Eagers and the Proposed Purchaser are Related Entities;
  - (v) AP Eagers and the Proposed Purchaser are Related Parties;
  - (vi) any Related Party, Related Entity or Entity Connected with AP Eagers is a Related Party, Related Entity or Entity Connected with the Proposed Purchaser;
  - (vii) AP Eagers and the Proposed Purchaser have a contractual relationship or had one within the past three years, other than those attached to this form;
  - (viii) the Proposed Purchaser is a supplier of AP Eagers or has been in the past three years;
  - (ix) AP Eagers is a supplier of the Proposed Purchaser or has been in the past three years; and
  - (x) any other relationship between AP Eagers and the Proposed Purchaser that allows one to affect the business decisions of the other.
- (e) a section addressing the following factors, including any information adverse to the Proposed Purchaser, in the power, possession or control of AP Eagers:
- (i) whether the draft sale and purchase heads of agreement or draft sale and purchase agreement is consistent with this Undertaking;
  - (ii) whether the Proposed Purchaser will complete the transaction as contemplated by the draft sale and purchase heads of agreement or draft sale and purchase agreement;
  - (iii) whether the Proposed Purchaser is of good financial standing;
  - (iv) whether the Proposed Purchaser has an intention to maintain and operate the Divestiture Business as a going concern;
  - (v) whether the Proposed Purchaser is able to conduct the Divestiture Business effectively;
  - (vi) whether the divestiture of the Divestiture Business to the Proposed Purchaser will address any competition concerns of the ACCC, including any relationships (including but not limited to shareholding interests, other proprietary interests, contracts, arrangements or understandings) between the Proposed Purchaser and other entities in a relevant market, and the likely long-term viability and competitiveness of the Divestiture Business under the ownership of the Proposed Purchaser; and
  - (vii) any other matters that may affect the Proposed Purchaser's capacity or ability to acquire or operate the Divestiture Business, such as outstanding legal action or disputes.

3) Please also attach to this form:

- (a) the finalised draft of the sale and purchase agreement and sale and purchase heads of agreement for approval by the ACCC in accordance with this Undertaking.
- (b) the finalised draft of any transitional technical assistance agreement for approval by the ACCC in accordance with this Undertaking.
- (c) the finalised draft of any transitional supply agreement for approval by the ACCC in accordance with this Undertaking.
- (d) any documents required to support the information provided by AP Eagers pursuant to this form.

### **Schedule 3 – Undertaking Appointment**

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This form sets out the information required by the ACCC in relation to proposed appointment of the following positions under the Undertaking:

- Independent Auditor; or
- Divestiture Agent;

(the Undertaking Appointments).

This form is to be used for each of the above appointments.

Please note in relation to information given pursuant to this form, giving false or misleading information is a serious offence.

#### **Method of Delivery to the ACCC**

The completed Undertaking Appointment form, along with the additional requested information is to be provided to the ACCC with the subject line (*proposed* [only include relevant Undertaking Appointment i.e. Independent Auditor/Divestiture Agent] *Form –* [insert name of undertaking]) to the below email addresses:

- 1) [mergers@acc.gov.au](mailto:mergers@acc.gov.au)

Attention: Executive General Manager  
Merger and Authorisation Review Division

- 2) **With a copy sent to:**

[mergersru@acc.gov.au](mailto:mergersru@acc.gov.au)

Attention: Director  
Remedies Unit  
Coordination and Strategy Branch  
Merger and Authorisation Review Division

#### **Information Required**

The ACCC requires the following information in order to assess a proposed Independent Auditor or Divestiture Agent (i.e. the relevant Undertaking Appointment).

- 1) Proposed Undertaking Appointment Details:

- (a) the name of the Proposed Undertaking Appointment; and
- (b) the name of the Proposed Undertaking Appointment's employer and contact details including:
  - Address;
  - Contact name;
  - Telephone number;
  - Other contact details.

- 2) A submission containing the following information:

