

Authorisation (Non-Merger) Application

Application for authorisation - s 88(1), *Competition and Consumer Act 2010* (Cth) (CCA)

Application for urgent interim authorisation - s 91(2)(d), CCA

Parties to the proposed conduct

1. Applicant

- 1.1 The Applicant is the National Honda Dealer Council Limited (ACN 006 169 769) (**Applicant**).
- 1.2 For the purposes of this Application, a number of Honda dealers are represented by the Applicant, and authorisation is requested on behalf of those dealers.
- 1.3 The details of the dealers on behalf of whom the Applicant makes this application are included with this Application at **Confidential Annexure A (Dealers)**. The Dealers' contact details for the purposes of this Application are the same as those set out in Schedule 1 for the Applicant. It is anticipated that other Honda dealers will wish to become a party to and act under this authorisation.
- 1.4 The Dealers' relevant business activities are:
 - (a) the sale of new and used Honda motor vehicles;
 - (b) vehicle financing arrangements and insurance;
 - (c) pre-delivery and after-sale vehicle servicing and parts;
 - (d) affiliated products;
 - (e) aftermarket products and accessories - tyres, oils, lubricants.

2. Other parties

- 2.1 Honda Australia Pty Ltd (**Honda Australia**) is a party to individual dealer agreements with each of the Dealers. A sample agreement (with dealer details redacted) which is representative of the current dealer terms is included with this Application at **Confidential Annexure B**.
- 2.2 Honda Australia intends to replace those dealer arrangements with a new agency model (**New Model**) whereby dealers would deal with consumers as agents of Honda Australia rather than in their own right.
- 2.3 **[Redacted pursuant to confidentiality claim]**.
- 2.4 While other parties may also be affected in due course by the New Model once it is introduced (noting in this respect that the proposed New Model would allow Honda Australia to require dealers to use certain providers for services such as insurance,

after-market products and oils¹ in lieu of current service providers who have traditionally been selected by each dealer at their discretion and on their own terms, meaning service providers presently used or able to be selected for use by the Dealers are likely to be either directly or indirectly affected by the implementation of the New Model), the conduct in respect of which authorisation is presently sought comprises collective bargaining by the Dealers in relation to their negotiations with Honda Australia, which conduct does not of itself directly affect any other party.

- 2.5 The details of the third party providers to be nominated by Honda Australia are not yet known and accordingly cannot be identified in this Application.

The proposed conduct

3. The conduct proposed to be authorised

Provide a description of the proposed conduct and any documents that detail the terms of the proposed conduct

- 3.1 Honda Australia has indicated an intention to terminate existing dealership arrangements with the Applicants and to replace those arrangements with the New Model. An Outline of Key Terms for that New Model prepared by Honda Australia in March 2020 is included with this Application at **Confidential Annexure C**. The terms on that Outline may change as negotiations progress.
- 3.2 The New Model, as currently proposed, will significantly affect the way in which Honda motor vehicles are sold in Australia and the commercial and legal relationship between Honda Australia and dealers. Of most significance is the termination of existing dealer agreements, rationalisation of the number of dealers, transition to agency arrangements and **[redacted pursuant to confidentiality claim]** the imposition of a single uniform pricing structure for new vehicles across the dealer network.
- 3.3 The Applicants seeks authorisation to discuss and share information about the proposed New Model (including its terms and the proposed transition from the existing arrangements to the new agency agreements) and, to the extent required, to collectively bargain with Honda Australia. To the extent necessary, authorisation is also sought to give effect to any agreements arising from those collective negotiations.
- 3.4 The proposed conduct does **not** extend to:
- (a) agreeing price or other terms on which Dealers currently compete with each other during any transition to the New Model; or
 - (b) agreeing price or other terms on which Dealers would compete with each other if competition between Dealers is able to be preserved
- 3.5 The Applicants also seek authorisation to work together during the period of the authorisation to discuss and share information regarding the terms of the proposed new agency arrangements, including terms and information with respect to:

¹ Honda Australia is currently able to direct dealers as to the suppliers that are to be used for spare parts and that is expected to continue.

