

Competition and Consumer (Industry Codes – Franchising)  
Amendment (Penalties) Regulations 2021 Consultation  
Justice - Small and Family Business  
Markets Group  
The Treasury,  
Langton Crescent, Parkes ACT 2600  
Via Email: [smallbusinessfranchising@treasury.gov.au](mailto:smallbusinessfranchising@treasury.gov.au)

**Attention:** Mr Simon Arnold, Director  
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Dear Mr Arnold,

The Motor Trades Association of Australia Limited (MTAA) thanks the Treasury Department for the opportunity to provide feedback and input on the proposed *Competition and Consumer (Industry Codes – Franchising) Amendment (Penalties) Regulations 2021*.

The amendments are welcome, timely and supported as a critical binding component of significant reforms introduced over 18 months. These reforms are likely to be undermined without the deterrent capacity and compliance requirements of the proposed penalties.

The following submission provides input and feedback on the proposed changes and raises a couple of other matters for the consideration of the Treasury and Government.

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 impacting the sector. This submission draws on materials and input provided by State and Territory Associations and their automotive businesses.

Don't hesitate to contact Mr Richard Dudley, CEO MTAA, if the Treasury Small Business team requires further information or clarity regarding this submission at [richard.dudley@mtaa.com.au](mailto:richard.dudley@mtaa.com.au) or 0412146828.

Yours Sincerely,



Richard Dudley  
Chief Executive Officer  
Motor Trades Association of Australia Limited



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## 1. Executive Summary

- The Motor Trades Association of Australia Limited (MTAA) welcomes the proposed introduction of new maximum penalties for breaches of the Franchising Code (the Code) as an overdue and necessary component of substantial regulatory reforms enacted in the past 18 months.
- MTAA agrees and supports the changed penalty arrangements and provides the following additional comments.
- In the context of international franchising regulation, MTAA believes Australia has moved and identified a fair and reasonable regulatory balance by establishing a framework that addresses identified market failures, unacceptable conduct and harmful practices by some franchisors. These attributes highlighted in the Fairness in Franchising Parliamentary Inquiry and subsequent investigations require strong deterrent and compliant requirements.
- MTAA believes the proposed changes achieve the delicate balance of continuing to encourage investment in this mature sector but prohibits conduct by a few franchisors who take advantage of their unique bargaining position to engage in exploitative conduct. The proposed changes will strengthen the intent and success of recent regulatory reforms, including:
  - The Introduction of Part 5 to the Franchising Code addresses specific new car market power imbalances, including new best practice principles.
  - Changes to the general provisions of the Code.
  - The addition of a class exemption for collective bargaining in franchise arrangements, and
  - The soon to be introduced reforms to Unfair Contract Terms
- If the penalty regime remained status quo, franchisors would have no deterrence to address the temptation to engage in poor conduct, change their conduct, or take the Code seriously.
- Since the enactment of the Code in 1998, some franchisors have found ways of circumventing requirements by increasing discretions and additional contractual obligations in franchise agreements to make it almost impossible for franchisees to protest poor conduct or demonstrate a lack of good faith by the franchisor.



## 2. Specific considerations

- Apart from the doubling of penalties previously announced by the Government, MTAA applauds the addition of a penalty of the greater of \$10 million, three times the value of the benefit reasonable attributable to the contravention, or if the benefit cannot be determined, 10 per cent of the annual turnover of the body corporate for that period. MTAA has long advocated harmonised and 'fit for purpose' penalty regimes to address changing markets and some players' behaviours, conduct, and actions in these markets.
- In particular, as global markets in some industries continue to consolidate, the number of participants decreases and power imbalances increase, the need for more robust deterrence is profound.

