

MTAA 2023 Franchising Code Review Submission

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About the Motor Trades Association of Australia (MTAA) response to the 2023 Franchising Code Review

1. The Motor Trades Association of Australia (MTAA) is the peak Australian retail automotive association and represents the interests of its State and Territory Motor Trade Associations and Automotive Chambers of Commerce.
2. MTAA is the only Australian member association to represent the entire spectrum of Australia's automotive franchise dealer participants. For the purpose of this review that representation extends to new car, motorcycle, farm machinery and industrial machinery dealers as well as aftermarket repairer franchisees.
3. MTAA is forever indebted to many courageous franchise dealer members – both current and ex-dealers – from across all franchise sectors who have provided evidence and participated in sworn, in camera testimony to many government inquiries into franchising. Those inquiries include the Australian Competition and Consumer Commission's (ACCC) New Car Retailing Market Study 2017, Fairness in Franchising Review 2019, the Joint Parliamentary Committee Inquiry into the Effectiveness of the Franchising Code 2018 and Treasury's Automotive Franchising: Discussion Paper released by Federal Treasury in 2021.
4. The members of MTAA consider the release of the Treasury's 2023 Franchising Code Review as a milestone moment in MTAA's longstanding advocacy for specific automotive industry franchise protections to be applied to the entire automotive retail franchise sector. MTAA specifically thanks the Independent Code Reviewer, Dr Michael Schaper, for his willingness to engage with MTAA.
5. We look forward to further in-depth consultation with the Australian Government as the sunset of the Franchising Code, due on 1 April 2025, draws closer.

Key Recommendations of the MTAA for Consideration of the Franchise Code

6. The MTAA recommends:
 - a. extending the Franchising Code to cover Motorcycle, Farm Machinery, Industrial Machinery & Truck Dealers;
 - b. extending the protections offered to dealers under the Franchising Code to franchise automotive aftermarket repairers;
 - c. The MTAA recommends that the Franchising Code should clearly mandate that a service and parts agreement that relates to motor vehicle dealer agreement falls within the protective umbrella of the Franchising Code;
 - d. amending the Franchising Code to recognise the right of dealers to be compensated for established goodwill;
 - e. giving dealers the right to sell their dealerships and recover their investment in goodwill where a dealer is not offered a new dealer agreement upon the expiration of the term of its current dealer agreement or where the dealer is not offered a renewal of its dealer agreement;
 - f. alternatively to (e), dealers be compensated for their established goodwill where a dealer is not offered a new dealer agreement upon the expiration of the term of its current dealer agreement or where the dealer is not offered a renewal of its dealer agreement (and the dealer is not permitted to sell its dealership);
 - g. that 'no fault' termination rights provided for by clause 28 of the Franchise Code should not be permitted to apply to dealer agreements;
 - h. amending the Franchise Code to make clear that a franchisor cannot include a clause in a dealer agreement that contains words to the effect that the dealer agrees that the term being offered



provides a reasonable opportunity for a return on its investment for the purposes of the franchisor complying with clause 46B of the Franchise Code;

- i. that dealers be granted a minimum 5 year term for their dealer agreements to provide them more certainty regarding obtaining a return on their investment;
- j. that the Franchise Code provides protections against unfair contracts and unjust conduct as provided to dealers in New South Wales pursuant to the *Motor Vehicle Dealers and Repairers Act 2013 (NSW) (MVDR Act)*; and
- k. the creation of a specialised Franchise Dispute List in the Federal Circuit Court of Australia that would provide for a quicker and lower cost Court forum for resolving franchise disputes.

Introduction

- 7. This submission is prepared on behalf of the MTAA. It is prepared in response to the 2023 review of the Franchising Code being undertaken by Dr Michael Schaper, the Independent Reviewer, appointed by the Federal Government.
- 8. The MTAA represents the Motor Traders' Association of New South Wales, the Victorian and Tasmanian Automotive Chambers of Commerce, the Motor Trade Association of South Australia and Northern Territory, the Motor Trade Association of Western Australia, and the Motor Trades Association of Queensland.

9. The sectors within the franchise dealer automotive industry that the MTAA represents includes new vehicle retailers,¹ truck retailers, motorcycle retailers and farm & industrial machinery retailers as well as aftermarket vehicle repair franchisees. Most of the participants operating in these sectors operate under franchise retail models.
10. The automotive industry is a vital contributor to Australia's economy, employing more than 384,810 people across 13 sectors and 52 trades, and contributing around 2.1% of Australia's GDP. This is approximately \$39.35 billion. The majority of automotive businesses (96.6%) are small and family-owned enterprises. Many of the businesses operating in the automotive industry operating under franchise systems. Membership data of the select state-based MTA's reveals that over 56 percent of franchise operators from motorcycle, farm, industrial and truck dealerships are based in regional Australia.

Background

11. The *Competition and Consumer (Industry Codes-Franchising) Regulation 2014* (Franchising Code) regulates the conduct between participants in franchising. It is an industry code made under Part IVB of the *Competition and Consumer Act 2010*.
12. The Franchising Code provides regulatory support for the industry to guard against misconduct and opportunistic behaviour, while fostering long term changes to business culture that can drive competitiveness, sustainability and productivity. Accordingly, this submission will focus on the effectiveness of the Franchising Code to protect franchisees and, in particular, MTAA members against misconduct and opportunistic behaviour in the franchising sector. This submission will also consider the effectiveness of protections afforded by the Franchising Code in light of emerging trends in the retail automotive sector such as the move to agency distribution models by some motor vehicle manufacturers/distributors.

The General Fitness of the Franchising Code

13. The Franchising Code needs to evolve and develop as marketing and distribution models evolve and develop and franchisors adapt their behaviours to ameliorate the restrictions that are placed on them by the Franchising Code. In assessing the general fitness of the Franchise Code, this submission will focus on the following:
 - a. The effectiveness of the Franchising Code to protect the goodwill of new vehicle retailers;
 - b. The effectiveness of Clause 46A - Franchise agreement must provide for compensation for early agreement;
 - c. The effectiveness of Clause 46B - Franchise Agreement Must provide reasonable opportunity for return on franchisee investment;
 - d. The effectiveness of the obligation to act in good faith in relation to new car dealerships;
 - e. The effectiveness of clarifying that agency models are captured by the Franchising Code;
 - f. The effectiveness of end of term obligations;
 - g. The effectiveness of changes to dispute resolution procedures;
 - h. Extending the Franchising Code to cover Motorcycle, farm machinery, industrial machinery & truck dealers; and
 - i. Extending the protections given to dealers under the Franchising Code to aftermarket repairers.

The effectiveness of the Franchising Code to protect the goodwill of new vehicle retailers

¹ The term 'new vehicle retailers' and 'dealers' is used interchangeably in this submission.

14. The MTAA submits that the Franchising Code is ineffective in protecting goodwill of new vehicle retailers and ought to be amended to better protect the goodwill of new car retailers. The protection of goodwill in the franchising sector has been the subject of discussion for many decades now and the time has come for reform in this area. The protection of goodwill for dealers is now becoming more acute so as to protect against franchisor opportunism in seeking to convert dealers into agents.
15. The issue of franchisor opportunism was the subject of a very recent case in which the Federal Court of Australia considered the rights of dealers to be compensated for a loss of goodwill where a vehicle distributor (Mercedes-Benz) converted their dealer agreements to agency agreements. In dismissing the dealer's claims, the presiding Justice Beach called for the reform of the Franchise Code where he stated:

'given that the facts led to an adverse finding, further consideration needs to be given to the terms of the Franchising Code, which is a matter for another day and another forum'²

The decision of the Federal Court is discussed in further detail at paragraph 36 below.

The Nature of Goodwill

16. The concept of goodwill has different meanings in accounting and at law.
17. Goodwill for accounting purposes is a subjective assessment reflecting the excess that a purchaser is willing to pay for a business or the discount a seller is willing to accept for same.³

² The Court Transcript can be made available upon request

³ AHG WA (2015) Pty Ltd T/A Mercedes-Benz Perth & Westpoint Star Mercedes-Benz & Ors v Mercedes-Benz Australia/Pacific Pty Ltd [2023] FCA 1022 (file number VID 604 of 2021) (Mercedes-Benz Case) [97]



18. However, the legal existence of goodwill is objectively ascertained.⁴ The High Court described the legal concept of goodwill as follows:

*From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes “the attractive force which brings in custom.” Goodwill is correctly identified as property, therefore, because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business.*⁵

19. In considering the concept of goodwill in franchising, Habersberger J in *Foxeden Pty Ltd v IOOF Building Society Ltd* [2003] VSC 356 stated that a franchise merely confers a licence to participate in the franchisor’s business system for a specified term. He said at [269]:

*However, Mr Hayes recognised that, generally, a franchise merely confers a licence to participate in the franchisor’s business system for a specified term. During the term of the franchise, the franchisee owns the goodwill of the franchise in the relevant sense and is able to sell the goodwill (by assigning the franchise agreement). In the absence of a contractual provision providing for compensation for goodwill on expiry or termination of the franchise, the franchisee will forfeit the goodwill...*⁶

20. The Courts also considered goodwill in franchising in *Favotto Family Restaurants Pty Ltd v Chief Commissioner of State Revenue* (2020) 111 ATR 283. In that case, Ward CJ stated at [104]:

*‘Second, as to the nature of the rights under a franchise agreement, reference was made to the decision of the Full Court of the Federal Court (Lockhart, Wilcox and Gummow JJ) in *Ranoa Pty Ltd v BP Oil Distribution Ltd* (1989) 91 ALR 251 (*Ranoa*), a matter involving a franchise governed by the Petroleum Retail Marketing Franchise Act 1980 (Cth). In *Ranoa*, it was held that, on the expiry or termination of a franchise agreement, the franchisee has no right to continue operating the business and no right (in the absence of specific provision in the agreement to the contrary) to any goodwill that may have accrued to the business whilst it was operated by the franchisee. Their Honours noted (at 256) that, under the general law, “the benefit of goodwill built up by reason of a tenant carrying on a business from the leased premises enures to the benefit of the landlord at the expiration of the term” (citing Lord Coleridge CJ in *Llewellyn v Rutherford* (1875) LR 10 CP 456 at 467) and that, “in the absence of any special covenant and any other applicable statute, upon the tenancy coming to an end, the benefit of any goodwill of that character would be lost to the tenant and would enure to the benefit of the lessor” (see at 257)’.*

History of Goodwill Under the Franchising Code

21. The Trade Practices Act Review Committee, in its report in 1976 (Swanson Report), recommended that upon termination of franchises, the franchisee should be entitled to fair compensation for their investment, including goodwill upon termination of their franchises⁷ on what the Court considers to be a just and equitable basis.⁸
22. The Trade Practices Consultative Committee, in its report in 1979 (Blunt Review), recommended that franchisees be entitled to an apportionment of goodwill. The Blunt Review relevantly found that:

⁴ Mercedes-Benz Case [97]

⁵ *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at ##.

