



Small and Family Business Division

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Dear Franchising Task Force, Small and Family Business Division

The Motor Trades Association of Australia Limited (MTAA) appreciates the work of the Treasury Department, Small and Family Business Division, for the vital discussion paper to further explore the potential for an Automotive Code of Conduct, related matters, and the opportunity to provide a submission.

The discussion paper follows the enactment of the most significant regulatory reforms to Franchising in two decades. The changes to the Franchising Code of Conduct and the addition of Part 5 specific to new car dealers have addressed many longstanding and outstanding concerns of many automotive industries. MTAA is also aware of the significant contributions and works in developing complementary policy and regulation, including the class exemption for collective bargaining, upcoming changes to Unfair Contract Terms (UCT) and a revised and more meaningful Franchising Code penalty regime.

The following Submission provides MTAA Member and constituent input into the discussion on whether there remains a need for a standalone automotive code and potential for further enhancements in dispute resolution, pre-contractual negotiation and arbitration and other related matters.

However, the single most crucial outcome for MTAA, Members and constituents now is to address the inclusion of other automotive industry franchisees. This anomaly is where motorcycle, truck, heavy vehicles, and agricultural machinery franchisee dealers are appropriately recognised and included in automotive dealer specific reforms already enacted. Much of the following Submission reflects this priority.

MTAA is a unique peak not-for-profit automotive sector organisation with the State and Territory Motor Trades Associations and Automotive Chambers of Commerce as Members. MTAA Member organisations serve thousands of automotive businesses constituents representing the entire automotive supply chain providing unparalleled capacity to consider and address policy and regulation across discrete automotive industries. The attached Submission should be considered alongside any provided individually by MTAA Members.

Don't hesitate to contact Mr Richard Dudley, CEO MTAA, if the Treasury team requires further information or clarity regarding this Submission at richard.dudley@mtaa.com.au or 0412146828.

Yours Sincerely,

Richard Dudley

Chief Executive Officer

Motor Trades Association of Australia Limited



MTAA Submission Automotive Franchising Discussion Paper

September 2021



August / September 2021



1. Executive Summary and MTAA critical responses

A. Option 1: Amend the Franchising Code and its automotive-specific provisions when required – Supported

- The Motor Trades Association of Australia Limited (MTAA) and State and Territory Association Members do not believe there is a requirement for a specific standalone automotive code of conduct at this time.
- MTAA believes the volume, scope and targeting of enacted reforms, combined with companion legislation and regulations to be introduced before the end of 2021, will likely address the majority of issues raised over the past two decades and highlighted in Government inquiries and investigations.
- MTAA believes the reformed Franchising Code, including Part 5 specific to car dealers and the government machinery processes underpinning it, now provides the capacity to address unintended consequences or a failure of existing remedies and reforms primarily by an amendment in a far more timely manner.
- **Therefore, MTAA supports Option 1 as outlined in the discussion paper to ‘Amend the Franchising Code and its automotive-specific provisions when required.’**

B. Option 2: Establish a standalone automotive franchising code – right to pursue reserved

- However, and as a graduated response, if there are significant failures in reforms and remedies or other substantial matters, including unforeseen conduct or behaviours, the Federation and Members reserve the right to call for a specific automotive code or other legislated solutions. MTAA anticipates any need to exercise this right will establish as part of the input to scheduled reviews into the effectiveness of reforms over the next several years.

C. Are provisions needed to cover other vehicle types? Yes and urgently

- With the previous point in mind, what is required immediately, is the complete integration and inclusion in Part 5 of the Franchising Code of motorcycle, commercial and heavy vehicle (truck) and agricultural machinery franchise dealers/agents. MTAA believes the inclusion of these franchises can be accommodated without the need for a standalone code, by definition inclusions and nuanced provisions in Part 5 and, where applicable, the broader Franchising Code.



- Since the release of the discussion paper, it has come to MTAA and Member's attention that some car manufacturer franchisors appear to be offering separate standalone agreements for vehicle sale, service and repair, and parts supply. Some constituents have suggested the break up of formally 'whole of relationship' agreements may be an attempt to dilute the intent of recent provisions designed to guard against detrimental power imbalances. MTAA believes appropriate clarification similar to that provided for 'agent' type agreements would address this concern. Irrespective, MTAA suggests increased clarity in existing provisions of the Franchising Code, and Part 5, specifically regarding vehicle service, repairs, and parts, is required.

D. Options for arbitration, pre-contractual arbitration and enhanced dispute resolution - Options 1 and 3 supported

- MTAA believes good faith industry negotiations to determine and implement voluntary binding arbitration, pre-contractual arbitration, and enhanced dispute resolution processes can be achieved through a combination of options 1 and 3, as presented in the discussion paper.

2. Recommendations

1. Immediate integration and inclusion in Part 5 of the Franchising Code of motorcycle, commercial and heavy vehicle (truck) and agricultural machinery franchise dealers/agents who operate under a franchisee/agent agreement.
2. Inclusion of provisions to clarify multiple individual agreements to cater to the vehicle sale, service, repair, parts etc., will all be treated as agreements under the Franchising Code, including Part 5 and subject to the compliance requirements.
3. The reforms of 2020/21 are allowed time to mature and for objective monitoring of effectiveness to be undertaken and guide any future refinements within the next three years.
4. Keep open the potential for a standalone code or enabling legislation in the event of reforms or industry code failure or the emergence of other conduct detrimental to Australian automotive, small business dealers and consumers.
5. The government facilitates additional work on developing pre-contractual dispute arbitration and industry-led voluntary binding arbitration as an additional step in dispute resolution processes for the earliest implementation.



Automotive Franchising and MTAA context

A. MTAA supports a graduated approach to government intervention in balancing the competing needs for red tape reduction, but government intervention when necessary.

- MTAA advocates in many forums that Governments should avoid the temptation to over-regulate trade and industry and restrict its involvement to matters involving fair competition and consumer protection. These representations echo bipartisan approaches to red tape reduction and smaller governments over several parliaments.
- However, global industry consolidation, automation, and technology application, among many influences, created market distortions detrimental to more minor market participants. The latter point has seen the Federation Increasingly call for government intervention through legislation and regulation when other graduated attempts at resolving market failures or small business and consumer detriment have failed.
- For example, the recent mandate of motor vehicle service and repair information provision became necessary when voluntary attempts to address consumer choice and small business competition with powerful information providers failed.
- Another example is current representations to urgently mandate the Motor Vehicle Insurance and Repair Industry Code of Conduct because, in the opinion of MTAA, the voluntary approach has failed.
- In automotive Franchising, including new car, motorcycle, truck and agricultural machinery dealers and fuel retailing, MTAA and members have advocated for stronger franchisee protections since before the enactment of the Franchising Code of Conduct in 1998.
- More than two decades of advocacy and representations have culminated in the past 18 months with arguably the most decisive set of responses to critical automotive franchising concerns following comprehensive departmental, regulator and Parliamentary investigations into Franchising and the impacts of the exit of General Motors Holden (GMH) from the Australasian market.
- The inquiries and investigations have finally proven the nature and significance of the automotive industry power imbalances, the detriment caused to consumers and other market participants, the failure of voluntary approaches and the appropriate scope of potential government intervention through the reforms provided.