- (a) commissions;
 - (b) circumstances in which capital expenditure will be reimbursed and the nature and calculation of that reimbursement;
 - (c) Honda Australia's proposed 'one price everywhere' model for new vehicle pricing;
 - (d) compensation and reimbursement for included services;
 - (e) vehicle servicing arrangements with Honda Australia;
 - (f) arrangements for finance, insurance, oil, aftermarket products, accessories; and
 - (g) territory boundaries.
- 3.6 The information to be shared may include offers made and terms proposed to Dealers regarding:
- (a) commissions;
 - (b) circumstances in which capital expenditure will be reimbursed and the nature and calculation of that reimbursement;
 - (c) Honda Australia's proposed 'one price everywhere' model for new vehicle pricing;
 - (d) compensation and reimbursement for included services;
 - (e) vehicle servicing arrangements with Honda Australia;
 - (f) territory boundaries; and
 - (g) processes for termination and transfers of the Dealers' businesses.
- 3.7 The information to be shared may **not** include:
- (a) personal details of existing Dealer clients and Dealer staff;
 - (b) special terms agreed between individual Dealers and their Dealer clients;
 - (c) special terms agreed with providers of services such as insurance, finance and spare parts;
 - (d) details of existing business plans for the way in which individual Dealers currently compete with each other.
- 3.8 Other than the documents included at Confidential Annexure C, there are no documents for inclusion with this Application which fall into the category of those submitted to the Applicant's board or prepared by or for the Applicant's senior management for purposes of assessing or making a decision in relation to the proposed conduct or any minutes or record of the decision made.

Provide the names of persons, or classes of persons, who may be directly impacted by the proposed conduct (e.g. targets of a proposed collective bargaining arrangement; suppliers or acquirers of the relevant products or services) and detail how or why they might be impacted

- 3.9 The primary party who would be affected by the proposed conduct is Honda Australia. As noted above, third party providers may in due course be affected subject to the outcome of the proposed conduct. In particular in this respect, if the New Model proceeds as currently anticipated and the Dealers' ability to choose a preferred service provider for suppliers of, for instance, insurance or aftermarket products is reduced or removed [redacted pursuant to confidentiality claim], that will have the potential to affect competition in the markets for those services as well.

4. CCA provisions relevant to the conduct proposed to be authorised

- 4.1 If authorisation is not obtained, the conduct identified above risks giving rise to contraventions of Part IV, Division I and/or section 45 of the CCA.

5. Rationale for the conduct proposed to be authorised

- 5.1 The Application seeks authorisation for the proposed conduct because, if the proposed conduct is not authorised, and the Dealers are not able to share information between themselves about their negotiations with Honda Australia, the Dealers will be significantly disadvantaged in those negotiations for the transition to the New Model.
- 5.2 If the New Model proposed by Honda Australia to replace the existing dealership arrangement is adopted in its current form, competition between the existing dealers for new vehicles will be substantially reduced, as all dealers will become agents of Honda Australia.
- 5.3 Some Dealers have serious concerns regarding the potential detrimental impact of the changes which, as currently proposed by the New Model, are anticipated to have a significant impact on the operations, revenue and (in some cases) ongoing viability of their businesses. [redacted pursuant to confidentiality claim]
- 5.4 All Dealers will be affected by the proposed changes and may wish to speak with and join together with other dealers who become Applicants in formulating appropriate contractual terms, negotiating revised arrangements with Honda Australia and managing the transition to the New Model.

6. Terms of authorisation

- 6.1 Authorisation is sought for a period of 11 years from the date of the ACCC's final determination.
- 6.2 The initial agreements under the New Model are intended to operate [redacted pursuant to confidentiality claim] for 5 years, with a potential to renew for another 5 years. The Applicant therefore considers it would be appropriate for the authorisation to remain in force to cover the initial negotiations and any negotiations at the time of the first two renewals, together with time to put into place any arrangements arrived at as a result of any such negotiations. The Applicant notes that the period for which

authorisation is sought may need to be extended at the end of the authorisation period if further renewals are required.

- 6.3 The Applicant acknowledges that s 91B of the CCA permits the ACCC to revoke any authorisation in the event of a material change in circumstances and will advise the ACCC if such circumstances arise.

7. Interim authorisation

- 7.1 Honda Australia has been engaging at a general level in relation to the New Model with the Applicant and the Dealers since the transition to the New Model was publicly announced and, as part of those discussions, has noted that certain topics (being those for which authorisation is sought via this application) should not be discussed collectively by the Dealers without authorisation. Honda Australia is wanting to finalise the transition to the New Model without delay and is therefore requiring prompt responses from the Dealers in relation to the terms of the draft Agency Agreement under the New Model, which was provided to the Dealers in July 2020.
- 7.2 There is a need for the Dealers to act promptly and the Applicant seeks urgent interim authorisation for the proposed conduct in order for the discussions between the Dealers to take place and for the Dealers to negotiate with Honda Australia in relation to the terms of the draft Agency Agreement as soon as possible. **[Redacted pursuant to confidentiality claim].²**
- 7.3 Delays in commencing those negotiations could affect the ongoing relationship of individual dealers with Honda Australia.