⁶ Page 269.

⁷ Trade Practices Act Review Committee, *Report to The Minister for Business and Consumer Affairs*, August 1976, [5.7].

⁸ *Ibid* [5.13].

'that in both the assignment and the termination or non-renewal situations there be an apportionment of any goodwill between the franchisor and the franchise on the basis of the principle of fair apportionment having regard to the relative inputs of the franchisee and franchisor, both of capital (including general marketing costs which the franchisor may have incurred to promote the tradename, etc.) and labour, so that any goodwill is apportioned having regard to that relationship'.⁹

23. In 2008, the Parliamentary Joint Committee on Corporations and Financial Services (Parliamentary Joint Committee) produced a report entitled 'Opportunity not opportunism: improving conduct in Australian franchising'. The Parliamentary Joint Committee considered, among other things, the concept of goodwill in franchising and in particular the positions adopted in the Swanson Report and Blunt Review.¹⁰ The Parliamentary Joint Committee expressed the following view after having considered the question of goodwill:

The present situation where a franchisee's contribution to their business has a market value prior to the end of the agreement which can be arbitrarily reduced to an amount determined by the franchisor afterwards is inequitable. At the end of an agreement, a franchisee has already committed considerably to the franchise system, financially and through their hard work, and is financially tied to the business. Franchisees stand to lose the prospect of returns on their capital investment, which in many cases is substantial.¹¹

The committee contends that a starting point for making an exit arrangement could be the market value of the business as a going concern.¹²

24. In 2013, the issue of goodwill was also considered in the review of the Franchising Code; undertaken by Alan Wein when he produced the Review of the Franchising Code of Conduct: Report to the Hon Gary Gray AO MP, Minister for Small Business, and the Hon Bernie Ripoll MP, Parliamentary Secretary for Small Business, 30 April 2013 (Wein Review). The Wein Review concluded (at p107):

Nonetheless, there should not be a general overarching right to compensation for franchisees at the end of a fixed term franchise agreement. Making such a recommendation would substantially and fundamentally change long established legal principles of property and contract law. There would also be a risk of greater cost and uncertainty in the industry and possible unintended consequences from any such change to contractual rights.

While appreciating the contribution made by franchisees to the development of their franchise site or territory, a franchisee should expect that the franchise period should be no longer than the negotiated terms of the contract. Any equitable right to compensation for a franchisee whose franchise is not renewed must lie with the courts and any statutory right that may exist under the ACL.

Arguably, adequate remedies already exist if a franchisor fails to renew a franchise agreement in a situation where the franchisee has complied with all the conditions for renewal. Unlawful refusal will amount to a breach of the agreement by repudiation or possibly unconscionable conduct. However, if the agreement does not provide for renewal, the franchisee knows before entering into the agreement that the franchisee's rights under the agreement will terminate on the expiry of the term. In that situation the franchisee should not be entitled to compensation

25. Following the Wein Review, amendments were made to the Franchising Code:

- a. in relation to the enforceability of restraint of trade provisions where a franchise agreement is not renewed and nominal or no compensation for goodwill is given to a franchisee;¹³

⁹ Trade Practices Consultative Committee, Small business and the Trade Practices Act, December 1979, [11.47].

¹⁰ Page 24.

¹¹ Paragraph 6.87, Page 81.

¹² Paragraph 6.88, Page 81.

¹³ Clause 23, Franchising Code.



- b. requiring franchisors to disclose ‘the prospective franchisee’s rights relating to any goodwill generated by the franchisee (including, if the franchisee does not have a right to any goodwill, a statement to that effect);¹⁴ and
- c. with specific reference to new vehicle dealership agreements, requiring franchisors not enter into a franchise agreement unless the agreement provides for compensation for early termination in certain circumstances and specifies how the compensation is to be determined, with specific reference to, among other things, lost profit from direct and indirect revenue¹⁵ and loss of opportunity in selling established goodwill.¹⁶

Goodwill of new car retailers

26. In the case of new car retailers, the goodwill they acquire and develop is as follows:

- a. When acquiring a dealership from another dealer, dealers pay valuable consideration for the value of the goodwill. The most common form of valuing dealership goodwill is applying an EBITDA¹⁷ multiple. Applying the multiple to the dealership’s EBITDA derives an implied value of the dealership. Generally, the earning considered are the most recent 12-month period or the most recent financial year. The multiple to be applied to the earnings is driven by factors such as the desirability of the brand, whether it is a prestige brand or volume brand, similar transactions for like brands and the general state of the industry/economy. The goodwill price that dealers pay to acquire a dealership is often in the millions of dollars and sometimes in the tens of millions of dollars;
- b. Dealers establish and operate their dealership businesses by making substantial investments of time, money, effort and entrepreneurial skill, and taking financial risks, in return for which they obtain a reward by means of profit from the sale transactions they entered into with their customers;

¹⁴ Franchising Code, Annexure 1 (Disclosure Document for franchisee or prospective franchisee), [18.1(fa)].

¹⁵ Clause 46A(1)(b)(i), Franchising Code.

¹⁶ Clause 46A(1)(b)(iii), Franchising Code.

¹⁷ EBITDA stands for earnings before interest, tax, depreciation, and amortization.

- c. Dealers invest in their customer relationships, with a view to building a base of loyal customers, who would continue to purchase vehicles over their lifetime from that dealer;
 - d. Under the dealership model, the customer relationship exists at the level of the dealer. Accordingly, the dealer had an incentive to build and maintain customer relationships to earn future profits, as a return on its investment; and
 - e. A dealer's profits may vary depending on their own entrepreneurial skills and market conditions and hence the value of goodwill.
- 27.** Unless a dealer is buying a distributor owned and operated dealership, dealers do not pay any price for goodwill to the distributor/manufacture or franchise fee to acquire a dealership. The Franchising Code is silent with respect to the sale of a 'goodwill' and only addresses the transfer of franchise agreements from one franchisee to another.¹⁸ Dealers only pay for goodwill when they acquire a dealership from another dealer.
- 28.** The current trend of manufacturers/distributors is to offer fixed term dealer agreement with terms of no more than 5 years with no right of renewal. Despite there being no right of renewal, it is the general industry understanding and practice for manufacturers/distributors to offer a new dealer agreement to a dealer at the end of a fixed term if the dealer is not in breach of its dealer agreement and has otherwise operated in a manner acceptable to the manufacturer/distributor. Manufacturers/distributors encourage dealers to take a long-term view of their investments in dealerships (despite only offering fixed terms).
- 29.** As dealers are unwilling to pay for goodwill of a dealership based on a multiple of earnings where the only right being 'sold' is the right to operate the balance of the term of the dealer agreement that is being transferred, the manufacturer/distributor will 'facilitate' the sale by agreeing to offer the purchaser dealer a new dealer agreement that has that manufacturer/distributor's standard term or agreeing to offer a new dealer agreement to the purchaser dealer upon the expiry of the balance of the term of the dealer agreement being transferred. Manufacturers/distributors facilitate this because it is in their commercial interests for dealerships to be considered valuable assets and attract the best dealer candidates into their dealer networks.
- 30.** As a consequence of the industry practice of buying and selling dealerships described above, dealers are able to:
- a. sell their dealerships and realise the value of the established goodwill despite, in strict contractual terms, only having the legal entitlement to sell the value of the balance of the term of the existing dealer agreement; and
 - b. purchase a dealership knowing that they can offer to pay for goodwill based on a multiple of earnings with an expectation of being offered a term by the distributor/manufacture (who is not a party to the sale transaction) that is longer than the balance of the term of the existing dealer agreement being transferred.
- 31.** When a manufacturer/distributor does not offer a new dealer agreement to a dealer or does not agree to renew its dealer agreement, the goodwill of that dealership is extinguished and is otherwise worthless. In addition, the Prime Market Area (PMA) allocated to that dealer under its dealer agreement is granted to one or more other dealers. The benefit of the goodwill established in that dealership is effectively granted to the new dealer or dealers who have taken over the PMA of the former dealer without having paid anything for the goodwill. This amounts to a windfall for the incoming dealer and a material financial loss for the dealer that has not been offered a new dealer agreement or has not had a renewal of the dealer agreement.

¹⁸ Division 4 of the Franchising Code.

32. Mr Wein's findings in the Wein Report that *'if the agreement does not provide for renewal, the franchisee knows before entering into the agreement that the franchisee's rights under the agreement will terminate on the expiry of the term'*¹⁹ does not address the manner in which dealerships are valued and transacted in Australia with the assistance of manufacturers/distributors.²⁰ The statement also does not address the inequitable financial outcomes of a dealer not having a new dealer agreement being offered to it or having its dealer agreement not renewed. This is because, as has been discussed, contrary to Mr Wein's statement, dealers make investment decisions to purchase a dealership with the implicit understanding (encouraged by manufacturers/distributors) that upon the expiry of the term they will be offered a new dealer agreement or a renewal.
33. The inequitable outcome of a dealer not being offered a new dealer agreement or renewal has been recognised by committees charged with reviewing the franchising industry. In particular:
- a. The Swanson Report in 1976 recommended that upon termination of franchises, the franchisee should be entitled to fair compensation for their investment, including goodwill upon termination of their franchises on what the Court considers to be a just and equitable basis;²¹

19 Paragraph 24 above.

20 See paragraphs 28 to 30 above.

21 Paragraph 21 above.





- b. The Blunt Review in 1979 recommended that franchisees be entitled to an apportionment of goodwill;²²
- c. In 2008, the Parliamentary Joint Committee considered it inequitable where a franchisee's contribution to its business has a market value prior to the end of the agreement which can be arbitrarily reduced by the franchisor.²³

Goodwill and Agency

- 34. There is an emerging trend in Australia and indeed worldwide for motor vehicle distributors/ manufacturers to change from the traditional dealership model to an agency model. In Australia, Mercedes-Benz and Honda have switched to agency models. Jaguar vehicles will also be sold under an agency model from 2025. There are also new entrants into the Australian market that have adopted an agency model; for example, Cupra.
- 35. Under an agency retail model, the manufacturer/distributor becomes the retailer while the dealer remains the physical touchpoint with the customer. The contract for the sale of the vehicle is between the manufacturer/distributor and the customer and the dealer sells the vehicle as the agent of the manufacturer/distributor. The manufacturer/distributor owns the vehicle inventory, set the prices for the sale of the vehicle and determines the commission the dealer/agent will earn from the sale of the vehicle.