- (a) details of the [Undertaking Appointment]'s qualifications and experience relevant to his or her proposed role pursuant to the Undertaking
  - (b) the names of the [owner/s and the directors (delete any that do not apply)] of [the Undertaking Appointment's employer]
  - (c) details of any of the following types of relationships between AP Eagers and [the Undertaking Appointment] or [the Undertaking Appointment's employer] or confirmation that no such relationship exists whether within Australia or outside of Australia:
    - (i) AP Eagers and [the Undertaking Appointment's employer] are Associated Entities
    - (ii) AP Eagers is an Entity Connected with [the Undertaking Appointment's employer]
    - (iii) [The Undertaking Appointment's employer] is an Entity Connected with AP Eagers
    - (iv) AP Eagers and [the Undertaking Appointment's employer] are Related Entities
    - (v) AP Eagers and [the Undertaking Appointment's employer] are Related Parties
    - (vi) any Related Party, Related Entity or Entity Connected with AP Eagers is a Related Party, Related Entity or Entity Connected with [the Undertaking Appointment]
    - (vii) AP Eagers and [the Undertaking Appointment] or [the Undertaking Appointment's employer] have a contractual relationship or had one within the past three years, other than those attached to this form
    - (viii) [the Undertaking Appointment's employer] is a supplier of AP Eagers or has been in the past three years
    - (ix) AP Eagers is a supplier of the [the Undertaking Appointment's employer] or has been in the past three years, and
    - (x) any other relationship between AP Eagers and [the Undertaking Appointment] or [the Undertaking Appointment's employer] that allows one to affect the business decisions of the other, and
  - (d) details of any existing or past contractual relationships between the Undertaking Appointment or the Undertaking Appointment's employer and the ACCC within the past three years.
- 3) A document outlining the terms of appointment for the proposed Undertaking Appointment. This should identify the basis on which fees will be paid, including disclosure of any proposed performance-based fees.

**Specific Information required for Undertaking Appointments**

The ACCC requires the below information in relation to the relevant Undertaking Appointment.

***Proposed Independent Auditor***

- 1) A finalised draft audit plan for the Divestiture Business, drafted by the Proposed Independent Auditor and outlining (to the extent possible) the Proposed Independent Auditor's plans in regard to the establishment audit and the Audit Report.

***Proposed Divestiture Agent***

- 1) The finalised draft Business Sale Agreement drafted by the Proposed Divestiture Agent in consultation with AP Eagers. The draft share, asset or business sale agreement is to provide for the divestiture of the Unsold Business.
- 2) The Proposed Divestiture Agent's draft marketing and sale plan for the Unsold Business.

## Schedule 4 – Divestiture Business

### 1. If share sale under clause 5.3(a)

#### 1.1 Divestiture Business: Kloster dealerships

(a) Either:

- (i) all of the issued share capital of PPT Investments Pty Ltd ABN 80 000 868 860 (*PPT Investments*) which is the owner of the assets and operations of the dealerships (details of which are set out in paragraph 1.2 of this Schedule 4) used in conducting the retail and wholesale of new and used motor vehicles, leasing, fleet leasing, servicing and repair of motor vehicles and the sale of parts (the *Kloster Business*) together with all rights necessary for, or used in the conduct of that business, including the associated assets, details of which are set out in paragraph 1.3 of this Schedule 4; or
- (ii) all of the issued share capital in each of:
- (A) PPT Holdings No 1 Pty Ltd ABN 13 078 207 333;
- (B) PPT Holdings No 2 Pty Ltd ABN 13 078 207 397; and
- (C) PPT Holdings No 3 Pty Ltd ABN 30 078 207 468,

which own all of the issued shares in PPT Investments.

- (b) And all of the assets necessary for the effective operation of the Divestiture Business, including the associated assets, details of which are set out in paragraph 1.3 of this Schedule 4.

#### 1.2 Divestiture Business: Kloster dealerships and operational sites

Dealership name	Address
Cardiff Ford	369 Main Road, Cardiff NSW 2285
Cardiff Honda	2 Sturt Road, Cardiff NSW 2285
Cardiff Hyundai	2 Sturt Road, Cardiff NSW 2285
Cardiff Nissan	367 Main Road, Cardiff NSW 2285
Highway Ford	190-198 New England Highway, Rutherford NSW 2320
Highway Hyundai	190-198 New England Highway, Rutherford NSW 2320
Kloster BMW	934 Hunter Street, Newcastle West NSW 2302
Kloster Ford	Corner of Tudor Street and Gordon Avenue, Hamilton NSW 2303
Kloster Honda	24-26 Tudor Street, Hamilton NSW 2303
Kloster Hyundai	14-22 Tudor Street, Hamilton NSW 2303
Kloster Mini Garage	2 Sturt Road, Newcastle West NSW 2303
Kloster Mitsubishi	49-57 Tudor Street, Hamilton NSW 2303
Kloster Nissan	33-35a Tudor Street, Hamilton NSW 2303

<b>Dealership name</b>	<b>Address</b>
Kloster Suzuki	37-43 Tudor Street, Hamilton NSW 2303
Kloster Volkswagen	49-57 Tudor Street, Hamilton NSW 2303 2 Sturt Road, Cardiff NSW 2285
<b>Other sites</b>	<b>Address</b>
Kloster Ford (service site)	185-189 Adelaide Street, Raymond Terrace, NSW
Kloster Parts	12 Albert Street, Wickham, NSW
Kloster Volkswagen (warehousing)	31 Gordon Avenue, Hamilton, NSW