B. MTAA history in franchising reform and origins of a call for an 'Automotive Code'

- Franchising improvements has been a central advocacy platform of MTAA since its inception in 1988. Following only two years of representations on small business fair trading, the Federation was appointed as an inaugural member of a National Franchising Task Force by the government of the day in 1990. This appointment marked the start of a long, arduous, and continuing effort to improve regulation and conduct in the franchising sector for automotive participants and more generally.
- In **APPENDIX 1** to this Submission, MTAA and Members considerable exposure and experience in Franchising laws and regulation reform over more than two decades are detailed. Experience and wisdom gleaned from this exposure provide MTAA and its Members a rare and unique perspective on legislative and regulatory limitations, the intersect of what the Commonwealth and jurisdictions can and cannot do, and the need to continue to search for acceptable solutions with these constraints in mind.
- Incremental changes have been secured over time with each franchising review, investigation and inquiry and each was welcomed. However, the changes were understandably designed for the entire franchise sector, not explicitly addressing the power imbalances peculiar to motor vehicle franchisor relationships. As a result, dealer constituents, be they car, motorcycle, truck or farm machinery, along with MTAA and its Members frustrations compounded as examples of poor conduct and behaviour by some automotive franchisors grew.
- The great difficulty has always been the ability to present unequivocal evidence necessary to convince legislators and regulators of power imbalance detriments and poor conduct. It was always challenging to support generalised evidence with specific case study testimony with an overriding fear of retribution by automotive industry franchisees, who had all personal and family wealth and wellbeing invested in the business. These fears are genuine, and there are examples of detrimental conduct to franchisees who took the risk of speaking out. In recent inquiries and investigations, exasperation and anger replaced fear with many dealers coming forward to provide evidence and testimony irrespective of retribution because, as some dealers said, 'there was nothing left to lose'.
- These frustrations materialised into a united call for the development and implementation of a standalone automotive code. If progressive changes to the Franchising Code could not deliver the required outcomes for automotive franchisees, then a standalone code would. The call became MTAA's position cognisant of a reluctance to create and administer additional codes and numerous conclusions that the franchise sector should maintain a single code.



- From MTAA's perspective, the call for a standalone automotive code also reflects Australian dealers longstanding desire for similar protections enjoyed by United States dealers to address detrimental power imbalances. MTAA understood the difficulties of uplifting US State Laws and transplanting them in an Australian context. The call for a standalone code within existing legislative mechanisms is considered the best means of addressing the multiple needs and drivers for change.
- As conduct and actions by some car manufacturer franchisors became more pronounced, MTAA believes criteria to create a standalone code were met, including:
 - Partial market failure (when car manufacturer/distributor franchisors fail conduct and compliance requirements)
 - Problems that have not and cannot be addressed using existing regulation.
 - Self-regulation has been attempted and failed.
 - Public benefits outweigh the costs of regulation.
- However, lingering doubts about the efficiency and effectiveness of a standalone code remained. At the head of these doubts was the adequate resourcing of regulators to monitor, investigate and enforce.
- These doubts guided MTAA to include a schedule to the Franchising Code as an alternative solution or a 'Plan B' to its preference for a separate Code of Conduct. Not because Australia's automotive industries, including new car, motorcycle, truck, and farm machinery, were not deserving of their Code. But because it was recognised the challenges of carving out relevant sections and provisions from the Franchising Code, including specific industry treatments to address power imbalances and ensure connections to Australian Laws and Acts in a standalone Code. MTAA and Members differed from other peak organisations in recognising the need for an alternative solution should a standalone code not be possible.
- When Government settled on the development and inclusion of a Schedule to the Franchising Code of Conduct, MTAA and Members decision to include this as an alternative option was vindicated. MTAA and Members engaged in considerable negotiations and consultation to achieve a meaningful outcome.
- The creation of Part 5 provides a legislative instrument for future change to address failed remedies, 'tweak' provisions, or adjust to changing market conditions or conduct. The Part 5 provisions, including Principles, broader changes to the Franchising Code, and companion legislation and regulations such as collective bargaining and UCTs, MTAA believes will address the majority of concerns. The onus now is dealers' effective and consistent utilisation of these reforms, careful and effective monitoring, and, where necessary, investigation and enforcement.



3. Detailed Considerations

Options for further supporting the automotive industry

Option 1: Amend the Franchising Code and its automotive-specific provisions when required

- MTAA believes the volume, strength, and scope of reforms to the Franchising Code of Conduct, including creating Part 5 specific to new car dealers and the inclusion of industry-developed principles, address considerable longstanding concerns of the MTAA over two decades.
- In addition, the introduction of the Class Exemption for Collective Bargaining for franchise businesses, further planned reforms to Unfair Contract Terms, and revised penalties will all contribute to a new era for franchise and agent agreement negotiations and operation.
- The reforms now require application, use, testing and monitoring to ensure intended outcomes, including protections and the desired overarching outcome of rebalanced productive automotive franchise relationships across the industry.
- MTAA believes adding the Schedule specific to new car retailing is significant and should not be underestimated. MTAA and Members recognise that automotive has demonstrated unique characteristics for automotive franchising and agency arrangements and specific power imbalances not found in other parts of the franchising sector warranting this solution. With the introduction of Part 5, a legislative instrument now exists where change can occur if warranted and only after usual investigation, consultation, and satisfying criteria.
- And consistent with MTAA's approach, MTAA supports this option.

Option 2: Establish a standalone automotive franchising code

- While supporting option 1, MTAA retains the right to advocate for a standalone code for the automotive sector or separate specific legislation if, during an initial review period (usually three years), the MTAA, Members and Dealer Constituents believe the reforms and remedies have failed.
- The immediate inclusion of commercial, heavy vehicles, motorcycles, and agricultural and industrial machinery dealers, who possess a franchise or agency agreement with a manufacturer franchisor, is critical.



- MTAA understands the rationale and reasoning for immediate non-inclusion of motorcycle, heavy and farm machinery dealers in Part 5 as officials concentrated on new car retailing drivers provided by the recommendations of the ACCC Market Study and dominant considerations to Parliamentary and other inquiries.
- MTAA believes its position to support reforms to date, allow for maturity and use of these reforms, but reserve a capacity to move further to a standalone code or other legislation demonstrates its ongoing commitment to graduated responses.
- MTAA is acutely aware of a need for a balanced approach to ensuring franchising remains a viable business model for years to come while addressing detrimental power imbalances, poor conduct, non-compliance or compliance avoidance.
- The Federation is now confident that power imbalances are now firmly defined, recognised and reforms justified. The task now is to continue increasing awareness, understanding, and use of the full suite of reforms, monitoring and, where necessary, investigating and enforcing. If over a reasonable review time, the remedies are failing, then further responses will be required.

Are provisions needed to cover other vehicle types?

WHAT ARE THE KEY PROBLEMS OR ISSUES BEING FACED BY THE AUTOMOTIVE SECTOR THAT YOU BELIEVE HAVE NOT ADEQUATELY BEEN ADDRESSED BY THE GOVERNMENT'S RECENT REFORMS?

- The immediate inclusion of other franchised or agency automotive dealers in motorcycles, trucks, agriculture, and industrial machinery industries.
- MTAA and Members do not differentiate between detrimental power imbalances between automotive industries or businesses. As the only automotive member-based organisations with coverage across the entire supply chain, MTAA and Members are uniquely positioned to observe market attributes and conduct across industries.



- The problems experienced by a new car dealer are also experienced by a motorcycle dealer, truck dealer or agriculture machinery dealer.
- It is not the definition of the automotive industry or the vehicle being sold that should dictate the applicability of solutions, but the commonality of power imbalances and conduct by those manufacturer /distributor franchisors in their dealings with dealer networks.
- There has never been any doubt in MTAA representations and advocacy over 20 years that the concerns cover all automotive franchise agreements, including heavy vehicles, motorcycles and farm and industrial machinery.

WHAT EVIDENCE CAN YOU PROVIDE ABOUT THE MAGNITUDE OF THE PROBLEM (I.E. QUANTITATIVE AND QUALITATIVE DATA)?