²² Paragraph 22 above.

²³ Paragraph 23 above.

36. Recently, Justice Beach of the Federal Court of Australia delivered judgment²⁴ with respect to a legal proceeding brought by most of the Mercedes-Benz dealers in Australia against Mercedes-Benz Australia/Pacific Pty Ltd (MBAuP) in response to MBAuP's decision to issue non-renewal notices to the dealers and subsequently offer them agency agreements (Mercedes-Benz Case).²⁵ One of the questions to be determined in the Mercedes-Benz Case was whether by converting the Mercedes-Benz dealers to agents, they had appropriated the dealer's goodwill in their dealerships and therefore engaged in unconscionable conduct in contravention of the Australian Consumer Law (ACL).

37. Justice Beach dismissed the claims of the Mercedes-Benz dealers. This is despite agreeing that the shift to the agency model was in large part a case of franchisor opportunism because Mercedes-Benz took advantage of its position after the dealers had made significant investments, and it intended to appropriate the gains in the industry margins associated with the move to the agency model.

38. Justice Beach held:

*'... the absence of any right at law for a franchisee to be compensated for goodwill on the non-renewal of a franchise agreement has long been recognised'*²⁶

39. Converting a dealership into an agency agreement differs from the situation described in paragraph # above where the dealer is not offered a new dealer agreement or renewal and the right to operate a dealership in the dealer's former PMA is granted to another dealer. Where a dealer is converted to an agent, the manufacturer/distributor effectively takes over the rights to the PMA (including all of the benefits of the investments made by the dealers in its dealership and customer relationships including the investment in building and developing its goodwill) without there being any legal obligation to pay compensation to the dealer.²⁷ Depending on the terms of the agency arrangement, the return on sales may be lower than previously enjoyed as a dealer. In such circumstances, the value of the goodwill in the new agency business will be lower than in the previous dealership business.

40. Despite Justice Beach finding in the Mercedes-Benz case that MBAuP intended to appropriate the gains in the industry margins enjoyed by the Mercedes-Benz dealers,²⁸ he found that:

- a. Mercedes-Benz dealers had no right to goodwill upon being issued with a non-renewal notice;²⁹
- b. a more flexible concept of goodwill can be accommodated under the law of unconscionability in the ACL;
- c. the conduct of MBAuP was nevertheless *not* unconscionable within the meaning of the ACL.

41. The adverse finding for the dealers in the Mercedes-Benz case demonstrates how difficult it is for dealers to be compensated for losses they suffer upon their dealerships not being renewed and being converted to an agency model. This is even in circumstances where the Court has found that the conduct of the MBAuP amounted to 'franchisor opportunism' because MBAuP took advantage of its position after the dealers had made significant investments, and it intended to appropriate the gains in the industry margins associated with the move to the agency model.³⁰ Moreover, it renders the statement in the Wein Report that *'any equitable right to compensation for a franchisee whose franchise is not renewed must lie with the courts and any statutory right that may exist under the ACL'*³¹ as theoretical, illusory and impractical.

24 30 August 2023.

25 Mercedes-Benz Case

26 Ibid [125].

27 See paragraph 38 above.

28 Paragraph 37 above.

29 Paragraph 38 above.

30 Paragraph 37 above.

31 Paragraph 24 above.

Shortcomings In the Franchising Code With Respect to Goodwill and The Need For Reform

42. This submission has identified that:

- a. dealers buy and sell dealerships valuing goodwill based on the expectation of a long-term relationship with the manufacturer/distributor and not on the value of the remaining term of the dealer agreement that is being assigned or transferred;
- b. dealers are subjected to prejudicial economic consequences in circumstances where at the end of the term of the dealer agreement:
 - i. a new dealer agreement is not offered to the dealer or a renewal (if there is a right to one); or
 - ii. the dealer is compelled to convert their dealership to an agency model that operates on a lower margins/returns on sale.

43. Under both circumstances described above, the Franchising Code offers no protections for the loss or diminution in the established goodwill of the dealers. This was clearly recognised by Justice Beach in the Mercedes-Benz case when he held that the absence of any right at law for a franchisee to be compensated for goodwill on the non-renewal of a franchise agreement has long been recognised³² and when he stated in his opening remarks when delivering judgment in the Mercedes-Benz Case that *'given that the facts led to an adverse finding, further consideration needs to be given to the terms of the Franchising Code'*³³.

44. The fact that the law does not recognise the right for a franchisee to be compensated for goodwill on non-renewal³⁴ does not detract from the fact that in the circumstances described in paragraph 31 above, one dealer has a financial windfall at the expense of another.

45. In the most recent changes to the Franchising Code, the established goodwill of dealers was sought to be protected where there was an early termination of a dealer agreement in certain circumstances by the inclusion of clause 46A. This clause requires a dealer agreement to specify how the compensation for the early termination is to be determined, with specific reference to, among other things, lost profit from direct and indirect revenue and loss of opportunity in selling established goodwill.³⁵

46. However, it is submitted that the protections sought to be conferred by clause 46A are arguably illusory in light of the findings in the Mercedes-Benz Case. In particular:

- a. Justice Beach found that the absence of any right at law for a franchisee to be compensated for goodwill on the non-renewal of a franchise agreement has long been recognised;³⁶
- b. with respect to clause 46A, the Franchising Code does not stipulate how compensation is to be calculated, only that the dealer agreement specify the franchisor's proposal;
- c. in response to the amendments to the Franchising Code in relation to the enforceability of restraint of trade provisions where a franchise agreement is not renewed and nominal or no compensation for goodwill is given to a franchisee (clause 23) where he said:

*'But no right to compensation for goodwill, and no right to renewal, has been included in the Franchising Code. Rather, a franchisor is required to disclose "the prospective franchisee's rights relating to any goodwill generated by the franchisee (including, if the franchisee does not have a right to any goodwill, a statement to that effect)" (Franchising Code, Annexure 1 (Disclosure Document for franchisee or prospective franchisee), [18.1(fa)]'.*³⁷

³² Mercedes-Benz Case [125]

³³ Court Transcript available upon request.

³⁴ Paragraph 38 above.

³⁵ Clause 46A(1)(b).

³⁶ Paragraph 38 above.

³⁷ Mercedes-Benz Case [132]



47. Although Justice Beach's statement was directed at clause 23, it is just as applicable to clause 46A. This is because:

- a. on the expiry or termination of a franchisee agreement the franchise forfeits its goodwill;³⁸
- b. clause 46A of the Code only directs a franchisor to specify in the dealer agreement how the compensation is to be determined upon early termination, with specific reference to, among other things, lost profit from direct and indirect revenue³⁹ and loss of opportunity in selling established goodwill⁴⁰
- c. Justice Beach has found that the Franchising Code has no express right to compensation for goodwill. This means that it is open to argue that clause 46A does not confer a right to compensation for goodwill. Rather, all clause 46A provides is a mechanism for calculating the value of established goodwill upon an early termination (assuming any goodwill exists). This was also recognised by Justice Beach.⁴¹ It follows therefore that if the dealer agreement has no right to renewal, the value of the established goodwill is zero upon it being terminated. In order to comply with clause 46A, all a manufacturer/distributor is required to do is specify how the compensation is to be determined for loss of opportunity in selling established goodwill. This could be done by merely stating the manufacturer/distributor will compensate the dealer for any goodwill that can identified by the dealer - which based on this analysis is arguably zero.

48. It is therefore arguable that only dealers that have a right of renewal in their dealer agreements would have a right to be compensated for the loss of opportunity in selling established goodwill where there is an early termination of the type described in clause 46A of the Franchising Code. As has already been stated, manufacturers/distributors are moving more and more towards offering fixed term

³⁸ Paragraph 19 above.

³⁹ Clause 46A(1)(b)(i), Franchising Code.

⁴⁰ Clause 46A(1)(b)(iii), Franchising Code.

⁴¹ Paragraph 46(c) above.



agreements. It is submitted that this is done in part to avoid having to compensate dealers for the loss of opportunity to sell established goodwill if a section 46A termination event was to occur.

49. A dealer with only a fixed term agreement would therefore only have a right to be compensated under a clause 46A early termination event for lost profit from direct and indirect revenue⁴² and the other elements specified in clause 46A - but not for the loss of opportunity to sell established goodwill. The structure of clause 46A is to list the elements of compensation in sub-clause (1)(b) as cumulative. The word 'or' is not used between each loss element as is the case in sub-clause (1)(b) when describing each early termination event. Clause 46A is therefore drafted in a way that intends to grant compensation to dealers for loss of established goodwill but, due to the matters described in this submission, compensation may not be available to dealers if a prescribed early termination event was to occur.
50. The prejudicial financial effect on a dealer where at the end of the term of the dealer agreement:
 - a. a new dealer agreement is not offered to the dealer or a renewal granted (if there is a right to one) can be ameliorated by amending the Franchising Code to require manufacturer/distributors to:
 - i. permit the dealer to sell its dealership within a prescribed period to another dealer approved by the manufacturer/distributor; or
 - ii. pay compensation to the outgoing dealer for the loss of its established goodwill. In this scenario, the manufacturer/distributor would be entitled to recover the 'compensation' from its incoming dealer of choice who would be taking over the outgoing dealer's PMA; or

⁴² Clause 46A(1)(b)(i), Franchising Code.

