Motor Trades Association of Australia

General Manager
Small Business and Deregulation Branch
Department of Innovation, Industry, Science and Research
GPO Box 9839
CANBERRA ACT 2601

Via email: smallbusiness@innovation.gov.au

Dear Mr Holley

I am writing on behalf of the Motor Trades Association of Australia (MTAA). MTAA is a federation of the various State and territory motor trades associations and automobile chambers of commerce. MTAA represents the interests of around 100,000 retail motor trades businesses, employing over 310,000 people, in a sector of the economy with an aggregated turnover in the order of $160 billion per annum. The retail motor trades represent the largest small business sector of the Australian economy.

The recent Government publication, '*Resolution of Small Business Dispute'* option paper outlines four options to be considered with regard to " . . . *affordable and accessible dispute resolution options that have the potential to directly benefit those small businesses that would otherwise not pursue dispute resolution for fear of cost or being unaware of the appropriate service*." The following provides comment on those options and also draws attention to other significant elements that have direct impact on a small businesses decision to engage in dispute resolution at its various levels.

One noticeable characteristic of the retail motor trades is the high level of franchising that occurs broadly in the sector. This is particularly pertinent in the new vehicle sales sector, where virtually every retailer will be a franchised business. A typical, mid-sized, metropolitan motor vehicle dealership might be characterised as follows[1]:

- it will represent a capital investment in the region of anywhere between $5 million to $13 million;
- it will have an annual turnover in the region of $88 million to $100 million;
- it will generally employ at least 60 people;
- its gross profit before tax will be in the order of 2.5 to 3 per cent, and;
- it will only 'break even' as an operation on 25 days out of every 30.

Despite figures of that magnitude, the overwhelming majority of new motor vehicle dealerships are essentially small family businesses.

[1] Delloite Dealership Benchmarks 2011. www.delloite.com.au

Dealership agreements are increasingly appearing as merely perfunctory. Many of these Dealer Agreements refer to major operations manuals which can detail matters such as warranty claim procedures, marketing commitments, dealership design requirements and many other matters of significance to dealership operations. While any agreement will invariably be compliant with the relative provisions of the Franchising Code of Conduct and the *Competition and Consumer Act*, the presence of these operations manuals can be construed in a manner that may not be entirely consistent with those legislative and regulatory provisions, their intent or object.

MTAA notes the attention given in the Discussion Paper to Oilcode and its dispute resolution framework. MTAA has – we believe for good reason – been critical in the past of that framework.

In the retail petroleum sector, franchisees, commission agents, lessees and independents (where leasing from third parties), cannot be classified as anything other than small businesses and, therefore, are entitled to the same opportunities as business operators in other sectors. Section 13 of the (repealed) *Petroleum Retail Marketing Franchise Act* (Cth) *1980* (PRMF Act) offered some security of tenure for fuel retailers through prescribing fuel reseller agreement terms. Oilcode, while also offering some specifics in that regard, nevertheless contains qualifiers and other conditions, which a supplier may use to its advantage.

As such, under Oilcode, no real certainty in terms of security of tenure exists for site operators (excluding, unavoidably, any reasons applicable under Division 4 of Oilcode). In MTAA's view clause 32 (11) (c) of Oilcode provides a 'loophole' that is currently being manipulated or exploited by supplier / franchisors on some occasions and which is effectively eroding the minimum tenure period that was promised to service station operators during the development of, and by, the Code. These are factors that are of significance in another context when matters of dispute are considered; not just with the petrol retailing space, but in the retail motor trades generally.

Anecdotal, but reliable, reports from MTAA Members, taken in combination with its own observations, lead the Association to have some concerns regarding the model employed for the resolution of disputes between parties to a fuel reselling agreement under Oilcode. Under section 29 (6) of the Franchising Code of Conduct, parties to a dispute *must* attend mediation (if dispute mediation has been requested) and make efforts to resolve the dispute.

By contrast and contradiction, under Oilcode, no such compulsion is placed upon parties to a dispute to undergo mediation. It is, therefore, not binding on a supplier to participate in dispute resolution under Oilcode. It needs to be.

For example, the Association is aware of one dispute where the mediation was attended by a supplier representative who clearly had no authority to make decisions on behalf of the supplier. This was tactically and deliberately done. This situation introduced unnecessary delay (and, therefore, cost) into the mediation process. MTAA believes, therefore, that mediation of disputes must require attendance by representatives of the parties involved who have the clear and declared authority to make decisions and commitments in and on the matter.