- To say truck, motorcycle, agriculture and industrial machinery dealers, who operate under a franchise or agent agreement, do not fit some definition of a motor vehicle is not sufficient to deny access to the remedies Part 5 provides. Mainly when the conduct, actions and behaviours experienced are inextricably the same.
- MTAA and Member franchising advocacy and representations over two decades have always included all automotive dealers irrespective of car, motorcycle, truck or farm machinery. While the sharp focus has more often than not been on new car retailing, MTAA has on numerous occasions made specific representations on specific franchising issues impacting motorcycles, truck and farm machinery dealers.
- Indeed, some farm machinery and motorcycle dealers might well argue that franchising power imbalances materialised in these industries well before impacting new car retailing on the scale and frequency of more recent times. MTAA records indicate for over 20 years; it has raised severe franchising and related issues about several motorcycle manufacturers and distributors, two truck importers and at least three agricultural machinery manufacturers.



- MTAA understands the reluctance to include other industry dealers when investigations and potential solutions were considered through the policy lens of responses to the ACCC Market Study, which essentially only looked at the new car retailing market. However, MTAA raised identical issues with motorcycle, truck, and farm machinery dealers in submissions to ACL reviews, previous investigations into the FCC, and the Parliamentary 'Fairness in Franchising' inquiry. These included:
 - Dealers offered contracts on a 'take-it-or-leave-it' basis.
 - The significant upfront capital investment involved establishing new dealership facilities, with estimates provided in the range of \$6 to \$20 million,²³ depending on the metropolitan or regional location of the dealership.
 - The same tenure issues with the length of the initial and subsequent dealership agreements are shorter but typically the same demands and often do not enable the dealer to recoup the capital they have invested before the end of the relevant term.
 - Agency agreements are also being actively considered or are already in place with some motorcycle and truck dealers.
 - Dealers do not have the security of tenure, and in most cases, renewal of the agreement is at the absolute discretion of the manufacturer.
- Rather than provide details of each of these representations, MTAA refers to the latest and most prominent examples. Some are provided in the VACC submission, and others are provided by MTAA Member constituents in evidence to the 'Fairness in Franchising' inquiry. Together these robust exchanges demonstrate the commonality of power imbalances and why these other dealers should be included in Part 5.

'...So we went to mediation. That is a total waste of time, effort, money—whatever you want to call it—because they hold the gun at your head. They say what you're going to do. And if they don't like it—and they keep changing the goalposts—it gets too hard. You can't go anywhere else because they are a multinational company. We're talking about CNH here, Case New Holland. You're wasting your time because it's going to go on forever. I've got better things to do than fight a losing battle and throw more money down the drain, which we were doing with them anyway, so we moved on.

But that is not fair for a business that has already got that same brand in another branch. It's ridiculous. To me, there's something terribly wrong with the code if you've got a word 'breach' in there that has got so many tentacles.' - **Mr McVilly, Owner and Managing Director of AG 4 U group in Colac and Warrnambool.**



'It's about power imbalance. Commercial contracts are the foundation on which a good economy should operate. Commercial contracts are meant to have a balance of power. Allow the power imbalance in the agreement to be there, and bad behaviour occurs. What is not currently understood is that our members, the dealers, need a stable business environment to operate in. Australian subsidiaries of overseas multinational corporations are always under pressure to increase sales. Regular senior management changes occur. Strategic changes occur also within that. Dealers shouldn't be subject to unconscionable behaviour reflected in changes during their agreement term, which is quite common. Balance of power is a huge issue.

The agreements that are put together are put together by tier 1 law firms. Do you think that the dealers can really compete in that environment?' – Mr Strickland, Former Managing Director Honda Australia.

'In 1972 I started a Yamaha dealership for Yamaha in Ballarat. The relationship deteriorated about 10 years ago, when they decided to split the farm franchise, which is the farm vehicles, from the motorcycles.

'.....They split them into two and said, 'The farm vehicles will go to the farm supply places and the motorcycles will stay with the motorcycle shops.' Anyway, three years later, on franchise renewal, they came back to me and said, 'You have to take the farm vehicles back, because our experiment didn't work, and the product that you put in to replace the loss of stock three years ago will have to be removed.' I offered to take their vehicles back in a separate showroom. Then they told me I'd have to have a separate workshop for their new product and I'd have to have this and that. In the end, it was just a matter of making it unworkable.

You've got to understand with this: I failed year 10 and I started in the business when I was 21. I had the privilege of working with Yamaha until I was three months off 65, so I've had a good run and I've had my go, but the reality is there are no 21-year-olds coming into this industry anywhere. That's the big thing you've got to watch with this. I started before franchise agreements. It was only a dealer agreement, and you didn't have to be special to read it. Then, once you've got your stock and your shop going and they introduce the franchise code or they introduce something else, you're stuck. You have no choice because, if you don't sign it, your house is on the line. You've got a wife, young kids and everything like that. You only want to run a motorbike shop, and they've changed all the rules on you overnight.' - Don Brown Sole Director Motorcycle dealer.

- A Hansard excerpt of these three members is at **Appendix 2** of this Submission.



- The three representatives of motorcycle and farm machinery dealers indicate the many reports received by MTAA and Members. The difference is fear of reprisal and retribution kept many silent – especially longstanding dealers in regional and rural Australia.
- The discussion paper indicates that rationale for not including other forms of automotive franchise dealers or agents into Part 5 solutions be

‘The amendments were only intended to cover new road motor vehicles and excludes all other motor vehicles such as motorbikes, farm machinery and trucks given there was limited evidence submitted at the time to support expanding the scope beyond new cars.’

- MTAA argues there was 'limited evidence' because:
 - The ACCC **New Car** Market Study was precisely that – a study of new car retailing, not trucks, motorcycles, farm machinery etc. The Terms of Reference did not allow for examining other vehicle retail markets and the inter-relationship of franchising arrangements.
 - New car dealers are the larger franchising retailer group compared to motorcycles, trucks and farm machinery. They, therefore, are a focus for power imbalances experiences by other dealers in other industries.
 - Fear of retribution and reprisal arguably is more pronounced, leading to a smaller number of business owners willing to come forward and provide details of conduct and actions.
 - MTAA can point to having raised franchising code concerns and replicated behaviour with Yamaha, Triumph, Kawasaki, Honda, Case New Holland, John Deere and others over the past 20 years when changes were made to business models, operations or market areas without warning.
- The power imbalances Part 5 and broader reforms of the Franchising Code address are the same irrespective of whether the product is a car, motorcycle, tractor, truck or other machinery. The same internationally headquartered manufacturer franchisors, whether directly or through an Australian importer/distributor, can engage the same conduct and detriment to Australian businesses should they choose.



WHAT POTENTIAL SOLUTIONS ARE AVAILABLE?

- MTAA believes the inclusion of commercial, heavy vehicles, motorcycles and agricultural machinery dealers in Part 5 and the specific automotive provisions can occur immediately by regulation amendment.
- MTAA suggests that provisions can accommodate this to include descriptions/ definitions of the vehicles and that franchising or agent agreements are the basis for the business relationship between the manufacturer and dealer.
- MTAA does not believe any of the provisions in Part 5 or dispute resolution or provisions of the broader Franchising Code will require amendment.
- The effectiveness of reforms for these other automotive industries should be monitored and reviewed as per for new car dealers.

Options for arbitration

Option 1: Pre-contractual arbitration model

Option 2: Arbitration model used in the Media Bargaining Code

Option 3: Industry-led improvements to dispute resolution

- MTAA supports Option 1 and 3.
- MTAA and Members believe some of the changes to the Franchising Code, including Part 5 provisions, will assist in improving negotiation capacity, so too will the Class Exemption for Collective Bargaining if utilised by automotive Franchisors and Franchisees. Introducing a revised FCC penalty regime and Unfair Contract Terms will also assist in deterrence, compliance, monitoring and enforcement. The real test will be in the use of these reforms during the negotiation of new agreements.
- Dispute resolution is critical. Rather than better mechanisms, MTAA suggests improved streamlined processes that have clear access, ridged timeframes, and graduated options would ease many dealers' concerns.