8. Persons directly affected by the proposed conduct

- 8.1 The Dealers and Honda Australia will be directly affected by the proposed conduct.
- 8.2 Third party providers may be indirectly affected insofar as the outcome of the proposed conduct, if authorised, may affect their rights and interests as suppliers to the Dealers.
- 8.3 Although the impact of the New Model will affect the broader market and consumers generally, the proposed conduct the subject of this Application (i.e. collective bargaining between the Dealers) will not.

9. Market information

Describe the products and/or services, and the geographic areas, supplied by the applicants. Identify all products and services in which two or more parties to the proposed conduct overlap (compete with each other) or have a vertical relationship (eg supplier-customer).

- 9.1 The products and services are primarily new Honda motor vehicles,³ but also Honda used vehicles, servicing and parts. **[redacted pursuant to confidentiality claim].**

² **[Redacted pursuant to confidentiality claim].**

³ In this context, motor vehicles means cars only and does not include motorbikes, quad bikes, scooters, marine or other vehicles.

- 9.2 Dealers within each State/Territory presently compete with each other for the products and services on price but also on other, less quantifiable factors such as customer service. Whilst competition across jurisdictions (i.e. State/Territory boundaries) is theoretically possible it rarely occurs in practice. **[redacted pursuant to confidentiality claim]**.
- 9.3 Currently, Honda Australia negotiates agreements individually with each Dealer. In addition, each state and territory has a representative council of dealers, each of which nominates one or two state level representatives (depending on the State/Territory) to the Applicant. Honda Australia negotiates and contracts individually with individual dealers in respect of their agency agreements, but will from time to time liaise with the Applicant to seek feedback from the dealer group on certain matters including on occasion matters relevant to the underlying "uniform" structure of the agency agreements.
- 9.4 **[Redacted pursuant to confidentiality claim]**. Honda Australia has explicitly advised the dealers it has offered to transition to the New Model that it will not discuss certain matters collectively, and that it intends to negotiate individually with dealers with respect to the transition to the New Model (unless the authorisation now sought is granted), and the Applicant understands Honda Australia does not intend to oppose the application).
- 9.5 All dealers who are transitioning to the New Model will be welcome to join the group of authorised Dealers if they wish to, and will be contacted and invited to join if they are not already identified as seeking authorisation in Confidential Annexure A to this application (which has been provided to the ACCC on a confidential basis).
- 9.6 **[Redacted pursuant to confidentiality claim]** The expectation is that if authorisation is granted, the Dealers will feed their concerns and views in relation to the Agency Agreement back to one or more subcommittees of the Applicant, and the Applicant will represent the Dealers in any collective bargaining with Honda Australia. Individual dealers will then enter into individual agreements with Honda Australia which may include terms in respect of which agreement is reached as a result of collective negotiations.
- 9.7 The Applicant itself will not enter into any binding agreements with Honda Australia but will simply assist and support the Dealers to discuss the New Model between themselves, and will be able to represent the authorised Dealers in any collective negotiations with Honda Australia. It is anticipated that the impact of the New Model on country dealers may be slightly more significant than for metro dealers, but that the overall impact on the various dealers is expected to be sufficiently similar that it would not be necessary to establish smaller subgroups to separately negotiate with Honda Australia and that one representative group will be appropriate.
- 9.8 The territories under the New Model are not yet finalised but will cover the whole of Australia including Tasmania.
- 9.9 The relevant industry is automotive sales and servicing. All vehicles and parts will be imported and supplied by Honda Australia to the Dealers. It is also presently expected

that Honda Australia will direct the Dealers as to the suppliers they are to use for insurance, consumables such as aftermarket products, and oils.⁴

In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available.

9.10 **[Redacted pursuant to confidentiality claim].**

Honda Australia has declared publicly that its sales and market share is expected to halve after implementation of the New Model.⁵

9.11 *The factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously are discussed below:*

- (a) *existing competitors* - Honda Australia competes with virtually all other motor vehicle brands in Australia (excluding heavy and light commercial). **[Redacted pursuant to confidentiality claim].**
- (b) *likely entry by new competitors* - the Australian market is already highly competitive with a large number of brands represented. However, with the development of global Electric Vehicle platforms, other brands are likely to enter the market as new electric models are launched.
- (c) *any countervailing power of customers and/or suppliers* - Honda Australia has all the information and all the bargaining power in the current situation. The proposed conduct (collective discussions and bargaining) simply allows dealers to present a united front and therefore alleviate some of the detriment which would otherwise arise from the power imbalance.
- (d) *any other relevant factors* - while the overall Australian motor vehicle market is highly competitive, the arrangements under the New Model will reduce the ability of Honda dealers to make autonomous decisions regarding their operations and thereby reduce competition between those dealers. This has the potential to impact consumers seeking to purchase Honda motor vehicles. For example, there will be fixed pricing for new vehicles across all Honda Australia dealers, meaning competition in terms of pricing for new vehicles will be significantly reduced or removed entirely.

