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The Treasury
Langton Crescent
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Attn: Michael Azize
Via email: franchisingcode@treasury.gov.au

Re: Amendments to the Franchising Code and the Competition and Consumer Act

Dear Mr Azize,

Thank you for the opportunity to provide input in relation to Amendments to the Franchising Code and the Competition and Consumer Act. This submission is an extension of the comments made by representatives of the Federation during consultations and hearings conducted during the Wein Review during 2013.

The Australian Motor Industry Federation (AMIF) is the pre-eminent body representing the interests of over 100,000 retail motor trades businesses which employ over 310,000 people and have an aggregated annual turnover in excess of \$208 billion; these figures, combined with the industries scope and size, makes the retail motor trades the largest small business sector in Australia. The Federation's membership consists of the automobile chambers of commerce and the overwhelming majority of state and territory motor trades associations, and it is these Members, members which impacted by the Franchising Code.

AMIF's Position:

AMIF remains supportive in principle of the two sets of Amendments as proposed. It is clear that the Amended Franchising Code can be considered as an 'evolution' of that currently existed and that it makes concerted efforts to address a number of AMIF's broad concerns; particularly in terms of the acknowledged imbalance in power relationship that can exist between franchisor and franchisee. In particular, AMIF welcomes; the introduction of financial penalties for certain breaches of the Code (especially around end-of-term arrangements); the (conditional) prohibition on unforeseen capital expenditure; improved disclosure of the online trading of franchisors; and, the introduction into the Code of 'good faith'. It is also those same specific areas, however, where AMIF believes there may be opportunities for further refinement as discussed in this submission.

AMIF continues to stress, that there remain significant issues associated with new car retailing and requests that the intent of Recommendation 16 of the Wein Review not be lost. AMIF formally requests the suggested further investigations of issues relating to new car retailing as outlined in recommendation 16 be included in work plans within government for the 2014/2015 planning cycle. AMIF remains ready and, indeed, keen to provide whatever assistance and facilitation around that work plan, or associated activity.

Discussion:

As Treasury will be aware, AMIF (and its predecessor organisation) has a long history of deep interest and involvement in franchising matters and franchising policy development. This is understandable given the significant incidence of franchising among the membership of AMIF's Member Bodies. AMIF's interest in this area is further sharpened by the unique characteristics of the operation of franchising among retail motor traders, which are clearly distinguishable from normal 'generic' retailing, or service provision. This distinction is particularly evident when attention is given to the operational characteristics of new motor vehicle dealerships.

AMIF is well placed, therefore, to provide Treasury with comments on the proposed Amendments to both the Franchising Code (the Code) and the *Competition and Consumer Act (Cth) 2010*.

AMIF notes Treasury's request that comments be focussed on the, ". . . *technical aspects of implementing the law*" and that there is, ". . . *no intention for this (consultation process) to reconsider the policy underpinning . . .*" That context is accepted by AMIF in recognition of the level of consultation that has been recently conducted in the lead up, and subsequent to, Mr Alan Wein's Review of the Code in 2013.

AMIF might suggest, however, that the technical aspects of a law's adoption, or operation, often precipitate policy considerations. AMIF would also suggest that in order for a government's policy intent to be realised, the nature of a law's adoption or operation needs to be considered. This is to further suggest that there remains, nevertheless, something of a symbiotic relationship, or nexus, between a law's adoption and policy. While AMIF might agree that this current process ought not be read as an opportunity to open new policy 'fronts' in the area of franchising, it nevertheless considers the space of that 'nexus' is one in which comments can be made.

Financial Penalties

It is conceded by AMIF that, in a good number of circumstances, a penalty of 300 Penalty Units (\$51,000-00) is significant. In terms of many of the operations involved in the retail motor trades, though, it is not. This is certainly the case if consideration is turned to the activity of new motor vehicle retailing and the respective financial 'might' of vehicle manufacturers compared to that of motor vehicle dealers.

Motor vehicle dealerships are typically high-level investment operations (investments in the tens of millions of dollars are not uncommon). Those operations are also characteristically high-turnover / low margin in nature. A typical, mid-sized, metropolitan vehicle dealership may have an annual turnover in the region of \$80 – 100 million dollars, but its profit before tax might only be in the region of 1.4 – 2.0 per cent. Compare these metrics with a certain European vehicle manufacturer that is known (by reliable anecdote) to spend, on research and development alone, Euros 1 million *every day*.