- Dealer concerns regarding dispute resolution mechanisms were detailed in-depth in both the 'Fairness in Franchising' and 'GMH' Parliamentary Inquiries. MTAA does not believe there is merit in revisiting what has already occurred, given it is believed the matter is still subject to court proceedings.
- One of the power imbalances is the ability of some vehicle manufacturers to circumvent the intent of negotiation and dispute resolution by using their power, resources and time to avoid negotiation or bog down resolution processes.
- Again it is important to note the concerns do not apply to all franchisors. Many have very productive trusting, profitable relationships with their dealer networks and open and transparent communications hallmark them with 'no surprises', and a willingness to work together as standard attributes.
- There is a willingness to explore potential voluntary arbitration mechanisms between the Federal Chamber of Automotive Industries (FCAI), the Australian Automotive Dealer Association (AADA) and MTAA. At the time of this Submission, the three peak organisations have had several meetings. They are working constructively to identify enhancements to the dispute resolution process and potential binding arbitration by agreement by the organisations and their respective member organisations and constituents.
- From MTAA's perspective, there is sufficient goodwill and intent to try and develop an industry-led solution, which would address Option 3. If an industry-led solution is identified for enhanced dispute resolution, it may also apply to Option 1 and a structured mechanism for pre-contractual arbitration.
- MTAA believes that any solution must address easy access, ridged timeframes and graduated responses consistent with the ACL, CCA, Industry Codes, the FCC and Part 5. Any solution must also utilise the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and extended accountabilities for facilitating dispute resolution mechanisms, including mediation.
- MTAA has drafted a potential approach that would see the elements of ADR as described in the FCC and referred to in Part 5 and approaches in other codes, including the Dairy, Sugar and Grocery Code. The approach can be incorporated directly into future agreements or as a standalone process referred to in agreements. Suppose the three peak associations gained endorsement from their memberships and constituents. In that case, the intent is to ensure a consistent approach to ADR for automotive, including binding arbitration voluntarily agreed by industry and readily incorporated into agreements.



- A feature of the draft is incorporating a variation of the Canadian mechanism referred to in the Discussion Paper. The proposal is that members of a panel of potential arbitrators would be agreed and provided to ASBFEO. ASBFEO would then choose a member from this panel to arbitrate a dispute that had failed mediation.
- MTAA believes such a mechanism has the potential for pre-contractual dispute resolution as well. The industry could agree to parameters such as the now enshrined principles in Part 5 as the areas for pre-contractual dispute arbitration. i.e. compensation arrangements etc.
- Presently, the difficulty is that while there is recognition of difficulties experienced in pre-contractual negotiations, it is not known how pronounced these will be given the new tools and reforms available. For example, some previous difficult negotiation areas should now benefit from reforms in the FCC, including Part 5, and through the Class Exemption to Collective Bargaining.
- It is envisaged that ASBFEO would assist the industry in the identification and development of an arbitration panel, and MTAA believes this is within the scope of the role and accountabilities of the Ombudsman.
- The ADR mechanisms, consistent with laws and regulations, would see:

○ Opportunity for both parties to resolve a dispute	10 business days
○ Opportunity for mediation facilitated by ASBFEO`	20 business days
○ Opportunity for pre-agreed binding arbitration by a member of a panel (agreed and provided by industry [specific to automotive considerations]) facilitated by ASBFEO	45 business days

- Again, the following is a first draft for discussion and potential solutions consistent with the Discussion Paper's options. It is not designed or intended as the only possibility, but MTAA has long tried to develop solutions and options as this is another example.



Suggested draft ADR proposal for automotive industries

Context

- Following changes enacted on 1 July 2021 to the Franchising Code of Conduct and Part 5 of that Code specific to new car retailing, there are now more alternative dispute resolution (ADR) options.
- This proposal drafted by MTAA intends to enhance the application of requirements in Part 4 of the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 that deal with complaint handling and dispute resolution procedures.
- MTAA believes the application of agreed ADR procedures will harmonise, coordinate, enhance and streamline the processes by which OEMs and Dealers can address complaints and disputes.
- It is envisaged that the agreement can either be fully incorporated in a Franchising or Agent agreement or as a standalone document to which the franchising or agent agreement refers.

Multiple party alternative dispute resolution

- Changes now provide for situations where multiple franchisees have similar disputes with a single franchisor; they can seek to resolve their disputes together. This can occur either by agreement with the franchisor, by request of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).
- If any of the franchisees with similar disputes cannot agree with the franchisor on how to resolve their disputes, they can refer their matter to ASBFEO for that specific matter to be addressed.

Questions:

- (a) Is there a preference for this to be a standard inclusion in dealer agreements thereby streamlining the application of dispute resolution requirements across all agreements, or as a standalone agreement where it **may be** used as the template in agreements?
- (b) Is there any reason why this suggested approach may not be a means of addressing pre-contractual dispute? i.e., if there was a dispute about what is or is not a reasonable solution to say compensation arrangements, could this dispute resolution mechanism be used as a potential template for resolution?
- (c) Others to be determined



Complaint Handling and Dispute Resolution procedure for new car retailing franchise and agent agreements

1. Resolving complaints and disputes—general

- a. Suppose a party to a new car franchise or agent agreement has a complaint or a dispute in relation to a matter arising under or in connection with the agreement. In that case, the matter may be dealt with or resolved using internal and external complaint handling and dispute resolution procedures described in this section.
- b. A franchise or agent agreement must provide for a complaint handling procedure that has the same effect as subclauses 40A (1) to (4) and clause 41A except for providing for the imposition of a civil penalty.
- c. The internal complaint handling procedure described in (2) provides a mechanism for parties to attempt to resolve the complaint before activating any mediation or arbitration procedures to escalate the matter to dispute resolution.
- d. If a complaint cannot be resolved using complaint handling procedures, either party can notify a dispute utilising the Alternative Dispute Resolution (ADR) in accordance with Part 4 Subdivision B, 41 A-C of the Franchise Code and attempt to resolve the matter with external resources using:
 - i. Mediation, and if required,
 - ii. Binding Arbitration.

The matter must not be resolved by binding arbitration unless:

- the new car franchise or agent agreement provides the inclusion of binding arbitration as a means for resolving disputes between parties to the agreement by the inclusion of or reference to this section.
- e. If the matter is the termination of a new car franchise or agent agreement, this section applies as if a reference to a party to a new car franchise or agent agreement included a reference to a person who was a party to the agreement before it was terminated.
 - f. No part of this section affects a party's right to a franchise agreement to bring legal proceedings, whether under the franchise agreement or otherwise.

2. Dealing with complaints in accordance with internal complaint handling procedure



- a. The procedure set out in this part applies if a party to a new car franchise or agent agreement (the **complainant**) wishes to have a complaint in relation to a matter arising under or in connection with the agreement dealt with in accordance with Division 3 Subdivision and this complaint handling procedure.
- b. The complainant must notify the other party to the agreement (the respondent), in writing, of the following:
 - i. the nature of the complaint;
 - ii. that the complainant wishes the complaint to be dealt with in accordance with the complaint handling procedure provided in the new car franchise or agent agreement;
 - iii. the outcome the complainant wants.
- c. Within five (5) working days after receiving notice of the complaint under subsection (2), the respondent must give a written acknowledgement to the complainant stating:
 - i. that notice of the complaint has been received; and
 - ii. the steps to be taken to deal with the complaint.
- d. The complainant and the respondent must attempt to resolve the complaint in accordance with the complaint handling procedure before resolving the complaint by mediation or binding arbitration.
- e. If the complaint is not within 21 days after the acknowledgement was given to the complainant under subsection (c.), either party may take action to have the complaint resolved by the Alternative Dispute Resolution process, including mediation and arbitration.
- f. Suppose the complaint is not resolved in accordance with mediation procedures outlined in (3) and in accordance with Part 4 Division 3 Subdivision 41 (A) and (B). In that case, either party may take action to have the dispute resolved by binding arbitration.
- g. Suppose this section is incorporated into new car retailing franchise / agent agreements or referred to in such agreements as a standalone applicable agreement. In that case, all parties agree to Binding Arbitration as a final step in the complaint handling and dispute resolution process.
- h. The application of (g) does not extinguish any party withdrawing from the procedures in accordance with 43 (c).
- i. The complainant may, at any time, withdraw the complaint by notice in writing to the respondent.