### Good Faith

- Good faith underpins all negotiated relationships between franchisors and franchisees, and the increase in penalties supports the criticality of the principal in achieving the outcomes intended by law and regulations.
- The increase in penalties assists in allaying concerns many MTAA Member constituents have regarding applying good faith. For example, while welcoming the implementation of the Class Exemption for Collective Bargaining, there remains genuine concern refusal to participate by a franchisor in collective bargaining will undermine the initiative. A heavy emphasis will, as a result, be on the application of good faith where franchisees are disadvantaged in being able to participate appropriately in collective bargaining. The penalty is considered imperative to addressing this potential.
- MTAA considers a clear need to increase the penalties for a breach of the good faith provisions is warranted, particularly where franchisors, including a motor vehicle, heavy vehicle (truck), agricultural machinery and marine distributors, engage in unfair, dishonest or predatory practices. It is a most challenging task regarding the evidentiary challenges for a franchisee to demonstrate that a franchisor has engaged in a breach of its duty of good faith.
- Accordingly, there is a clear need to deter such conduct by increasing penalties to \$10 million, three times the value of the benefit reasonable attributable to the contravention, or if the benefit cannot be determined, 10 per cent of the annual turnover of the body corporate for that period. Franchisors who do not breach their duty have nothing to fear from such an increase in penalties.



- It is a fundamental betrayal of the franchise business model for a franchisor to breach its duty to a franchisee to act in good faith. While there will undoubtedly be strident opposition to this proposal from franchisors, MTAA rejects any such opposition as such views against the interests of good public policy.

### Increase in Penalty Units

- MTAA fully supports the increase in penalty units from 300 penalty units to 600 penalty units to deter breaches of the Code obligations. MTAA provides its position on all individual proposed penalties is at **(Attachment 1)**.
- There have been insufficient incentives for franchisors to comply with the Code. The experience to date has been more about franchisors getting around compliance with the Code, particularly given the lack of adequate provisions and enforcement.
- Some motor vehicle distributors have demonstrated an attitude that on the basis that there is little need for compliance with the Code, there is no need to change conduct, behaviour or corporate standards until there is a direction from a court of law. Over recent years, that attitude has gained acceptance by some distributors based on a lack of enforcement action by franchisees or any regulatory body. Fortunately, the increased penalties as part of a suite of reforms are addressing these behaviours.

### Written Plan for Winding Down

- MTAA is very concerned that the proposed amendments do not propose any penalty increase where Parties do not agree on a written plan for winding down and reducing the stock on new vehicles and parts (clause 49).
- At present, there is no penalty and no increase proposed. Therefore there is no deterrence to a breach of this requirement or the development and implementation of 'clever' interpretations in future agreements to bypass the requirement.
- Without 'teeth', the attempt to address this central concern will be ineffective and immediately nullify reforms only recently introduced.
- MTAA suggests that either:
  - Clause 49 be amended to provide an explicit formula be imposed on a distributor for winding down and the reduction of new vehicles and parts so that a substantial penalty of 600 units can be imposed, or
  - Introduce a penalty of 600 units and allow formal dispute resolution processes to adjudicate appropriateness of application.



MTAA is willing to work with the Government to develop such a formula.

## Attachment 1 - MTAA position on proposed penalties

Obligation	No penalty	300 penalt yunits	600 Penalty units	\$10 million +	MTAA Comment
Clause 6(1): Obligation to act in good faith – applies to both franchisor and franchisee		Current		Proposed	Agreed
Clause 6(4)-(5): franchise agreement must not limit or exclude the obligation to act in good faith	Current & proposed				Agreed
Clause 8(1): Franchisor must create a disclosure document		Current	Proposed		Agreed
Clause 8(6): Franchisor must update disclosure document		Current	Proposed		Agreed
Clause 8(8): Franchisor must update disclosure document even if otherwise not required to if franchisee requests copy		Current	Proposed		Agreed
Clause 9(1): Franchisor must provide disclosure 14 days before entry into franchise agreement		Current		Proposed	Agreed
Clause 9(2): Franchisor must provide disclosure 14 daysbefore renewal or extension of franchise agreement		Current	Proposed		Agreed
Clause 10(1): Franchisor must receive written confirmation franchisee has received, read and had a reasonable opportunity to understand disclosure document and code	Current & proposed				Agreed
Clause 10(2): Franchisor must receive written confirmationfranchisee has sought or knows it should seek but decided not to seek independent legal, business & accounting advice	Current & proposed				Agreed
Clause 11: Requirement to provide information statement	Current & proposed				Agreed
Clause 13: Franchisor to give leasing info within 1 month (four separate subsections – all attract penalty)		Current	Proposed		Agreed
Clause 14: Franchisor to give copies of other documents – restraints, confidentiality, security, lease, hire purchase etc		Current	Proposed		Agreed