- b. the dealer is compelled to convert its dealership to an agency sales outlet can be ameliorated by amending the Franchising Code to require manufacturer/distributors to pay for the established goodwill of the dealer.
- 51. The suggested amendments to the Franchising Code are premised on there being a further amendment to the Franchising Code that recognises a right to compensation for established goodwill.
- 52. To avoid debate as to what established goodwill means for the purposes of compensation, the Franchising Code should be amended to define 'established goodwill' to be based on the direct sources of EBITDA of the dealership business in the 12-month period prior to the termination or expiration of the dealer agreement applying the average multiple in like branded dealership sale transactions in the previous 24-month period.
 - a. The idea that a dealer has established goodwill in its dealership business and that it ought to be protected is not novel. In particular, as has been discussed: various Government committees reviewing franchising in Australia have called for the protection of a franchisee's goodwill;⁴³
 - b. the recent addition of clause 46A to the Franchising Code which seeks to address the need to compensate dealers for the loss of opportunity in selling established goodwill if a prescribed early termination event occurs. However, the practical effectiveness of this clause particularly to dealers with fixed term agreements has already been discussed;
 - c. the call made by Justice Beach for the reform of the Franchising Code as a consequence of the Mercedes-Benz Case; and
 - d. legislation enacted in some States in the United States of America to protect a franchisee's goodwill.
- 53. Examples of legislative protections of dealership goodwill in the United States of America are as follows:
 - a. In Hawaii, if the franchisor terminates or refuses to renew the franchise agreement for the purpose of converting the franchisee's business to one owned and operated by the franchisor, then the franchisor must compensate the franchisee for the loss of goodwill. This particularly applies to agency arrangements;⁴⁴
 - b. In Illinois, franchisors cannot refuse to renew a franchise agreement, without compensating the franchisee either by repurchase or by other means for the diminution in the value of the franchised business caused by the expiration of the franchise where the franchisee:
 - i. is barred by the franchise agreement (or by the refusal of the franchisor at least 6 months prior to the expiration date of the franchise to waive any portion of the franchise agreement which prohibits the franchisee) from continuing to conduct substantially the same business under another trademark, service mark, trade name or commercial symbol in the same area subsequent to the expiration of the franchise; or
 - ii. has not been sent notice of the franchisor's intent not to renew the franchise at least 6 months prior to the expiration date or any extension thereof of the franchise;⁴⁵ and
 - c. In Washington, franchisors generally cannot refuse to renew a franchise agreement without fairly compensating the franchisee for, among other things, good will. However, compensation for good will need not be made if:

⁴³ Paragraphs 21-23 above.

⁴⁴ Haw Rev Stat § 482E-6(3) (2022).

⁴⁵ Ill Comp Stat 705/20 (2016).

- i. the franchisee has been given one year's notice of nonrenewal; and
- ii. the franchisor agrees in writing not to enforce any covenant which restrains the franchisee from competing with the franchisor.⁴⁶

Effectiveness of Clause 46A - Franchise agreement must provide for compensation for early termination

54. As has been discussed in this submission, the effectiveness of clause 46A is lacking insofar as it relates to compensation for the loss of opportunity in selling established goodwill. In short, where the law does not recognise a franchisee's right to goodwill upon the termination of their franchise agreement, merely mandating that a dealer agreement must specify how compensation is to be determined for the loss of opportunity in selling established goodwill offers not protection to dealers when the Franchise Code itself does not recognise the right for a franchisee to be compensated for established goodwill. This is the essence of the Justice Beach's call for reform of the Franchise Code in the Mercedes-Benz Case.⁴⁷

Effectiveness of Clause 46B - Franchise Agreement Must provide reasonable opportunity for return on franchisee investment

55. The MTAA considers the inclusion of clause 46B to be a worthwhile inclusion to the Franchising Code but its effectiveness is impeded in 3 ways, namely by the:
- a. inclusion of clause 28 in the Franchising Code;
 - b. manufacturer/distributors including terms in dealer agreements requiring dealers to 'agree' that the term being offered provides a reasonable opportunity for return on franchisee investment; and
 - c. Franchising Code not recognising a right to compensation for goodwill.

Each of these points is discussed in further detail below.

Inclusion of clause 28 in the Franchising Code

56. Clause 28 of the Franchise Code permits a manufacturer/distributor to include a term in the dealer agreement to terminate the dealer agreement at any time by giving reasonable notice where there is no breach on the part of the dealer. By operation of clause 47 of the Franchising Code, the notice period must be at least 12 months if the term of the dealer agreement is more than 12 months.
57. Assuming the dealer has a dealer agreement with a term of 12 months, the effect of including a 'no fault' termination right in the dealer agreement is to effectively grant to the dealer a 'rolling' 12-month dealer agreement with a term of no more than 5 years. This means that where a manufacturer/distributor that has a no 'no fault' termination right in its dealer agreement:
- a. the manufacturer/distributor can never truly know if it is discharging its obligation under clause 46B and therefore be in contravention of that clause;
 - b. a dealer can never properly assess if it has a reasonable opportunity to obtain a return on its investment.
58. The MTAA submits that 'no fault' termination rights permitted by clause 28 should not be allowed to apply to dealer agreements because:
- a. manufacturer/distributors already include extensive termination rights in their dealer agreements for unsatisfactory performance by dealers;
 - b. dealers make significant investments in goodwill and capital when purchasing a dealership and therefore the exercise of a 'no fault' termination right can lead to significant financial prejudice on the part of the dealer; and

⁴⁶ Wash Rev Code § 19.100.180(2)(i) (2014).

⁴⁷ Paragraph 15 above.

- c. the inclusion of a 'no fault' termination right into a dealer agreement renders the term of the agreement to be a 'rolling' 12-month term up to the maximum term specified in the dealer agreement, which is inconsistent with the protections that clause 46B is intended to provide dealers.

Requiring dealers to 'agree' that the term being offered provides a reasonable opportunity for return on franchisee investment

- 59. The MTAA has observed that some manufacturer/distributors are seeking to protect themselves from contravening clause 46B and being liable for a civil penalty by including clauses in their dealer agreements that contain words to the effect that the dealer agrees that the term being offered provides a reasonable opportunity for return on its investment.
- 60. The MTAA submits that the Franchising Code should be amended to make clear that a manufacturer/distributor cannot include a clause in a dealer agreement of the type described in paragraph 59 above.

Franchising Code not recognising a right to compensation for goodwill

- 61. Whilst the MTAA considers that the certainty and protection that clause 46B seeks to provide is laudable, it does not go far enough as it only applies to 'any investment required by the franchisor as part of entering into, or under, the agreement'. Those investments are capital in nature. However, very often, the most significant investment a dealer makes when acquiring a dealership and entering into dealer agreement is its investment in goodwill. As has been discussed earlier in this submission, the Franchising Code provides no adequate protections for the investment a dealer makes in acquiring, establishing and maintaining goodwill.

Reforms to clause 46B

- 62. The MTAA considers that dealers would have more certainty in their dealership investments if the Franchising Code:
 - a. mandated a minimum 5-year term for dealer agreements;
 - b. recognised a right to compensation for goodwill and adopted the protections for dealers not being offered a new dealer agreement or renewal upon the expiry of a dealer agreement discussed in paragraph 50 above.

These changes, if adopted, would protect dealers with respect to their investment in both capital and goodwill with respect to purchasing and operating a dealership business. Absent these reforms, the 'no breach' termination right should not apply to motor vehicle dealer agreements.

Effectiveness of obligation to act in good faith in relation to new car dealerships

- 63. The 'good faith' provisions in the Code were amended to include clause 3A with respect to new vehicle dealerships. Clause 3A provides that in considering whether a party has contravened the obligation of good faith clause 6(1) of the Franchising Code, the court must have regard to whether the terms of the agreement are fair and reasonable.
- 64. As presently drafted, a manufacturer/distributor could take advantage of a term that is not fair and reasonable but still escape liability under clause 3A if the manufacturer/distributor was found to be acting in good faith. For instance, in the Mercedes-Benz Case, the Court found that there was no implied limitation to the term of the dealer agreements permitting MBAuP to issue a non-renewal notice to the effect that it could not be exercised for the purpose of converting dealers to agents and that MBAuP acted in good faith when exercising the power of non-renewal.

65. The MTAA considers the inclusion of clause 3A to be an important protection for dealers. However, the protections offered to dealers could be more effective if:
- there was a standalone prohibition for including terms in a dealer agreement that are not fair and reasonable - as opposed to being tethered to a duty of good faith; and
 - the protections extended to 'unfair conduct'.
66. These protections could be enacted by amending the Franchising Code to include the protections afforded to dealers in the MVDR Act which prohibits unfair contracts and unjust conduct against dealers (sections 142 & 143).
67. Section 142(1) of the MVDR Act provides that a term of a *supply contract*⁴⁸ between a manufacturer and a motor dealer for the supply of motor vehicles by the manufacturer to the motor dealer for sale by the motor dealer] is unfair for the purposes of this Part if:
- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - it would cause detriment (whether financial or otherwise) to a party if it were to be relied on.
68. Section 142(2) of the MVDR Act provides that without limiting subsection (1), the following are examples of terms of supply contracts that may be unfair:
- a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
 - a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
 - a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
 - a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
 - a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods to be supplied under the contract;
 - a term that permits, or has the effect of permitting, one party unilaterally to vary the goods required to be sold or the place at which goods are required to be sold by the motor dealer;
 - a term that unreasonably limits, or has the effect of unreasonably limiting, the assignment by the motor dealer of the motor dealer's rights under the contract or the sale of the motor dealer's business;
 - a term that limits, or has the effect of limiting, one party's rights to sue another party.
69. Section 143(1) of the MVDR Act provides that conduct of a manufacturer is unjust conduct for the purposes of this Part if it is conduct:
- that occurs in connection with a supply contract and is conduct that is dishonest or unfair; or
 - that is authorised by an unfair term of a supply contract.

⁴⁸ 'supply contract' means a contract (including any documents forming part of, or referred to in, the contract - see section 141, MVDR Act.

70. These amendments to the Franchising Code, if made, would:

- a. provide more effective protections to dealer over and above the existing good faith provisions in the Franchising Code;
- b. provide all dealers in Australia the protections presently only afforded to dealers in NSW by the MVDR Act; and
- c. provide protections akin to the unfair contract protections in the ACL which presently many dealers cannot access due to the restrictive definition of 'small business'.