- j. No part of this section affects a party's right to a franchise agreement to bring legal proceedings, whether under the franchise agreement or otherwise.

3. Mediation

- (a) The procedure set out in this section applies if a party to a new car franchise or agent agreement wishes to have a dispute resolved by ADR procedures and the use of mediation and the role of the Commonwealth Small Business and Family Enterprise Ombudsman (ASBFEO) in accordance with Part 4 of the Code.

Appointment of mediator

- (b) The party must request the ASBFEO to appoint a mediator for the dispute.

- (c) ASBFEO:

- i. Must appoint a mediator within 14 days after receiving the request under subsection (2) unless ASBFEO is satisfied that the complaint giving rise to the dispute:
 - i. is frivolous or vexatious; or
 - ii. has previously been the subject of another mediation; and
- ii. Must give the parties to the dispute, in writing, details of the mediator appointed.

Conduct of mediation

- d. Subject to subsection (c), the mediator must decide:
 - i. how the mediation is to be conducted (for example, by telephone or in meetings); and
 - ii. the time and place for the mediation; and
 - iii. the day the mediation commences for this Subdivision.
- e. The mediation must be conducted in Australia.

The mediator must notify ASBFEO that mediation has commenced

- f. Within five days after the mediation has commenced, the mediator must notify the ASBFEO, in writing, that the mediation has commenced and of the nature of the dispute.

Note: The mediator decides under paragraph 3 (d) when a mediation commences.



Attendance at mediation

- g. Each party to the dispute must attend the mediation and attempt to resolve the dispute
- h. A party is taken to attend a mediation to attempt to resolve a dispute if the party is represented at the mediation by a person who has the authority to enter into an agreement to settle the dispute on behalf of the party.

The mediator must give notice of successful mediation

- i. If an agreement is reached in relation to the dispute, the mediator must, within 14 days after the agreement is reached:
 - i. set out, in writing, the terms of the agreement; and
 - ii. give a copy of the terms to each party to the dispute; and
 - iii. notify the mediation adviser that an agreement has been reached.
- j. The party who requested the mediation may, at any time, withdraw the complaint that is the subject of the dispute by notice in writing to the other party to the dispute and the mediator.

3.1 Termination of mediation

- a. The mediator conducting a mediation of a dispute in accordance with this Subdivision:
 - i. may terminate the mediation at any time if the mediator is satisfied that a resolution of the dispute is not likely to occur; and
 - ii. must terminate the mediation if the party who requested the mediation requests the mediator to do so.
- b. If a dispute that is the subject of mediation in accordance with this Subdivision is not resolved within 30 days after the mediation commenced:
 - i. the respondent to the mediation may ask the mediator to terminate the mediation; and
 - ii. the mediator must do so.

Note: The mediator decides under paragraph 48(4)(c) when a mediation commences.

- c. If the mediator terminates a mediation under subsection (a) or (b), the mediator must issue a certificate stating:
 - i. the names of the parties to the mediation; and



- ii. the nature of the dispute that was the subject of the mediation; and
 - iii. that the mediation has been terminated; and
 - iv. that the dispute has not been resolved.
- d. The mediator must give a copy of the certificate to:
 - i. ASBFEO; and
 - ii. each party to the dispute.

3.2 Costs of mediation

- a. Each party to a dispute that was the subject of a mediation in accordance with this Subdivision must pay half the costs (if any) of the mediation (being all reasonable costs associated with the conduct of the mediation) unless the parties to the mediation agree otherwise.
- b. Each party to a dispute that was the subject of a mediation in accordance with this Subdivision must pay that party's costs of attending the mediation unless the parties agree otherwise.

4. Arbitration

- a. The procedure set out in this section applies if the parties to a new car franchise or agent agreement agree, by inclusion or reference to this agreement, to have an already notified dispute that has failed resolution by parties and through mediation to be finalised by binding arbitration conducted in accordance with this Subdivision and in the event of the failure of mediation.

Note: It is intended that binding arbitration is a final step in a three-stage complaint handling and dispute resolution procedure for a new car franchise or agent agreement rather than an alternative to internal complaint resolution between parties and / or mediation.

It is suggested that the peak automotive organisations provide ASBFEO provide an arbitrator from an agreed panel of arbitrators specific to the nuances of the commercial contractual arrangements between parties to a new car retailing franchise/agent agreement.

- b. The parties must request ASBFEO to appoint an arbitrator from the panel nominated by industry and provided by ASBFEO for the dispute.



- c. The arbitration adviser:
- i. Must appoint an arbitrator within 14 days after receiving the request under subsection (3), following the failure of mediation unless ASBFEO is satisfied that the ongoing complaint giving rise to the dispute and matters unresolved through resolution:
 - a. is frivolous or vexatious; or
 - b. has previously been the subject of another arbitration; and
 - ii. Must give the parties to the dispute, in writing, details of the arbitrator appointed.

Conduct of arbitration

- d. Subject to subsection (4), the arbitrator must decide:
- i. how the arbitration is to be conducted (for example, by telephone or in meetings); and
 - ii. the time and place for the arbitration; and
 - iii. the day the arbitration commences for the purposes of this Subdivision.
- e. The arbitration must be conducted in Australia.

Arbitrator must notify arbitration adviser that arbitration has commenced

- f. Within 14 days after the arbitration has commenced, the arbitrator must notify the arbitration adviser, in writing, that the arbitration has commenced and of the nature of the dispute.

Note: The arbitrator decides under paragraph (4)(c) when an arbitration commences.

Attendance at arbitration

- g. Each party to the dispute must attend the arbitration.
- h. For the purposes of subsection (7), a party is taken to attend an arbitration if the party is represented at the arbitration by a person who has the authority to enter into an agreement to settle the dispute on behalf of the party.

Arbitrator must give notice of successful arbitration

- i. If the dispute is resolved, the arbitrator must, within 14 days after the dispute is resolved:
- i. set out, in writing, the terms of the resolution; and
 - ii. give a copy of the terms to each party to the dispute; and



- iii. notify the arbitration adviser that the dispute has been resolved.

4.1 Termination of arbitration

- j. The arbitrator conducting an arbitration of a dispute in accordance with this Subdivision must terminate the arbitration if the complainant mentioned in section 47 requests the arbitrator to do so.
- k. If the arbitrator terminates an arbitration under subsection (4.1), the arbitrator must issue a certificate stating:
 - i. the names of the parties to the arbitration; and
 - ii. the nature of the dispute that was the subject of the arbitration; and
 - iii. that the arbitration has been terminated; and
 - iv. that the dispute has not been resolved.
- l. The arbitrator must give a copy of the certificate to:
 - i. the ASBFEO; and
 - ii. each party to the dispute.

4.2 Costs of arbitration

- m. Each party to a dispute that was the subject of an arbitration in accordance with this Subdivision must pay half the costs (if any) of the arbitration (being all reasonable costs associated with the conduct of the arbitration) unless the parties to the arbitration agree otherwise.
- n. Each party to a dispute that was the subject of an arbitration in accordance with this Subdivision must pay that party's costs of attending the arbitration unless the parties agree otherwise.

5. Confidentiality

- a. The complainant and respondent must observe any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving the dispute by an ADR process or arbitration.

6. Schedule of potential matters covered by this agreement

- a. The intention of the complaint handling and dispute resolution procedures is for mechanisms for substantive, systemic, systematic matters.