Presently, where a dispute has been mediated and a ruling of the Dispute Resolution Adviser on the dispute (on the advice of the Mediator) has been made, that ruling is not binding on the parties. Instead, the ruling is declared, by Oilcode, to be a 'non-binding determination' (section 45 (6)). It is MTAA's belief that a determination with this status places no enforceable requirement upon a party to a dispute, found to be 'at fault', to make any remedy.

When that is taken in connection with section 46 of Oilcode (or, at the very least, that section's import), it is MTAA's understanding that no element of an Oilcode dispute mediation – including a non-binding determination - may be admissible as evidence or, indeed, so much as submitted as persuasive, in the event of a dispute progressing beyond mediation and being placed before any assembly, tribunal or the courts. The Association therefore believes that the dispute resolution arrangements of Oilcode need to be reviewed with the end objective of Oilcode incorporating procedures and rules that can impose binding, enforceable decisions on parties.

While MTAA welcomes the Government's recent signal to adopt the recommendations of the Oilcode review with respect to Section 44 of Oilcode, it nevertheless considers the balance of the recommendations in that regard to fall well short of ideal.

The above examples provide added context to matters of dispute within the petroleum and new car sectors specifically and retail motor trades more broadly. If there was an 'elephant in the room', it is the disproportionate balance of power between retailers and their suppliers / franchisors in favour of suppliers / franchisors.

It needs to be noted that many retail motor traders – particularly those that are members of their respective state or territory motor trades association or automobile chamber of commerce – will be well informed as to the mechanisms they might access in order to seek dispute resolution. The ever recurring reality, however, is often their reluctance to pursue those paths to an ultimate destination for fear of repercussions. In some instances, MTAA has witnessed from some proximity actions that make these fears more than reasonably held.

As a final comment on the issue of imbalanced power relationships between retailers and their suppliers / franchisors, MTAA would wish to note the references to the various industry codes mentioned in the Discussion Paper and, more particularly, the Motor Vehicle Insurance and Repair Industry Code of Conduct.

The Motor Vehicle Insurance and Repair Industry Code of Conduct has been in operation since 1st September 2006. The Code is voluntary in all States and Territories of Australia, other than New South Wales where it is mandatory. Over 2,000 smash repairers are signatories to the Code. Twenty-three insurance companies, representing most major participants in motor vehicle insurance, are also signatories to the Code. MTAA has been a promoter of that Code and adheres to the view that it should be mandatory in all jurisdictions.

It would be a fair assessment to make, however, on the basis of reliable yet anecdotal reports from MTAA Members, that the operation of that Code – even in New South Wales– has had a less than satisfactory affect on addressing disproportionate balance of power issues in the collision repair sector of the retail motor trades. The threat of repercussion – perceived or otherwise – is nevertheless a reality to the many motor body repairers who indicate to their member bodies the prospects for dispute resolution, yet invariably take no action after consideration of the available options.

It is largely on that basis, then, that MTAA would not support options one or two as outlined in the discussion paper. MTAA's contention is that those options do not represent any major difference to the existing available avenues of dispute resolution for retail motor traders, nor do they represent any form of mechanism that might address the more significant reasons for the non-pursuit of remedies for dispute resolution.

Of the remaining options, MTAA considers both to have merit, particularly in terms of the potential to bring redress to matters of imbalanced power relationships. Indeed, MTAA has long advocated for the establishment of an independent and adequately resourced Small Business Advocate, who would be appointed to provide a voice for small business from within the Government.

MTAA considers that a Small Business Advocate would be able to communicate the needs of small business to the government and comment on government policy without being constrained by political interest. MTAA notes, however, that the Advocate would need to be adequately resourced to fulfil those roles. MTAA would, therefore, indicate its preference for Option 4 as outlined in the Discussion Paper.

The MTAA National Secretariat also notes that it's Member Bodies in the Victorian Automobile Chamber of Commerce and the Motor Trades Association of Queensland, and its colleague body in the form of the New South Wales based Service Station Association, have also submitted comments on the Discussion Paper. MTAA fully supports and endorses those submissions and the points and arguments raised therein.

I trust you find these comments of use to the Minister and the Government in its consideration of the matters and options raised in the Discussion Paper. If there is any further information you require, or if there is any further assistance you think I may be able to provide you, please contact me.

Yours sincerely

Richard Dudley
Executive Director
29 June 2011