71. The ACCC has been lobbying for an unfair practices prohibition for some time, commencing in 2019 in its Digital Platforms Inquiry final report, up to and including recent speeches by ACCC Chair Ms Gina Cass-Gottlieb. The ACCC believes that Australia is falling behind other OECD nations such as Singapore, the United Kingdom and European Union, all of which have an unfair practices prohibition.⁴⁹

72. The MTAA therefore believes that amending the Franchising Code to include the protections in the MVDR Act against unfair contracts and unjust conduct would be a welcome and necessary reform. This is well demonstrated by the decision in the Mercedes-Benz Case that showed a very high threshold of commercially immoral behaviour needs to be reached to establish unconscionable conduct under the ACL.

Effectiveness of clarifying that agency models are captured by the Franchising Code

73. The MTAA welcomes the change in the definition of motor vehicle dealership in the Franchising Code to include agency arrangements. However, the MTAA has observed that at least one manufacturer/distributor in Australia has sought to disaggregate its franchise agreement when establishing an agency distribution model by having one agreement for the sale of new vehicles and another for the service of vehicles and sale of spare parts (Service & Parts Agreement).⁵⁰

74. Disaggregating franchise agreements in the manner described may become a common feature of agency arrangements and more common generally in the Australian new car industry if the trend to adopt agency distributions models in Australia grows. This is because manufacturer/distributors require an agency agreement for the sale of motor vehicles but may still prefer a traditional non-agency relationship with respect to the Service & Parts Agreement.

75. It is not clear whether a Service & Parts Agreement would fall within the definition of *new vehicle dealership agreement* in clause 4 of the Code. There should be no ambiguity as to whether a Service & Parts Agreement falls within the protective umbrella of the Franchising Code. Dealers risk losing all protections currently afforded to them under the Franchising Code with respect to the investments they make under a disaggregated Service & Parts Agreement if the Franchise Code does not expressly provide that such agreements fall within the definition of *new vehicle dealership agreement*. Those protections include all of the recent reforms in the Franchising Code as they relate to *new vehicle dealership agreement*.

Effectiveness of end of term obligations

76. The MTAA submits that the effectiveness of end of term obligations under Division 2 of the Franchising Code could be enhanced by better protecting a dealer's established goodwill and capital investment in circumstances where at the end of the term of the dealer agreement a new dealer agreement is not offered to the dealer or a renewal (if there is a right to one).

77. The effectiveness of end of term obligations under Division 2 of the Franchising Code could be enhanced in the following ways:

⁴⁹ Tihana Zuk and Amanda Tesvic, 'Consultation begins on whether Australia needs a prohibition on unfair practices', Ashurst (Blog Post, 31 August 2023) <<https://www.ashurst.com/en/insights/consultation-begins-on-whether-australia-needs-a-prohibition-on-unfair-practices/>>.

⁵⁰ Mercedes-Benz Australia

- a. With respect to protecting established goodwill, by adopting the reforms proposed in paragraph 50 above;
- b. With respect to dealer agreements that have a right of renewal:
 - i. only permitting the dealer to exercise it. It is very unfair on a dealer who makes a significant investment to acquire a dealership based on the financial security that comes with long term tenure provided by a right of renewal to then be faced with a manufacturer/distributor not granting the renewal. The dealer's only redress in those circumstances is to challenge the decision not to grant a renewal in the Courts on the basis that the decision contravenes the obligation of good faith. This is an expensive and uncertain exercise for the dealer. In tenancy agreements, the tenant always has the right to renew a lease, not the landlord. The reason for this speaks for itself. It is therefore curious that such an inequitable arrangement with respect to the renewal of dealer agreements would be permitted to exist under the Franchising Code. Manufacturers/distributors already grant themselves ample powers in their dealer agreements to manage and, if necessary, terminate underperforming dealers. There is therefore no reasonable justification for permitting manufacturers/distributors to reserve themselves the power to not grant a renewal of a dealer agreement; and
 - ii. requiring the manufacture/distributor to give 30 days' written notice to a dealer that a renewal will not be granted if the dealer agreement does exercise its option to renew within the time specified in the dealer agreement. The MTAA is aware of cases where a dealer has not been permitted to renew its dealership agreement by the manufacturer/distributor when the dealer has failed to exercise the renewal notice strictly within the time limit prescribed by the dealer agreement. A mere omission of the type described can have a severely detrimental financial outcome for the dealer because the dealer effectively loses the right to operate the dealership for the balance of the renewal term or sell its dealership.

Effectiveness of changes to dispute resolution procedures

78. The lengthy time and high cost that dealers are faced with to protect their legal rights when in dispute with manufacturer/distributors can be prohibitive. Manufacturer/distributors are very often multi national companies who are well resourced financially as well as with internal and external legal teams. Therefore, there is a significant power imbalance when a dealer is faced with a legal dispute with a manufacturer/distributor. As yet, it is too early to judge the effectiveness of the changes to the Franchising Code that permit multi party mediations, conciliations and arbitration. However, the MTAA welcomes any change to the Franchising Code that make dispute resolution more time efficient and cost effective for dealers. For this reason, the MTAA also calls for the creation of a specialised Franchise Dispute List in the Federal Circuit Court of Australia that would provide for a quicker and lower cost Court forum for resolving franchise disputes.

Extending the Franchising Code to Cover Motorcycle, Farm Machinery & Truck Dealers

- 79.** The motorcycle, farm machinery and truck sectors are significant in Australia. For example, as of 2022:
- a. the retail motorcycle⁵¹ sector had 697 franchise participants, generated revenue of \$1.8 billion, employed 3,3785 people and generated wages of \$242.6 million⁵²;
 - b. the retail franchise farm machinery sector had 838 participants, generated revenue of \$5.6 billion, employed 6,711 people and generated wages of \$455 million;⁵³

⁵¹ including scooter, all-terrain vehicles & off highway vehicles

⁵² Ibis Reports (2022) Motorcycle Dealers ,retrieved from <<https://www.ibisworld.com/au/industry/motorcycle-dealers/435/>>

⁵³ TMA State of the industry Report (2022), Ibis Reports (2022) Ag Machinery, retrieved from <<https://www.ibisworld.com/au/industry/>>

- c. the franchise retail truck sector had 337 participants, generated revenue of \$5.4 billion, employed approximately 1,800 people and generated wages of \$452.5 million.⁵⁴
80. Each of the sectors have the same structural relationship imbalance and vulnerabilities found in the contractual relationships governing new vehicle dealer agreements. This is because most dealerships in the motorcycle, farm ,industrial machinery and truck sectors are operated by small to medium size businesses and often family run businesses. The very size of the machinery and service departments connected with dealerships in the farm, industrial and truck dealership sectors necessitate dealership and location infrastructure set ups that are often much larger than that of new car dealerships. Conversely, most manufacturer/distributors are large multi-national corporations. Also, as is the case with motor vehicle dealer agreements, there is little scope for a dealer to negotiate the terms of a dealer agreement in the motorcycle, farm machinery and truck sectors due to inherent imbalance in the bargaining power between the parties. Similarly, dealer agreements in the motorcycle, farm machinery and truck sectors:
- are generally one sided and heavily favour the manufacture/distributor;
 - heavily prescribe the obligations of the dealer but place few obligations on the manufacture/distributor;
 - require significant investment in stock and parts inventory; and
 - require significant capital investment in showroom and service facilities.
81. Like motor vehicle dealer agreements, most dealer agreements in the motorcycle, farm, and industrial machinery and truck sectors do not fall within the definition franchise agreement in clause 4 and 5 of the Franchising Code. The MTAA submits that there are no justifiable grounds to deny dealers in the motorcycle, farm machinery and truck sectors the same protections in the Franchising Code offered to new vehicle dealers.
82. For over 25 years the MTAA, along with its affiliated State associations such as the VACC have lobbied for reforms to the Franchising Code to extend the protections afforded to motor vehicle dealers, motorcycle, truck, farm and industrial machinery dealer sectors.⁵⁵
83. At least in the case of farm machinery dealers, the need to provide them (along with motor vehicle dealers) protections under franchising legislation was recognised as far back as the late 1990s. When the Federal Government was considering enacting franchising legislation, the Committee tasked with undertaking the review⁵⁶ produced a report in 1997 entitled Finding a Balance Towards Fair Trading in Australia. Recommendation 3.3 of the report relevantly stated:
- The Committee recommends that the Commonwealth enact specific franchising legislation providing for compulsory registration of franchisors and compliance with codes of practice. The definition of franchising under that legislation should include motor vehicle and farm machinery distribution arrangements and the oil industry.*⁵⁷
84. Over a quarter of a century has passed since the Finding a Balance Towards Fair Trading in Australia report was produced and the farm machinery sector, along with the motor cycle and truck sectors, still do not have the necessary protections provided to motor vehicle dealers and other franchisees under the Franchising Code.
85. MTAA has never understood, or ever been provided, with a considered response as to why the ,motorcycle, farm, industrial machinery and truck franchised retailers were not included in the extended protections made available to new car dealers under Part 5 of the Franchising Code of Conduct 2014.

agricultural-machinery-manufacturing/275>

54 Ibis Reports (2022) Truck Dealers, retrieved from <<https://www.ibisworld.com/au/industry/truck-dealers/4031/>>

55 See for example the MTAA's most recent submission to The Treasury's 'Automotive Franchising Discussion Paper' of August 2021.

56 House of Representatives Standing Committee on Industry, Science and Technology.

57 Page 120.

The MTAA invites the Independent Code Reviewer and the Team at Federal Treasury to meet with franchise dealer members from the motorcycle, truck, farm, and industrial machinery dealer sectors to highlight the level of sophistication and infrastructure requirements to operate and maintain such facilities.