- b. Such matters may include, but are not necessarily constrained to:
- i. The operations of, or changes to, the franchise or agent agreement or provisions in that agreement that were not part of the original good faith negotiations and finalisation of the agreements that by design or consequence damage or disadvantage any party to the agreement. As an example, and with due consideration to the above potentially impacting multiple franchisees, matters might include
 - i. Complaints regarding appropriate compensation for warranty work in the event of differences of interpretation of methodology, time, etc.
 - ii. Early termination of a new car franchise / agent agreement and compensation is applicable due to:
 - i. Withdrawal from the Australian market
 - ii. Rationalisation of dealer networks in Australia
 - iii. Change to the distribution models in Australia
 - iv. Other issues by mutual Agreement between OEMS and Dealers.
 - iii. Compensation considerations specific to new car retail franchise/ agent agreements:
 - i. Lost profits from direct and indirect revenue
 - ii. Unamortised Capital expenditure where requested by the franchisor
 - iii. Loss of opportunity in selling established goodwill
 - iv. Cost of winding up the franchised business.

Conclusion

- MTAA welcomes the opportunity to provide this Submission and welcomes ongoing consultations and efforts to cement long-overdue reforms and improve the environment for critical businesses.
- MTAA thanks the Department and its officers for continuing work and remains available to assist any anytime.

Appendix 1 - History MTAA and Franchising
Appendix 2 - Hansard Excerpts dealer testimony



Appendix 1

Abridged historical timeline - MTAA & Franchising:



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- **1988-1990:**
From inception in 1988, MTAA started advocacy for improved and fairer competition.
- **1990:**
MTAA appointed principal participating member of the National Task Force on Franchising.
- **1992/1993:**
MTAA raised competition and related franchising issues into the Hilmer Review into Competition Policy.
- **1993:**
Appointed Franchising Code Administration Council and release of voluntary Franchising Code of Practice.
- **1994:**
MTAA substantial submission to Review of Franchising Code of Practice.
- **1997:**
MTAA provides substantial input to Reid Report into fair trading and supports findings and recommendations, including:
 - Amendments to the Trade Practices Act to provide for the mandatory or voluntary prescription of industry codes.
 - New franchising code announced as mandatory with enforcement by ACCC.
 - Establishment of Franchising Policy Council (FPC).
- **1998:**
Franchising Code of Conduct (FCC) implemented. Substantial improvement, reflecting much of MTAA's advocacy efforts for improvements over the previous eight years.
- **2000:**
In the first review of the FCC, MTAA highlighted dispute resolution procedures lacked 'teeth' and called for a stop to the ability of franchisors to terminate franchise agreements 'at will' and without just cause in a comprehensive submission. Unfortunately, the Code remained essentially unchanged despite some increased disclosure requirements for small franchisees with turnovers less than \$50,000 per annum and some tweaking of mediation timeframes.
- **2003:**
MTAA provided input to and supported an ACCC decision to establish a Franchising Consultative Panel (FCP). MTAA stepped up its advocacy on critical issues, including the emergence of motorcycle and farm machinery dealer concerns regarding the conduct of some international-based franchisors terminating or reconstructing franchise dealer networks. MTAA is a current member of the ACCC consultative forum for small business and franchising.

MTAA advocated extensive implications of a proposed joint venture between Caltex and Woolworths, the expansion of Woolworths retail outlets and the impact on fuel retailing franchisees.

▪ **2006:**

A government review (Matthews Review) of the FCC in 2006, particularly disclosure provisions, provided MTAA with another opportunity for further comprehensive submission. MTAA and Members detailed disclosure provision weaknesses in automotive industries, including farm machinery and motorcycles, and provided recommendations to strengthen disclosure requirements relating to the financial status of the franchisor, performance obligations, marketing strategies and capital expenditure and a range of other issues.

▪ **2007:**

On 6 February 2007, the then Government released the Committee's Report on the Review of the Code and the Government's Response to the review. While the review found that the Code was operating effectively, it recommended that prospective franchisees have as much information as reasonably possible. The Australian Government accepted a total of 31 of the 34 recommendations outlined in the Committee's Report on the review.

▪ **2008:**

MTAA provided a submission to a Joint Parliamentary inquiry into the reforms.

On 15 August 2007, the amendments to the Code were tabled in Parliament and came into effect on 1 March 2008. The Government adopted most of the review's recommendations but unfortunately did not remove, as MTAA had hoped, subclause 5(3)(b), the exemption of some agreements from the Code. However, MTAA believed the amendments, as a whole, were a welcome addition to the Franchising Code of Conduct.

▪ **2009:**

MTAA provided input and submissions into inquiries and investigations in areas with close relationships to Franchising, including the start of actions to improve Unfair Contract Terms and Conditions (UCT).

▪ **2010:**

Additional investigations (Expert Panel Review) into dispute resolution and concerns that processes for mediation were ineffective, poorly designed and favoured franchisors to the detriment of small businesses.

Several changes were secured, including clarifying unconscionable conduct, unilateral variation of agreements, unforeseen capital expenditure disclosure, confidentiality agreements and greater use of plain English. While welcome, these changes only addressed part of the concerns.

▪ **2011/13:**

MTAA initiated an investigation into the cross-subsidisation of shopper docket discounts for fuel with the purchase of products through supermarkets and their petroleum outlet convenience stores. While not specifically Franchising Code related – there were significant cross-overs in conduct and actions by dominant market suppliers with smaller fuel retailing franchisees. MTAA actions secured a binding limitation on the size of the discounts offered and the removal of cross-subsidisation.

▪ **2013:**

In its 2013 submission to the Wein Review into the FCC, the MTAA submission continued to raise emerging power imbalances, including the need for further improvements to disclosure, lack of compensation and fair and equitable treatment at the end of, or non-renewal of term, and emerging poor conduct by some franchisors experiencing falling market share or seeking to increase sales by effectively 'dumping product' without dealer agreement.

MTAA took the liberty of drafting an automotive code to raise discussions and potential solutions to address power imbalance issues. MTAA provided a copy of that draft Code to the then Department of Industry, Innovation, Science, Research and Tertiary Education for its review and comments. Many of the concepts raised in the draft code have been adopted in the 2020 and 2021 Franchising Code amendments.

Notably, the Wein Review recognised enough material had been presented on motor vehicle franchising concerns to warrant a chapter (Part Nine) in the final report. Notably, the Wein Review recommended:

'16. An analysis of the impact of a minimum term and standard contractual terms for motor vehicle agreements should be undertaken prior to a future review of the Code.'

This recommendation was to be one of the catalysts for the ACCC Market Study into new car retailing in 2016.

▪ **2014:**

MTAA provided additional submissions to Treasury and input on amendments to Franchising Code and CCA [Industry Codes] in response to the Wein Review. MTAA also raised concerns regarding the behaviour of some motorcycle manufacturers on changes to their dealer models and product and service offerings.

▪ **2015:**

MTAA provided submissions including franchising concerns to the Harper Review into Australian Consumer Law and Competition and Consumer Act.

▪ **2016 (November):**

The ACCC started a study into the new car retailing market, providing MTAA and its Members with the first real opportunity to detail the relationships between carmakers and dealers and the new car market. It is important to note that while MTAA and Members raised the commonality of concerns in new car retailing with other industries such as farm machinery and motorcycles, these industries were not part of the Terms of Reference for the Market Study. MTAA continued to pursue individual complaints provided by Members on behalf of motorcycle and farm machinery dealers.

▪ **2017:**

MTAA provided further submissions and input to the ACCC draft report before the final report was delivered in December 2017. Report recommendations recognised power imbalances in new car franchise retailing operations, including:

- Recommendations to car manufacturers to update complaint handling systems.