A breach of the Code, such as those attracting a penalty, through the operation of an agreement can have a highly deleterious impact upon a dealer to the point of threatening their very viability. AMIF might reasonably ponder if 300 Penalty Units is sufficient dissuasion for a franchisor possessed of comparatively unlimited financial resources to entertain strategic breach of the Code in order to obtain a specific business objective. While it might be argued that any behaviour of that sort could fall into the ambit of the operation of the proposed Clause 7 (Good Faith), it is also noted that transgression of that Clause carries the same quantum of penalty (300 Penalty Units).

Given that penalties are established at common law as being ‘maximums’, AMIF would ask that consideration be given to substantially increasing the potential quantum for breaches of the Code, with the potential also provided for those penalties to be applied for each instance.¹

Capital Expenditure

The issue of unforeseen capital expenditure being thrust onto a franchisee has been one of contention for AMIF for some time. Hence why the prohibition – albeit conditional – upon its occurrence is welcomed by AMIF with the Code’s Amendments. AMIF has concerns, however, that through the operation of Clause 31 (2) (e) that prohibition might be easily circumvented by some franchisors. Indeed, AMIF is aware of circumstances in which franchisors have already framed the need for capital expenditure – sometimes running into the millions of dollars – in terms not dissimilar to that Clause. AMIF would also suggest that Clause 31 (2) (e) stands to defeat the policy intent of Clause 31 more broadly and, thus, would suggest that 31 (2) (e) be deleted in its entirety.

Disclosure of Online Trading

It is to the awareness of AMIF that many franchise agreements, particularly in the vehicle sales space, already contemner the prospect of the franchisor reserving their rights to ‘market direct’ in any way it sees fit. In some instances, this has recently included online trading in a manner akin to being ‘direct to consumers’.

It would be AMIF’s assertion that, in many instances, the fundamentals sought to be achieved by the operation of the proposed Annexure I, Clause 12 are often met within existing agreements. AMIF might make the comment that the principle effect of that Clause will be to simply bring into greater awareness, to franchisees, the activity of some franchisors in the online space. It is not entirely clear to AMIF if the policy intent of that Clause was to somehow mitigate the increase of franchisor behaviour of that nature, but AMIF would suggest it to have potentially little impact in the retail motor trades environment.

This area is of particular importance and one that would be worth of further investigation as part of the proposed examination of the new car retail environment as mooted in Recommendation 16 of the Wein Review. AMIF stresses that Recommendation 16 remains an important outcome and remaining worthy of action in its own right as opposed to being buried in a wider, more complex, examination of broader competition policy issues.

Good Faith

As Treasury would be well aware from its engagement with AMIF in connection with franchising reform, advocacy for the introduction of the concept of good faith into the Code has been something of a perennial activity. Treasury would also be aware that the thrust of AMIF’s advocacy in that regard was for ‘good faith’ to not necessarily be defined *per se* but, rather, that it be conceptualised in the same manner as ‘unconscionable conduct’ (through S21 / 22) has been in the *Competition and Consumer Act (Cth) 2010* via a set of ‘interpretative principles’.

AMIF acknowledges that there already exists, at common law, the legal principle of ‘good faith’ when matters of business contract law are judicially considered. It remains AMIF’s understanding, however, that those principles are yet to be given clear enunciation within those judicial fora.

¹ That is, if the breach occurred across an entire dealer group, the penalty can be aggregated for each instance (that is, for each dealer that was subject to said breach).

To that end, AMIF is of mixed views regarding the expressions given around good faith in Clause 7. While noting that the obligation imposed by the common law cannot be excluded, AMIF might still consider that Clause 7 falls short of meeting its desired objective. Neither AMIF, nor its members, have any desire to see the operation of good faith left to interpretation via iterative process at common law while before the courts.

The suggestion AMIF makes, therefore, is to for Treasury to consider what mechanisms might be available to allow Clause 7 of the Amended Code to effectively 'point' to the unconscionable conduct provisions of the *Competition and Consumer Act (Cth) 2010* (as the underlying judicial considerations are not dissimilar), or that the Clause be rewritten to better 'capture' the spirit and intent of the aforementioned s21 and s22 of that Act.

Conclusion

Taken as a whole, the proposed Amendments to the Franchising Code and the *Competition and Consumer Act (Cth) 2010* do seem to represent a sensible evolution to the policy settings around franchising to AMIF. As a mechanism that needs to adapt and change to suit rapidly changing market behaviour and the ongoing changes in the balance of the power relationships between franchisor and franchisee, the Code has needed to undergo change. AMIF supports these most recent changes, albeit in principle in recognition of the comments contained in this submission.

If there are any further questions or you would like further clarification on the points raised within this submission, please contact Mr Richard Dudley, CEO of AMIF at richardd@amif.com.au or Mr Colin Duckworth, Director Policy at colind@amif.com.au .

Yours sincerely



Richard Dudley
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