Extending the Protections Given to Dealers Under the Franchising Code to Aftermarket Repairers

86. The MTAA submits that the protections afforded to motor vehicle dealers under the Franchising Code should also be extended to franchise aftermarket repairers (Aftermarket Repairers). This is because Aftermarket Repairers have the same structural relationship imbalance and vulnerabilities as dealers.
87. Research undertaken by MTAA reveals that Aftermarket Repairers should have a heightened level of protection afforded to them by the regulator. MTAA makes this statement as a snapshot summary of the MTAA research shows that:
 - a. 40 percent of Aftermarket Repairers have had franchise agreements unilaterally altered in the past five years and that 60 per cent are unsure if they have been subjected to a unilateral change of their franchise agreement;
 - b. 40 per cent of Aftermarket Repairers report that they have had their PMA changed without consultation in the past five years;
 - c. 60 per cent of Aftermarket Repairers are unsure of how their franchisee-franchisor co-contributory marketing fund is utilised; and 80 per cent of Aftermarket Repairers do not have clear understanding of their obligations, and entitlements at the end of their franchise term.It is for this reason that the MTAA calls for the Franchising Code to be amended so that the protections afforded to dealers under Division 2 of Part of the Franchising Code be extended to Aftermarket Repairers.

Conclusion

88. MTAA thanks the Australian Government for the opportunity to make a submission on behalf of its new car, motorcycle, truck, farm, and industrial machinery dealers as well as aftermarket franchise repairer members. The Mercedes Benz Case serves as a timely reminder of the structural vulnerabilities that dealers find themselves and the inadequacies of the Franchising Code and the general law to protect their interests. It is for this reason that Justice Beach's call for reform of the Franchising Code must be heeded. Aftermarket Repairers do not have the same protections as dealers under the Franchising Code. Other classes of members such as motorcycle, truck, farm, and industrial machinery dealers are afforded no protections under the Franchising Code at all. Their interests and need for protection under the Franchising Code cannot be continued to be ignored.

Other

89. The Code Reviewer will find as an addendum to this submission, a version of MTAA member the Victorian Automotive Chamber of Commerce, 'VACC's response to *The Treasury's Automotive Franchising: Discussion Paper, August 2021*'. Page 17-19 of the VACC response provides examples of where franchise motorcycle and farm machinery dealers have been dealt with in an unsavory manner by their franchisors. The VACC response also provides five qualitative examples where Victorian franchisees from those sectors were dealt with unfairly.



Acknowledgement

- 90.** The MTAA acknowledges Mr Evan Stents, Partner, HWL Ebsworth Lawyers, for his assistance in compiling the MTAA response.
- 91.** The MTAA acknowledges the guidance of VACC Policy Lead, Dr Imogen Reid and all the MTAA Policy Team for their guidance and contribution to this submission.
- 92.** The MTAA acknowledges the ongoing support and collaboration with the Australian Automotive Dealer Association and Australian Chamber of Commerce and Industry with regards to better outcomes for all franchise dealers.



VACC's response to The Treasury's Automotive Franchising: Discussion Paper, August 2021

September 2021



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About the Victorian automotive franchise dealer members represented by VACC

The Victorian Automotive Chamber of Commerce (VACC) is the peak industry body representing automotive franchise dealers in Victoria. They include the new car, commercial vehicle, motorcycle, car rental, outdoor power-equipment, farm, and industrial machinery sectors.

VACC provides Secretariat services to the following VACC franchise dealer related Executive Committees:

- Victorian Automobile Dealers Association (VADA)
- Farm and Industrial Dealer Machinery Association (FIMDA)¹
- VACC Motorcycle Industry Division (MID)
- Commercial Vehicle Industry Association of Victoria (CVIA)

The membership of VACC's franchise dealer Executive Committees is diverse. They span from single franchise operators through to family run entities and listed companies. Franchisors, distributors or Original Equipment Manufacturers (OEM) are not represented on VACC's franchise dealer Executive Committees. Franchise dealer policy is created by franchise dealers actively engaged with VACC and other industry committees. It is VACC's view that franchise dealers provide direct and meaningful insights into key regulatory and policy challenges facing the industry and it is their views expressed and represented in this submission.²

VACC works closely with its national body, the Motor Trades Association of Australia (MTAA) in developing its state and national industry policy positions.



¹ FIMDA also counts amongst its membership participants of the Outdoor Power and Equipment sector.

² VACC , Committees, Boards & Governance (2021)<<https://vacc.com.au/About-us/Committees-Boards-Governance>> [1].

1. Executive Summary

VACC, and its franchise dealer divisions, welcomes the opportunity to respond to the Treasury's *Automotive Franchising: Discussion Paper August 2021* ('discussion paper'). The VACC franchise dealer divisions have reviewed the paper and provided the imprimatur for VACC's commentary for the consideration of Treasury. VACC seeks strengthened franchising protections on behalf of its 1,141 motor vehicle dealer members.³

VACC considers the release of the Treasury's discussion paper as a milestone in VACC and MTAA's longstanding advocacy for specific automotive industry franchise protections, applied to the entire automotive retail franchise sector.

VACC is indebted to several courageous franchise dealer members – both current and ex-dealers – from across all franchise sectors who have provided sworn, in camera testimony to many government inquiries, including the Australian Competition and Consumer Commission's (ACCC) *New Car Retailing Market Study 2017, Fairness in Franchising* and the *Joint Parliamentary Committee Inquiry into the effectiveness of the Franchising Code*.

VACC franchise dealers wish to advise Treasury that most franchise dealers have no intention, nor desire, to escalate conflicts with their franchisor. VACC franchise dealer members seek harmonious and constructive interactions with their respective franchisors.

It is no surprise, and no accident, that market leading franchisors have more profitable, and often more content businesses in their dealership networks. Such franchisors work collaboratively with their dealer networks to reach business decisions based on trust. This was confirmed by two dealer surveys undertaken by VACC in 2018.⁴ The consumer value prospect is also heightened through better business franchisor-franchisee practices that focus on expedient product issues resolution that contributes to a greater customer experience.

VACC and MTAA reiterate their united policy positions in their respective responses to the 2019 Department of Industry, Innovation and Science review: *'Regulatory Impact Statement: Franchise relationships between car manufacturers and new car dealers'*. That position was, and remains, that commercial vehicle, motorcycle, farm, and industrial machinery franchise dealers⁵ must be afforded the same legislative protections as new car dealers.⁶

The evidence shows very little difference between the issues faced by new vehicle dealerships (culminated in the creation of the new car dealer specific Part 5 to the Franchise Code) and those issues faced by farm machinery, motorcycle and commercial vehicle dealerships. This is highlighted in six examples detailed in subsequent sections of this submission.

The sophisticated business models, capital outlays, tooling requirements, and the fact all vehicle manufacturer operations are controlled by overseas parent companies, dictates that the separate, transparent and automotive industry specific schedule that became operational from 1 July 2021 must apply to all automotive franchise dealer sectors. The most recent schedule (Parts 5 and Parts 6) include definitive terms that must be revisited to include dealerships from the commercial vehicle, motorcycle, farm and industrial machinery franchised dealer sectors.

There are no quantifiable, nor qualifiable differences to suggest those operating commercial vehicle, motorcycle, farm and industrial machinery franchised dealerships are impacted to a lesser degree by franchisor transgressions of the Code. The impacts on business, the community and consumers are the same. These impacts are amplified in rural Australia where those same dealers are often the largest employer, biggest contributors to community groups and employers of new apprentices.

3 Approximate number of VACC member sites who are either new car, truck, farm machinery and motorcycle franchise dealers.

4 VACC Cyber car survey & VACC Franchise and Oil Code Survey (2018).

5 VACC, *Regulatory Impact Statement: Franchise relationships between car manufacturers and new car dealers*, (2019), 5 [5].

6 MTAA, *Regulatory Impact Statement: Franchise relationships between car manufacturers and new car dealers*, (2019) https://www.mtaa.com.au/images/docs/submissions/2019/MTAA_Dealer_Manufacturer_RIS_Submission.pdf 3 [5].

VACC views the exclusion of commercial vehicle, farm machinery and motorcycle dealers from the full suite of franchise protections as being illogical and discriminatory against what amounts to half of the entire motor vehicle retail sector.⁷

With regard to further obligations such as pre-contractual arbitration, VACC fully supports this notion. The parameters for resolving disputes related to unfair contract terms, contracts taken under a take-it-or-leave approach and/or breaches of the Franchising Code continue to be too high and resource intensive for dealers to take action on with their offshore, multinational franchisor.⁸ This is a whole of automotive franchise dealer issue. VACC believes mandated precontractual arbitration would act a deterrent to franchisors seeking to exert unfair power over their franchisees.

Key responses to Treasury's discussion paper:

1. The single most crucial outcome for VACC members is the inclusion of other automotive industry franchisee sectors. Motorcycle, commercial vehicles and agricultural machinery franchisee dealers should be appropriately recognised and included in automotive dealer specific reforms already enacted. The following submission reflects this priority.
2. VACC does not believe there is currently a need for a specific standalone automotive code of conduct. However, if there are failures in reforms and remedies, or other substantial matters, including unforeseen conduct or behaviour, VACC reserves the right to call for a specific automotive code or other legislated solutions.
3. VACC believes the reformed Franchising Code, including Part 5 and the governance processes underpinning it, now provides the opportunity to address unintended consequences of the reformed Code and the failure of existing remedies and reforms to be actioned in a timely manner.
4. VACC supports Option 1, as outlined in the discussion paper to *'Amend the Franchising Code and its automotive-specific provisions when required.'*
5. VACC acknowledges the significant contributions and work undertaken in developing complementary policy and regulation – including the class exemption for collective bargaining, upcoming changes to Unfair Contract Terms (UCT) and a revised, more meaningful Franchising Code penalty regime. All franchisees should qualify for UCT protections.
6. VACC supports reforms that underpin dealer rights to an uninterrupted and single franchise or agency agreement that includes the provision of all elements that a typical franchise dealer supports (e.g., new and used sales, finance, service and parts). A move to an agency agreement should not see a franchisee relinquish any of those operational elements or result in multiple agreements running concurrently nor permit franchisors to use an agency agreement to segregate those elements via ancillary agreements.
7. VACC supports amendments to the Franchising Code that will see the definition of a new vehicle dealership, and a new motor vehicle, being consistent with State based legislation, the *Road Standards Act 2018* (Cth) and the *Franchising Code 2014* (Cth) itself.
8. VACC supports the inclusion of mandatory pre-contractual arbitration.