- Update dealer agreements and policies to reflect manufacturer warranty obligations are in addition to, and do not exclude or limit the manufacturer's obligations to indemnify the dealer under section 274 of the ACL; and
- Review dealer agreements policies and procedures to ensure commercial arrangements do not contain unfair contract terms and / or contain limits to unilaterally varying agreements and / or operations manuals.

Throughout 2017 increasing focus on the effectiveness of the Franchising Code emerged with fast food and hospitality franchise businesses coming under scrutiny. This focus added to the ongoing advocacy of MTAA and Members regarding conduct by some agriculture machinery and motorcycle franchisors to their franchisees and some carmakers conduct to their dealer networks. In particular, the unilateral dumping of products on dealers by some manufacturers emerging as a consistent issue.

▪ **2018:**

In March 2018, as a result of media coverage on franchising concerns and increasing awareness by the Australian Parliament, the Senate referred an inquiry into the operation and effectiveness of the Franchising Code of Conduct to the Parliamentary Joint Committee on Corporations and Financial Services.

For the first time since 1988, MTAA and Members were able to secure new car, motorcycle, farm machinery and truck dealers to participate and provide their shared experiences to this Parliamentary inquiry. Previously the fear of retribution was too intense a threat. Representative dealers provided testimony to the inquiry primarily at a hearing in Melbourne in June 2018. It was also the first time MTAA attracted franchisees from fuel retailing, new car, motorcycle and farm machinery dealers to participate in person as a group of concerned franchisees across automotive, all reporting similar concerns.

▪ **2019:**

The Government established an inter-agency Franchising Taskforce to '*examine the feasibility and implementation of recommendations in the Parliamentary Joint Committee on Corporations and Financial Services' Fairness in Franchising report*'.

▪ **2018-2021:**

MTAA consulted extensively with the Departments of Treasury and Industry investigations into specific automotive industry franchising concerns informed by the ACCC new car retailing market study and the Fairness in Franchising report. These consultations and the work of the Industry Department led to a focus on a Schedule to the Franchising Code specific for new car dealers. At the same time, the Franchising Task Force concentrated on reforms to the broader Franchising Code. MTAA advocated for the inclusion of motorcycle, truck and agriculture machinery franchise or agent dealers.

Also initiated were moves to provide a Class Exemption for Collective Bargaining by the ACCC to extend to franchisees and further reforms to Unfair Contract Terms. MTAA provided extensive input into these investigations and consultations.

▪ **2020**

In February 2020, the plight of new car dealer franchisees occupied media headlines with a decision by United States-based General Motors to exit the Australasian market, cease the Holden brand, and close down its 180+ dealer network.

In the same month, the Senate referred an inquiry into the announcement by General Motors to withdraw the Holden brand and operations from Australia to the Education and Employment References Committee for investigation. This inquiry strengthened long-standing arguments regarding the inadequacies of the Franchising Code, dispute resolution and termination compensation arrangements to the specific needs of automotive industries. Again MTAA Member dealer constituents came forward to testify, further illustrating increasing frustration experienced by dealers. Pertinent was the failure of mediation processes to negotiate fair and equitable termination arrangements promptly.

On 1 June 2020, Part 5 of the Franchising Code of Conduct – a schedule of specific provisions to protect new car dealers – came into force. MTAA had engaged in the development of Part 5, particularly facilitating dialogue on provisions between peak automotive associations.

The introduction of Part 5 recognised the practical problems associated with creating a separate automotive code of conduct for franchise or agent type agreements. MTAA has previously recognised the difficulties in exercising the relevant sections and provisions of the Franchising Code and replicating these many provisions in another Code. It is a significant milestone as there is now recognition and a legislative instrument to address new car dealer concerns.

MTAA continued input and submissions to the Holden inquiry and franchising reforms.

▪ **2021:**

Further changes were announced and introduced to Part 5 - the specific amendments for new car dealers – to incorporate principles developed by automotive industry peak organisations as provisions into the Code. These principles dealt with expected conduct and actions in end-of-term arrangements and the operations of the Code and Part 5.

The Government released and enacted substantial changes to the Franchising Code of Conduct, covering automotive industry dealers.

The ACCC implemented the Class Exemption for Collective Bargaining for small businesses and franchises.

MTAA provides additional input to franchising penalty regime considerations, a discussion paper on the need for an automotive code and additional dispute resolution remedies and the implementation of changes to Unfair Contract Terms.

Ends.

Appendix 2

Select extracts Hansard evidence from motorcycle and farm machinery dealers - Fairness in Franchising Inquiry, Melbourne Hearing 22 June 2018.



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Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Operation and effectiveness of the Franchising Code of Conduct. Hearing Melbourne 22 June 2018

Mr McVilly: Owner and managing director of an AG 4 U group in Colac and Warrnambool.

Mr McVilly: *Yes. I'm the managing director and owner of a company that employs about 85 people. I've been at the one company for 44 years since I was a 16-year-old apprentice, so I've been through the mill and know the ropes backwards. The business has been dealing with one company for over 60 years.*

We're talking about profits and the way they want showrooms, and you have to do that or that word 'breach' comes into it, and that word 'breach' has many, many, many tentacles. Some horrible things come out of the word 'breach'.

When they cut the size of their business down, we had to look at other ways to be profitable. We put two businesses together, which everyone knew were run by—all our customers knew. Then we went to mediation because they didn't like having a competitor in their own space that they weren't paying for, but that competitor was in our other business at Warrnambool under the same banner. So the word 'breach' came in.

Senator WILLIAMS: Are you saying you had two franchises—

Mr McVilly: *Yes.*

Senator WILLIAMS: and in one venue you had the two combined together into one yard—

Mr McVilly: *Yes.*

Senator WILLIAMS: and you went to combine the same two in another yard—

Mr McVilly: *Yes.*

Senator WILLIAMS: and they went off about the second one?

Mr McVilly: *The second one was our major one in Colac. It shifted across the road. There was a strip of bitumen between us. I've been the managing director of the company for that time, for a long time—as I said, I've been there for 44 years, dealing with this company for 60 years in our business and 44 years directly. We shifted one that already had that company in Warrnambool against it, the other business, and the word 'breach' came in because we were doing that and they believed they were a standalone dealership.*

So we went to mediation. That is a total waste of time, effort, money—whatever you want to call it—because they hold the gun at your head. They say what you're going to do. And if they don't like it—and they keep changing the goalposts—it gets too hard. You can't go anywhere else

because they are a multinational company. We're talking about CNH here, Case New Holland. You're wasting your time because it's going to go on forever. I've got better things to do than fight a losing battle and throw more money down the drain, which we were doing with them anyway, so we moved on.

But that is not fair for a business that has already got that same brand in another branch. It's ridiculous. To me, there's something terribly wrong with the code if you've got a word 'breach' in there that has got so many tentacles.

Senator O'NEILL: Is it the code or the original contract, Mr McVilly?

Mr McVilly: *I think if you read the word 'breach' in that contract you'd have to dig a long way down. You'd be to the bottom floor here before you found what all the breaches were.*

Senator O'NEILL: So this goes back to the comments by Dr Hardy about being legal but unconscionable.

Mr McVilly: *Unconscionable. And that is one word in this industry that is badly, badly used; I can tell you now. It's a terrible thing. When you've been working with customers—and the end user is not their customer; their customer is the dealer. They like to think they own the customer, the end user, but they don't, because we're the ones that have got to step up and put all the signs out the front, put all the tools into the franchise, get the parts from them that they say you have to use for warranty and use everything that they say you have to use, but then, as soon as there's a bad problem a minute out of that warranty, they'll run away from it.*

CHAIR: So, Mr McVilly, what would your solution be?

Mr McVilly: *I'm not actually sure. I know what my solution was in that case: two words.*

Senator WILLIAMS: Go away?

Mr McVilly: *It did have that, yes—go away.*

CHAIR: How's your relationship with them now? Are you still a dealer?

Mr McVilly: *No.*

CHAIR: You're not?