10. Public Benefits

Describe the benefits to the public that are likely to result from the proposed conduct. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.

10.1 The competitive dynamics of the relevant markets (being the Australian Honda dealer market, and the Australian automotive market) will change as a result of the New Model

⁴ **[Redacted pursuant to confidentiality claim]**

⁵ This has been publicly reported in a number of articles, including: <https://www.caradvice.com.au/837331/honda-to-adopt-fixed-prices-will-scale-back-the-number-of-showrooms-in-2021/>; <https://www.goauto.com.au/news/honda/honda-culls-dealers-models/2020-03-24/82113.html>; <https://www.carsguide.com.au/car-news/is-honda-about-to-revolutionise-the-way-we-buy-cars-78504>; <https://www.carsales.com.au/editorial/details/honda-axes-jazz-confirms-restructure-of-australian-operations-123492/>

regardless of whether authorisation (interim or otherwise) is granted as Honda Australia intends to introduce the New Model in some form in any event, but arrangements under the New Model as presently proposed will reduce competition between the Dealers (especially on price for new vehicles), and authorising joint discussions and collective bargaining means there is some chance of the Dealers being able to negotiate terms with Honda Australia which preserve more autonomy and a greater ability to compete at the dealer level. Without those discussions being authorised to take place, Dealers who are taken on as agents under the New Model as presently proposed are likely to only be able to compete in insignificant ways and with respect to minor matters such as accessories or some adjustments to trade-ins, or on less tangible factors such as customer service - the service otherwise being offered to customers via those Dealers as agents of Honda Australia will be largely homogenous and as directed by Honda Australia.

- 10.2 In addition, **[redacted pursuant to confidentiality claim]**, allowing collective bargaining prevents Honda Australia from being the only party in possession of all the respective trading terms and market information. Dealers will be prejudiced if they are excluded from that information and are unable to ascertain the terms negotiated with other Dealers.
- 10.3 The public benefits which will or are likely to arise from the proposed conduct include:
- (a) Increased competition between Dealers -
 - (i) by using collective bargaining to obtain more beneficial terms, the Dealers will be in a stronger position and better able to compete more vigorously under the New Model. This is likely to result in cost savings and more advantageous terms for consumers. There is less scope for this to occur if competition between the Dealers is reduced;
 - (b) Transaction cost savings and efficiencies -
 - (i) collective bargaining between the Dealers will reduce the costs of negotiating the new agreements relative to the costs of undertaking a series of separate individual negotiations;
 - (ii) the Dealers will also be able to share the costs of obtaining legal and other professional advice in relation to the proposed new model. This is particularly important given Honda Australia has instituted these negotiations but is requiring the Dealers to bear their own costs associated with the transition to the new arrangements;
 - (iii) the proposed conduct can also be expected to result in contract terms which better reflect the Dealers' circumstances and are therefore more likely to deliver improved incentives for efficiency and innovation.
 - (c) Decreased risk of monopoly conduct -
 - (i) the effect of the new model as presently proposed will be that all Dealers will have their existing dealerships terminated and become agents of Honda Australia. **[redacted pursuant to confidentiality claim]**. As noted above, Honda Australia will introduce the New Model

in some form regardless of whether the authorisation is granted, but authorisation (including interim authorisation) is sought as it is considered that is the most likely way in which the Dealers may be able to negotiate to retain greater autonomy in decision making [redacted pursuant to confidentiality claim]. Whilst the outcome of any collective bargaining cannot be known ahead of time, authorising discussions between the Dealers and collective bargaining with Honda Australia will put the Dealers in a stronger position as a result of that conduct and it can therefore be expected that those Dealers are more likely to retain a greater ability to independently compete in a meaningful way in the market for Honda products and services in Australia after the transition to the New Model. [redacted pursuant to confidentiality claim].