2. Previous franchising code reviews

VACC and MTAA have called for a strengthening of the Franchise Code for the whole automotive franchise sector since 1998 and responded to all inquiries and reviews announced by government. It is a sad reality that some of the actual, and proposed, changes to the Franchising Code have arrived too late for some dealers, resulting in catastrophic losses as a consequence of a weak regulatory environment.

⁷ MTAA Directions in Australia's Automotive Industry (2021) 20.

⁸ AADA, Government Response to the Fairness in Franchising Report (Media release 21 August 2020) [3].

When the Franchising Code was initially introduced in 1998, the aim of the regulation included “... *addressing the power imbalance between all franchisors and franchisees*” and *raising the standards of conduct in the franchising sector without endangering the vitality and growth of franchising*.” Subsequent amendments to the Franchising Code have attempted to improve the Code with this in mind. Further, it is VACC’s position that the inclusion of the obligation to ‘act in good faith’ should be a continuance of achieving the Codes stated objectives.⁹

The Franchising Code, to some extent, was amended with between 2008 and 2010 with the intention to address the power imbalance between franchisee and franchisor. During this period, seeking protections under the Code was often viewed “David facing off against a group of Goliaths”.¹⁰

In its 2013 submission to the Wein Review, MTAA displayed tremendous initiative in developing a draft version of an updated Franchising Code – providing copies to the then Department of Industry, Innovation, Science, Research and Tertiary Education for its review and comment.¹¹ Many of the key recommendations contained in the draft code have been adopted in the 2020 Franchising Code amendments. However, a key omission is coverage and protections for all motor vehicle dealer franchises, as amended by the *Competition and Consumer (Industry Codes—Franchising) Amendment (New Vehicle Dealership Agreements) Regulation 2020*.

Identical to new car dealers, many franchise dealers from the commercial vehicle, motorcycle and farm and industrial machinery sectors will carry many millions of dollars’ worth of parts in stock and inventory. These are parts that are needed in stock for: counter sales to members of the public, account sales (to other, independent, workshops and collision repairers, freight companies and farmers for example), and, as workshop/service ‘consumables’. Many of the large dealership groups will have much larger inventory and can be parts suppliers themselves to other, smaller dealerships and to other agri businesses.¹² That investment in inventory must be protected.

3. The Value of Automotive Imports in Australia

Data sourced from the Department of Foreign Affairs and Trade indicates that approximately half of new vehicles / machinery imported to Australia is retailed by franchises from the commercial vehicle, motorcycle and farm machinery sectors.

Category	2019/20 (\$000)	2018/19 (\$000)	Percentage change
Agricultural machinery (excl tractors) & parts	1,341,835	1,315,470	2.0
Tractors	689,510	808,795	-14.7
Passenger motor vehicles	19,093,022	21,573,858	-11.5
Goods vehicles	8,074,974	10,571,717	-23.6
Other road motor vehicles (incl bus, truck)	438,708	746,721	-41.2
Vehicle parts & accessories	2,956,019	3,244,092	-8.9
Motorcycles & cycles	1,220,785	1,186,084	2.9
Trailers & semi-trailers	931,834	1,017,777	-8.4
TOTAL	34,746,686	40,464,514	-14.1 ¹³

4. The importance of fairer franchising reforms for farm machinery, industrial machinery, motorcycle, and truck franchise sectors

Since 1998 VACC has lobbied the Australian Government on the ineffectiveness of the Franchising Code of Conduct (the Code) for all its franchise dealer members.

A new automotive section, Parts 5 of the Franchising Code of Conduct (Franchising Code) 2014 came into effect on 1 June 2020.¹⁴ Part 5, and Part 6 of the Franchising Code is specific to new car

¹⁰ Ibid 12 [2].

¹¹ Ibid 17 [5].

¹² Ibid 16 [6].

¹³ MTAA (n 7) 20.

¹⁴ Competition and Consumer (Industry Codes—Franchising) Regulation 2014.

dealers only, and addresses many longstanding concerns of multiple automotive industries.¹⁵ As previously mentioned, the new regulations do not apply to all franchise motor vehicle dealerships,¹⁶ but only those who fall within a new definition of a "*new vehicle dealership agreement*".¹⁷ Using the definitions of the franchising code, this is taken to mean that a vehicle dealership agreement relates to a dealership that predominantly deals in new passenger vehicles or new light goods vehicles (or both). VACC refers to this further on in this document.

VACC and MTAA have never understood why the commercial vehicle, motorcycle, farm, and industrial machinery franchised retailers were never considered to be included in this amendment despite these sectors experiencing the same issues as new car dealers with regard to their franchisee-franchisor relationship.¹⁸

In relative terms these groups experience the same concerns and business pressures, albeit with some subtle differences.¹⁹ The reason for this policy distinction is not clear, and the insertion of the word "*predominantly*" in the schedules' definitions is likely to be closely scrutinised by those franchisors seeking to avoid the application of the new regulations.²⁰

In 2019, the ACCC's submission *Regulation Impact Statement – franchise relationships between car manufacturers and new car dealers* reported that during the research phase of its market study a number of systemic problems were brought to light that provided valuable insights into the automotive franchise sector."²¹ Those issues are analogous with what transpires across the entire automotive retail franchise sector.

Not the least were issues that contributed to imbalances in bargaining power relating to:

- Dealers being offered contracts on a 'take-it-or-leave-it' basis.²²
- Significant upfront capital investment involved in 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.



15 MTAA submission to Treasury 2021.

16 Minister for Industry, Science and Technology for the Treasurer, Explanatory statement Competition and Consumer (Industry Codes—Franchising) Amendment (New Vehicle Dealership Agreements) Regulations 2020 (legislation.gov.au) (2020) s1 Part 5 [46].

17 Competition and Consumer Code Division 2 s 4.

18 VACC reply to the 'Regulatory Impact Statement Franchise relationships between car manufacturers and new car dealers' (2019) 5 [5].

19 MTAA Submission to the 'Regulation Impact Statement on dealing with Franchise relationships between car manufacturers and new car dealers' (2019) 4 [4].

20 Stephen Giles et al 'Motor vehicle changes to Franchise Code effective now' (2020)

<https://www.nortonrosefulbright.com/en-au/knowledge/publications/6e4172aa/motor-vehicle-changes-to-franchise-code> [3].

21 ACCC, 'Regulation Impact Statement – franchise relationships between car manufacturers and new car dealers' ACCC submission (2019) 1 [4].

22 NSW Small Business Commission Submission to the ACCC market study (2016) 2.

23 IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia (2017); Fennessy's submission to the ACCC market study, (2017) [2].

- The length of the initial, and subsequent, tenure of dealership agreements is typically of a short duration. In most cases it is between one to five years and often does not enable the dealer to recoup the capital they have invested before the end of the relevant term. Over time dealer franchise agreements are becoming shorter in duration, and a move to an 'agency model' will see agreements shortened even further; and down to 12 months.
- Dealers do not have security of tenure and in most cases renewal of the agreement is at the absolute discretion of the manufacturer.²⁴

It is VACC's view that the ACCC overlooked the same systemic issues that are experienced by franchise dealers in other sectors and has effectively created different franchising hierarchies for franchisors to exploit, to the detriment of franchisees.

5. What previous franchise dealer surveys have told us?

The most recent survey of VACC's 1,141 franchise dealers took place in 2018, with the data from that survey used to inform VACC's response to the Australian Government's *Parliamentary Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct*.²⁵

The survey reaffirmed that there was a heightened level of dealer discontent regarding how powerless franchise dealers felt under the then Code. This was reinforced via testimony from former franchisees who were not sufficiently resourced to test their contracts against a well-resourced manufacturer, and ultimately, could not renew their agreement. Franchisees have also argued that there is a strong power imbalance embedded within their agreements that is weighted heavily in favor of the franchisor.²⁶

Evidence obtained via the VACC Franchising Code of Conduct Survey is as relevant today as it was in 2018 for commercial vehicle, motorcycle, farm, and industrial machinery franchised sectors for issues relating to the disclosure of the contractual rights, termination rights, capital expenditure and geographical exclusivity. Findings from the 2018 survey revealed that:

- More than one-third (36 per cent) of respondents reported they did not receive full disclosure of all contractual rights in their agreement, and consequently were unaware of their full rights and obligations.
- More than half (59 per cent) reported that they were unaware of their rights upon termination.
- More than half (54 per cent) did not have a clear understanding of the obligations and entitlements of each party at the end of the franchise term.
- Over one quarter (26 per cent) reported that their agreements did not include statements regarding geographic exclusivity, (i.e., defined primary market areas (PMAs)).
- Of those franchisees that did have PMA statements in their agreement, 36 per cent reported that the PMA allocations had been changed without their consent or agreement, and with no compensation or consideration of key performance indicators.

The survey results indicate that the disclosure and understanding of contractual rights and obligations remains 'patchy' within agreements relating to the entire automotive industry.

Furthermore, there was a general lack of understanding of respective rights and obligations by franchisees, often due to the complexity of wording contained within agreements.

In commentary received by VACC at the time of the survey, a prominent farm machinery Dealer Council advised that in a 2016 review of their Dealer Agreements, substantive changes were made to agreements that had a watering down effect on of the dealer's rights, which adversely

²⁴ ACCC, Regulation Impact Statement – franchise relationships between car manufacturers and new car dealers ACCC submission, (2019), 1-2 [8-12].

²⁵ Steve Bletsos, VACC Submission to Parliamentary Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct (2018).

²⁶ Ibid 7 [1-9].

impacted the value of their dealerships.²⁷ That group has now been subject to a national dealer rationalisation program.

6. Should the Franchising Code and its automotive specific provisions be amended when required or a standalone automotive Franchising Code be developed?

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

VACC views the recent amendments to the Franchising Code to be a watershed moment for franchise new car dealers and thanks the Australian Government for introducing the automotive specific provisions via Part 5 and Part 6.

VACC is also of the view that the amendments should always remain flexible enough to cater for a changing business model and be open to ongoing scrutiny and review by all stakeholders. This includes the rights of those dealers who fall under an agency model as defined in Schedule 11 of the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*.

There is a reasoned argument from the commercial vehicle, motorcycle, and farm and industrial machinery franchised retailers that the new provisions do not adequately address franchise-franchisor issues as those new amendments have not captured all affected automotive retail franchisees.