Mr McVilly: *No. It's not lucky, but a hard worker's put it that they have suffered badly in our area because of that. We've been a dealer—as I said, we were one of their top dealers for 60 years.*

Senator WILLIAMS: Six decades.

Mr McVilly: *Yes. And I was with it for 44 of it.*

Mr Strickland: *It's about power imbalance. Commercial contracts are the foundation on which a good economy should operate. Commercial contracts are meant to have a balance of power. Allow the power imbalance in the agreement to be there, and bad behaviour occurs. What is not currently understood is that our members, the dealers, need a stable business environment to operate in. Australian subsidiaries of overseas multinational corporations are always under pressure to increase sales. Regular senior management changes occur. Strategic changes occur also within that. Dealers shouldn't be subject to unconscionable behaviour reflected in changes during their agreement term, which is quite common. Balance of power is a huge issue.*

The agreements that are put together are put together by tier 1 law firms. Do you think that the dealers can really compete in that environment?

The very fact that that agreement was created by people who are absolutely skilled in protecting a franchisor really impacts badly on the franchisee, and you get into a mediation, and they rock up with the lawyers. The contracts are not in common man's language. They are extremely complex. I don't know if you've been through any contracts, but they are very complex. I listened to the previous witness. There's so much complication that dealers have to deal with. In the end, this industry is quite a simple industry. The manufacturers are under extreme pressure to pump product out. That's their life. Once the production line slows down, they're in strife, so they've got to pump the product out. The dealers, our members, are only there to make profit. There's got to be balance between pumping the product out and them being able to make a profit.

Of course, our industry is different. It's a strange umbrella, the franchise umbrella, to be sitting the motor industry under, because it's a complex industry that requires a lot of money to be invested in it for the dealers to operate. When you start looking at the showrooms, the parts support, the service support, the complexity you have in trading products and holding trades, it's a very complex industry. Sitting under this franchise code just doesn't work. It doesn't work for the motor industry. It just causes grief. In the motorcycle industry, which is probably an enthusiasts' industry, a lot of dealers that got involved in that really loved being involved in the motorcycle industry. Now the dealers I'm dealing with who are bringing problems to me hate going to work. It's now an encumbrance.'

Mr Strickland : *The people who are here today run absolutely fantastic dealerships, and any manufacturer should be proud to have them representing their product. Don Brown has one of the best regional motorcycle dealerships you could get. Tony's Colac premises is just superb. It's a fantastic outlet. What's reflected here is changes in management, just continual shift. There's no stability in the management of these manufacturers anymore, regrettably. They change. I sat on the board of the Federal Chamber of Automotive Industries. I'm the longest-serving board member they've ever had—in excess of 20 years. The amount of changes I saw occur in that 20-plus years was just amazing.*

We've got a term that we use in the automotive industry, 'skin in the game'. These people have serious skin in the game. The people they're dealing with have got no skin in the game. They just come and they go. They make decisions that crucify dealers and just move on. They don't care.

This franchise code is just a bloody joke. It just doesn't fit. It's useless. And the power imbalance is just—I mean, mediations, you know—they rock up to a mediation and you're dealing with a tier 1 lawyer who just ties everything in knots. It's unconscionable. The whole situation with this is just a bloody joke. It is. You see people getting destroyed that are doing good business. When Yamaha took away Don Brown's franchise, he had terrific market share, and his customers were extremely happy, as were Colac's business, Rhys Evans. Their customers are sitting there thinking, 'Well, why did this happen?'

- *It is, unfortunately, stupidity. But it's tangled up. The industry doesn't need these complicated structured franchise agreements. They're so complicated. Have you ever had a really good look at these franchise agreements? Have you got inside them and had a look at a Yamaha franchise agreement? Have you had a look at some of the major farm machinery ones? They're so complex.*

Mr Brown sole director of a motorcycle dealership

Mr Brown: *In 1972 I started a Yamaha dealership for Yamaha in Ballarat. The relationship deteriorated about 10 years ago, when they decided to split the farm franchise, which is the farm vehicles, from the motorcycles. Without any option—*

Senator WILLIAMS: *You're saying they split the ATVs from the motorcycles?*

Mr Brown: *Yes. There is a farm bike and there are the four-wheelers and the side-by-side.*

Senator WILLIAMS: *There's an ag bike, the four-wheeler and then you've got the ordinary road bike type of thing, and they split them up?*

Mr Brown: *Yes, the road bikes and the trail bikes. They split them into two and said, 'The farm vehicles will go to the farm supply places and the motorcycles will stay with the motorcycle shops.' Anyway, three years later, on franchise renewal, they came back to me and said, 'You have to take the farm vehicles back, because our experiment didn't work, and the product that you put in to replace the loss of stock three years ago will have to be removed.' I offered to take their vehicles back in a separate showroom. Then they told me I'd have to have a separate workshop for their new product and I'd have to have this and that. In the end, it was just a matter of making it unworkable.*

You've got to understand with this: I failed year 10 and I started in the business when I was 21. I had the privilege of working with Yamaha until I was three months off 65, so I've had a good run and I've had my go, but the reality is there are no 21-year-olds coming into this industry anywhere. That's the big thing you've got to watch with this. I started before franchise agreements. It was only a dealer agreement, and you didn't have to be special to read it. Then, once you've got your stock and your shop going and they introduce the franchise code or they introduce something else, you're stuck. You have no choice because, if you don't sign it, your house is on the line. You've got a wife, young kids and everything like that. You only want to run a motorbike shop, and they've changed all the rules on you overnight.

Senator KETTER: *What changed in an instant, Mr Brown? What was the pivotal change to the franchise agreement?*

Mr Brown: *Sorry, I have hearing aids.*

Senator KETTER: I'm trying to understand what happened. At one point, there was obviously trust and you felt there was a working relationship. There was imbalance, but you felt that it was a viable option. Now you're saying to us that it's not a viable option for young people coming—

Mr Brown: *As Stuart says, they changed management. They came in with a new idea, and they then decided that the new trend is to split the franchise up. Then they decide that didn't work, so they bring it back to you because you're the only one that they can rely on, and your business is still going—*

Senator WILLIAMS: If I can interrupt, when they made you split it up, you had a Yamaha dealership. They said, 'We're going to take the ATVs off you and send them down to the local ag depot down the road selling tractors and so on, so it's a one-stop shop for the farmers.' What happened to the parts et cetera that you had in stock when they took that dealership off you?

Mr Brown: *We just had to wear that.*

Senator WILLIAMS: When you say wear it—

Mr Brown: *That's not even a consideration.*

Senator WILLIAMS: Would they take the parts back when they took the dealership off you?

Mr Brown: *No. When we finally separated, I had \$288,000 worth of units and parts. They offered me \$77,000 for it, and I had 10 days to make a decision. They withdrew that after—*

Senator WILLIAMS: You'd blow \$200,000?

Mr Brown: *Yes.*

CHAIR: Up until the point when they decided to split the product lines, how was the franchise system working?

Mr Brown: *We held a 22 per cent market share for them, which is the national average. Today, it's five per cent, roughly. They haven't been able to replace me in four years, and we've got no recognition of all the goodwill that was created over that period of time. And our customers are left holding the baby because we've sold them in good faith a vehicle, and then the minute they turn it off, you can't give them a warranty. We still buy the parts and put the genuine parts in, but we make little or no margin, because that's the way we've got to look after our customer.*

CHAIR: So, until they changed the rules, the franchise was going okay?

Mr Brown: *Yes. It was as good as!*

Mr VAN MANEN: It's very interesting listening to this. Part of my frustration with this inquiry and with other things we're doing is that, increasingly, there's this view that we as legislators are constantly rewriting codes, amending legislation and putting in place new legislation all because businesses out there—and, sadly, predominantly large businesses—are failing to act in an ethical manner.

Mr Brown: *That word there, yes.*