Clause 15: Requirements in relation to financial statement for marketing and other cooperative funds		Current	Proposed		<b>Agreed</b>
Clause 16: Franchisor must give franchisee disclosure document if requested		Current	Proposed		<b>Agreed</b>
Clause 17(1): Franchisor must disclose materially relevant facts (financial details)		Current		Proposed	<b>Agreed</b>
Clause 17(2): Franchisor must disclose materially relevant facts (other matters)		Current		Proposed	<b>Agreed</b>
Clause 18(1): Franchisor must notify re end of term arrangements		Current	Proposed		<b>Agreed</b>
Clause 18(2): Franchisor must notify franchisee of right to request DD in relation to extending franchise agreement		Current	Proposed		<b>Agreed</b>
Clause 19: Record keeping obligations	Current & proposed				<b>Agreed</b>
Clause 20: Prohibition on release from liability	Current & proposed				<b>Agreed</b>
Clause 21: Franchise agreement must not require dispute resolution outside state franchisee located in	Current & proposed				<b>Agreed</b>
Clause 22: Franchise agreement must not require franchisee to pay franchisors dispute costs	Current & proposed				<b>Agreed</b>
Clause 23: When restraint of trade has no effect	Current & proposed				<b>Agreed</b>
Clause 25: Transfer obligations, including franchisor must not unreasonably withhold consent to transfer	Current & proposed				<b>Agreed</b>
Clause 26(3): Franchisor must repay amounts if franchisee cools off		Current	Proposed		<b>Agreed</b>
Clause 27(2): Franchisor must provide notice of termination for breach		Current	Proposed		<b>Agreed</b>
Clause 27(3): Franchisor cannot terminate if breach remedied	Current & proposed				<b>Agreed</b>
Clause 28(3): Termination no breach – notice required		Current		Proposed	<b>Agreed</b>
Clause 30: Franchisor must not require capital expenditure unless an exception applies	Current & proposed				<b>Agreed</b>



Clause 31(2): Franchisor must maintain a separate bank account for marketing fees	Current		Proposed		Agreed
Clause 31(3) (formerly 31(2)): Franchisor operating more than one franchised business must pay marketing fees on behalf of each unit on the same basis as other franchisees	Current			Proposed	Agreed
Clause 31(4) (formerly 31(3)): Franchisors restricted use of marketing funds for legitimate marketing expenses	Current			Proposed	Agreed
Clause 32(2): If a request is made, franchisor must not disclose a former franchisee's details to a prospective franchisee	Current & proposed				Agreed
Clause 32(3): Franchisor must not intentionally influence former franchisee to make or not make a request not to disclose their details		Current	Proposed		Agreed
Clause 33: Franchisor must not restrict or impair association of franchisees		Current		Proposed	Agreed
New Clause 41A(3) (replacing existing clause 39(3)): Requirement to attend ADR		Current		Proposed	Agreed
New Clause 46A(1): Automotive franchisor must not enter into a franchise agreement unless agreement compensation for early termination				Proposed	Agreed
New Clause 46A(2) (New Vehicle Dealers only): franchisor must not enter into a franchise agreement unless agreement provides buy back or compensation for new vehicles, spare parts and special tools if the franchise agreement is not renewed or is terminated early				Proposed	Agreed
New Clause 46A(3) (New Vehicle Dealers only): franchisor must not enter into a franchise agreement which purports to exclude compensation for early termination				Proposed	Agreed





New Clause 46B (New Vehicle Dealers only): Franchisor must not enter into a franchise agreement unless reasonable opportunity to franchisee to make a return during term				Proposed	Agreed
Clause 47(2) (New Vehicle Dealers only): franchisor must give notice of extension or renewal		Current	Proposed		Agreed
Clause 47(3) (New Vehicle Dealers only): Franchisor notice requirements if the agreement is < 12 months		Current	Proposed		Agreed
Clause 47(4) (New Vehicle Dealers only): Franchisor must state that franchisee may request a disclosure document		Current	Proposed		Agreed
Clause 47(5) (New Vehicle Dealers only): Franchisor who is not renewing or extending must give reasons		Current	Proposed		Agreed
Clause 49 (New Vehicle Dealers only): Parties must agree to a written plan for winding down and must cooperate on reducing stock of new vehicles and parts	Current & proposed				Not agreed further action requested

End of submission