- (d) Reduction of information asymmetry -
 - (i) the Dealers have significantly less information and therefore bargaining power compared to Honda Australia.
 - (ii) joint discussions and collective bargaining will allow the Dealers to have a greater level of input into the contracts with Honda and the structure of the new business model.
- (e) Improved relationships and communication -
 - (i) collective bargaining will streamline the negotiation process between the Dealers and Honda and facilitate the sharing of information arising from those negotiations.
- (f) Equalisation of bargaining power -
 - (i) individual Dealers have virtually no bargaining power in the current situation. They are unaware of the terms offered to other Dealers and are unable to discuss the status of negotiations with those Dealers. Honda Australia is not prepared to provide certain information to Dealers or to discuss issues jointly with Dealers on the basis that Australian competition law precludes those steps being taken.
 - (ii) dealers face a risk of the value built up in their dealerships being adversely affected under the New Model and, for some dealers, their operations under the New Model may become unviable. Without knowledge of the position of other Dealers and an ability to formulate and submit alternative terms on a collective basis, those Dealers are more likely to suffer prejudice and financial detriment.

11. Public Detriment

Describe any detriments to the public likely to result from the proposed conduct, including those likely to result from any lessening of competition. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the detriments

- 11.1 It is submitted there is no public detriment likely to result from the proposed conduct.
- 11.2 Collective bargaining means that it is likely that the deal done between each Dealer and Honda Australia will be on very similar terms. In other situations, it might be argued that that reduces the prospects of the Dealers competing between themselves. However, in the current situation, the new agency arrangements will have that effect in any event. Accordingly, the Applicant submits that there is no actual detriment (and only likely benefit, as set out above at 10.3) by allowing the Dealers to speak with each other and to collectively bargain with Honda Australia.
- 11.3 In the Australian motor vehicle market, Honda Australia does not have a significant share and, to the extent any public detriment could be said to arise, its impact would be minimal.
- 11.4 The potential public detriment is also mitigated by:
- (a) restrictions on information that can be shared;
 - (b) the proposed conduct being voluntary (noting that if authorisation is granted, no Dealer will be compelled to engage in the conduct);
 - (c) the limited scope of the authorisation;
 - (d) the minimal public impact of the proposed conduct.

12. Contact details of relevant market participants

- 12.1 Honda Australia can be contacted at:

[redacted pursuant to confidentiality claim]

- 12.2 As the national dealer representative, the Australian Automotive Dealer Association (AADA) may have an interest in this Application. AADA can be contacted at:

[redacted pursuant to confidentiality claim]

- 12.3 Current insurers and consumable suppliers who Dealers use now but who may be excluded if Honda Australia dictates arrangements in the future may also have an interest in this Application.

13. Confidentiality

- 13.1 Details of the specific existing contractual terms as between individual Dealers and Honda Australia are confidential and disclosure would be highly prejudicial to the commercial interests of the Dealers and Honda Australia.
- 13.2 Details of the proposed contractual terms between Dealers and Honda Australia under the New Model would also be highly prejudicial to the commercial interests of the Dealers and Honda Australia.
- 13.3 Details of the Dealers in Confidential Annexure A to the Application are highly confidential. The disclosure of those details will disclose the identity of the dealers who

are expected to continue in the New Model and (by omission) the dealers who will be terminated. This will be highly prejudicial to the businesses of the terminating dealers during the period prior to termination and damage the Honda brand more generally which will, in turn, be prejudicial to all dealers (and Honda Australia itself). The identity of the Applicant (National Honda Dealer Council) and the fact that the Application is made on behalf of a number of Honda dealers is still able to be disclosed.

14. Additional information

- 14.1 The New Model has been the subject of media publicity - <https://www.news.com.au/technology/innovation/motoring/motoring-news/honda-australia-announces-devastating-changes/news-story/2cee5f14c5e55d50900d1c66fa9f3b11>
- 14.2 It is anticipated that other motor vehicle manufacturers may wish to introduce similar proposals in the future. For example, Mercedes Benz has announced it proposes to move to an agency model in January 2022. It is important that the negotiations in this matter are handled in a fair, reasonable and commercial manner as they have the potential to create a precedent for future negotiations between dealers and manufacturers.

CONFIDENTIAL ANNEXURE A

[redacted pursuant to confidentiality claim]

CONFIDENTIAL ANNEXURE B

[redacted pursuant to confidentiality claim]

CONFIDENTIAL ANNEXURE C

[redacted pursuant to confidentiality claim]

CONFIDENTIAL ANNEXURE D

[redacted pursuant to confidentiality claim]

CONFIDENTIAL ANNEXURE E

[redacted pursuant to confidentiality claim]

Declaration by Applicant(s)

Authorised persons of the applicant(s) must complete the following declaration. Where there are multiple applicants, a separate declaration should be completed by each applicant.

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).


Signature of authorised person

DIRECTOR - NATIONAL HONDA DEALER COUNCIL
Office held

AARON HILLAR PUVI
(Print) Name of authorised person

21st day of August 2020
This [insert day] day of [insert month] [insert year]

Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.