### 1.3 Associated assets

- (a) Land, leases or the right to use land associated with the land on which the dealership sites or other operations of the Divestiture Business are located or conducted, or assistance with the novation of leases as applicable, as outlined in Confidential Schedule 8
- (b) Supply and distribution arrangements (including dealership Agreements) to which PPT Investments is a party
- (c) Material Contracts (other than supply and distribution arrangements to which PPT Investments is a party)
- (d) Licenses/permits and authorisation necessary to carry on the Kloster Business
- (e) Plant, equipment, machinery, furniture, fixtures and fittings owned by PPT Investments and used in carrying on the Kloster Business
- (f) Goods inventory (including unsold new vehicle stock and parts stock located at each dealership location) owned by PPT Investments
- (g) Sales and marketing material owned by PPT Investments
- (h) Intellectual property rights that are owned by PPT Investments, including the trademarks, registered business names, logos, brands, designs, copyright and rights to use those things, pertaining to each of the relevant dealerships operated at the above-listed sites
- (i) Business records necessary for the Kloster Business
- (j) Agreements, documents, arrangements, undertakings or orders entered into, made or accepted by or on behalf of PPT Investments in the operation of the Kloster Business that are not completed or discharged by performance in the ordinary course of business
- (k) Key personnel, including the personnel identified in Confidential Schedule 6 (subject to clauses 5.7 to 5.8)



**2. If asset sale under clause 5.3(a)**

**2.1 Divestiture Business: Kloster dealerships and operational sites**

All of the assets and operations of the dealerships and associated operations operated at the sites listed in the table below, including all assets which form part of the Divestiture Business as operated by AP Eagers, including the associated assets, details of which are set out in paragraph 2.2 of this Schedule 4.

<b>Dealership name</b>	<b>Address</b>
Cardiff Ford	369 Main Road, Cardiff NSW 2285
Cardiff Honda	2 Sturt Road, Cardiff NSW 2285
Cardiff Hyundai	2 Sturt Road, Cardiff NSW 2285
Cardiff Nissan	367 Main Road, Cardiff NSW 2285
Highway Ford	190-198 New England Highway, Rutherford NSW 2320
Highway Hyundai	190-198 New England Highway, Rutherford NSW 2320
Kloster BMW	934 Hunter Street, Newcastle West NSW 2302
Kloster Ford	Corner of Tudor Street and Gordon Avenue, Hamilton NSW 2303
Kloster Honda	24-26 Tudor Street, Hamilton NSW 2303
Kloster Hyundai	14-22 Tudor Street, Hamilton NSW 2303
Kloster Mini Garage	2 Sturt Road, Newcastle West NSW 2303
Kloster Mitsubishi	49-57 Tudor Street, Hamilton NSW 2303
Kloster Nissan	33-35a Tudor Street, Hamilton NSW 2303
Kloster Suzuki	37-43 Tudor Street, Hamilton NSW 2303
Kloster Volkswagen	49-57 Tudor Street, Hamilton NSW 2303 2 Sturt Road, Cardiff, NSW 2285
<b>Other sites</b>	<b>Address</b>
Kloster Ford (service site)	185-189 Adelaide Street, Raymond Terrace, NSW
Kloster Parts	12 Albert Street, Wickham, NSW
Kloster Volkswagen (warehousing)	31 Gordon Avenue, Hamilton, NSW

And all of the assets necessary for the effective operation of the Divestiture Business, including the associated assets, details of which are set out in paragraph 1.2 of this Schedule 4.

**2.2 Associated assets**

- (a) Land, leases or the right to use land associated with the land on which the dealership sites or other operations of the divestiture business are located or conducted, or assistance with the novation of leases as applicable, as outlined in Confidential Schedule 8

- (b) Supply and distribution arrangements (including dealership Agreements) to which PPT Investments is a party
- (c) Material Contracts (other than supply and distribution arrangements to which PPT Investments is a party)
- (d) Licenses/permits and authorisation necessary to carry on the Kloster Business
- (e) Plant, equipment, machinery, furniture, fixtures and fittings owned by PPT Investments and used in carrying on the Kloster Business
- (f) Goods inventory (including unsold new vehicle stock and parts stock located at each dealership location) owned by PPT Investments
- (g) Sales and marketing material owned by PPT Investments
- (h) Intellectual property rights that are owned by PPT Investments, including the trademarks, registered business names, logos, brands, designs, copyright and rights to use those things, pertaining to each of the relevant dealerships operated at the above-listed sites
- (i) Business records necessary for the Kloster Business
- (j) Agreements, documents, arrangements, undertakings or orders entered into, made or accepted by or on behalf of PPT Investments in the operation of the Kloster Business that are not completed or discharged by performance in ordinary course of business
- (k) Key personnel, including the personnel identified in Confidential Schedule 6 (subject to clauses 5.7 to 5.8)

**Confidential Schedule 5**

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**Confidential Schedule 6**

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**Confidential Schedule 7**

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**Confidential Schedule 8**

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**Confidential Schedule 9**

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