6.2 Option 2: Establish a standalone automotive franchising code

It is VACC's view that whilst a standalone code would be an optimal outcome, the reality is that the new amendments must be given every opportunity to succeed. VACC welcomes the inclusion of voluntary principles as mandated requirements in the announced reforms, including reforms that allow for appropriate time to recoup significant capital expenditure, the inclusion of 'agency' type agreements, and proper compensation arrangements.

The new reforms have already achieved what a standalone code may take some time to overcome. Additionally, and the new reforms, with binding pre-contractual arbitration, will address concerns of multi-national manufacturers not following voluntary principles²⁸, as well as a streamlining of the dispute resolution framework under the Australian Small Business and Family Enterprises Ombudsman.²⁹



²⁷ Dealer Council correspondence to Australian Franchisor. Available upon request 2016.

²⁸ MTAA Media release Franchising reforms foster the potential for improved relationships (June 1, 2021) [4].

²⁹ Ibid [5].

VACC stipulates that as a graduated response, if there are failures in reforms and remedies or other substantial matters, including unforeseen conduct or behavior, then it reserves the right to call for a specific automotive code or other legislated solutions. VACC anticipates any need to exercise this right will be established as part of the input to scheduled reviews into the effectiveness of reforms in approximately three years.³⁰

7. Definitions in the Franchising Code are not consistent with other Commonwealth or state-based legislation

The rights of dealers who fall under an agency model as defined in Schedule 11 of the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* must also be addressed specifically to include all elements of a dealership (e.g., new and used sales, parts, service, finance).

The definition of a new vehicle in the Franchising Code should be amended to reflect the definition as stated in Section 78 (5) of the *Road Vehicle Standards Act 2018*.

The definition of a new vehicle dealership agreement in the Franchising Code should be changed from

Current Motor Vehicle Dealership Agreement definition (Division 2, Section 4):

a motor vehicle dealership agreement relating to a motor vehicle dealership that predominantly deals in new passenger vehicles or new light goods vehicles (or both),
to

Recommended Motor Vehicle Dealership Agreement definition:

a motor vehicle dealership agreement relating to a motor vehicle dealership that predominantly deals in motor vehicles as defined in this Code, that has not been used in transport on a public road in or outside of Australia, other than for reasons legislated in Section 78 (5) (a)-(f) of the *Road Vehicle Standards Act 2018 (Cth)*.

The definition of a new vehicle dealership in the Franchising Code should be changed from

Current Motor Vehicle Dealership definition (Division 2, Section 4):

(a) means a business of buying, selling, exchanging or leasing motor vehicles that is conducted by a person other than a person who is only involved as a credit provider, or provider of other financial services, in the purchase, sale, exchange or lease; and

(b) includes a business of selling motor vehicles that is conducted by a person (for the purposes of this code, the franchisee) who sells the motor vehicles as an agent for a principal (for the purposes of this code, the franchisor).

to

Recommended Motor Vehicle Dealership definition:

- means a business of buying, selling, exchanging or leasing motor vehicles that is conducted by a person other than a person who is only involved as a credit provider, or provider of other financial services, in the purchase, sale, exchange or lease; and
- includes a business of:
 - (i) selling motor vehicles that is conducted by a person (for the purposes of this code, the franchisee) who sells the motor vehicles as an agent for a principal (for the purposes of this code, the franchisor);
 - (ii) selling motor vehicle parts for motor vehicles sold by the business;
 - (iii) servicing and repairing motor vehicles sold by the business; or
 - (iv) offering or carrying out any other service at the direction of the franchisor.

³⁰ MTAA advice to VACC August 2021.

8. Response to key questions

8.1 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 new *Competition and Consumer (Industry Codes-Franchising) Regulations 2014 (Cth)* was registered as a legislative instrument on 22 June 2020.

Key limitations with the reforms, from the perspective of commercial vehicle, motorcycle, farm, and industrial machinery franchised sectors, is an absence of complete protections afforded to those sectors as announced in the new regulations. The protections included have not been included for all franchise dealers, other than new car dealers. The new Code sections Part 5 and Part 6 make an announcement of greater legislative protections. The new protections in Part 5 and 6 must be made available to all commercial vehicle, motorcycle, farm, and industrial machinery franchised dealers.

They specifically are:

- **Mandatory principles for new Dealer agreements**

Addresses the concerns of franchisees whose overseas-based franchisor ignores voluntary arbitration.

- **Inclusion of Agency Agreements under the Code**

Dealers that are appointed as a manufacturer's agent for new vehicle sales are now expressly protected by the Code.³¹

- **Change in end of term obligations**

s 47 – 48 of the Code addresses the bilateral termination, terms, and renewal protocols of a franchise agreement.

s 49 (3) states that the parties must cooperate to reduce the franchisee's stock of new vehicles and spare parts over the remaining term of the agreement.

- **Change in Capital Expenditure requirements**

The new Part 5, s 50, makes the announcement that a franchisor must not require a franchisee to undertake significant capital expenditure in relation to a franchised business during the term of the franchise agreement.

- **Punitive measures for transgression**

VACC supports the increase in available penalties under the Code for those franchisors who undertake systemic breaches of the Code.

8.2 What evidence can you provide about the magnitude of the problem (i.e., quantitative, and qualitative data)?

The magnitude of the problem is stretched across the entire VACC membership base that supports approximately 501 commercial vehicle, motorcycle, farm, and industrial machinery franchised dealers.³²

Franchise dealers in these sectors are exposed to the same inequitable risks and liabilities – from an operational and transactional perspective – as those experienced by new car dealers. Those pressures include unrealistic capital expenditure requirements, unreasonable target setting, and over or under supply of stock.

³¹ ACCC, Changes to the Franchising Code of Conduct - July 2021,(2021) < Changes to the Franchising Code of Conduct - July 2021 | ACCC>.
³² VACC (n 3).

8.2.1 Qualitative examples are provided in the five examples below:

Example 1 – see Appendix 1

In September 2020 the ACCC issued correspondence to Australian motorcycle dealers who retail quad bikes. It clearly announced that select OEMs had threatened nonrenewal of a motorcycle dealer's franchise agreement if that dealer was to take on another brand (one that complied with new safety standards).³³ Dealers have alleged that the Japanese manufacturing giant Yamaha Australia has been foremost in this issue.³⁴

It was the ACCC's view that such an approach from franchisors may constitute anti-competitive behavior, in contravention of the *Competition and Consumer Act 2010 (Cth) (CCA)* and the *Franchising Code of Conduct*.

Example 2 – see Appendix 2

In September 2018, Husqvarna Australia Pty Ltd, the Australian representative of the Swedish motorcycling giant, was subject to an enforceable undertaking by the ACCC under clause 17 (2) 'Disclosure of materially relevant facts' of the Franchising Code.³⁵

Husqvarna undertook to:

- Offer all new dealers a new agreement that complies with the Code and does not contain unfair terms.
- Provide all existing dealers a written notification, in a form approved by the ACCC, that the Code applies to their current dealer agreement, as well as the opportunity for existing dealers to transition to the new agreement.
- Not enforce any of the unfair terms in the old agreement.
- Provide all new and existing dealers a disclosure document and any other documents required by the Code, and.
- Implement and maintain an ACL training and compliance program for a period of three years.³⁶



33 ACCC Correspondence to motorcycle dealers (2020) ACCC ref CS1050020 2020 [6].

34 Peter Hunt, Yamaha threatens to (2018) cancel ATV franchises if dealers sell CF MOTO quad bikes', Weekly Times, (8 September 2020).

35 Mick Keogh, "Franchising and the ACCC" (Speech, Franchise Council of Australia Law Symposium, 2018) [36].

Husqvarna Australia is one example of many OEMs within the commercial vehicle, motorcycle and farm and industrial machinery sectors who have inadvertently or advertently included those, or similar type terms in their dealership agreement.³⁷

Example 3

Honda Australia MPE announced it would stop selling quad bikes in Australia from 10 October 2021, due to new Australian *Consumer Goods (Quad Bikes) Safety Standard 2019 (Cth)*. The new standard requires all quad bikes to be fitted with rollover protection measures at point of sale by 10 October 2021.³⁸ The manufacturers were convinced there was evidence to support negative outcomes associated with the new safety standard for quad bikes (i.e., roll over bars). Earlier in 2020, Polaris and Yamaha announced they would also stop selling quad bikes in Australia if the new regulation upheld this change, which it has.³⁹ Dealers were prepared to retail those quadbikes with factory modifications but were unsuccessful in their negotiations with the manufacture to have them fitted. Polaris has now exited the Australian market for quadbikes.

Many Victorian based Honda, Yamaha and Polaris dealer franchisees had acquired, or built, their franchises based on quad bikes significantly adding to their business model and income streams. This issue will have a profoundly negative effect on franchise dealerships in rural Victoria, where the sale of road bikes can be negligible in comparison to a metropolitan dealership.

The vehicles nominated by those franchisors to replace quad bikes, known as side-by-side vehicles,⁴⁰ do not bring a comparative amount of retail sales volume, subsequently placing the dealer at an immediate disadvantage. Further, side-by-side vehicles are more expensive, making them a cost prohibitive alternative to quad bikes.⁴¹ This coupled with breaking the generational psyche of farmers who have favoured quad bikes, to now move to side-by-side vehicles means dealers are confronted with a difficult situation with dire consequences for many dealers.

VACC understands the manufacturer's decision to no longer supply quad bikes to the Australian market. VACC also acknowledges that the manufacturer is entitled to supply to the local market whatever product/s they believe best suit the local conditions. However, a lack of adequate compensation to the dealers, by the manufacturer, regarding the immediate loss of revenue due to the product being withdrawn remains a serious issue.

Dealers have lost market share to other brands who have continued retailing quad bikes. For example, CFMoto has enjoyed record sales of their product. Dealers who had retailed, serviced, and repaired quad bikes had invested heavily in franchisor mandated training, employment and infrastructure development that supported the sales of quadbikes. Dealers were not part of the decision-making process to withdraw this type of vehicle from the Australian market; however, they suffered because of this withdrawal – both economically and in the overall value of their businesses. There was no support offered by the OEM to transition the dealership away from this product line. Instead, they were told it was a fait accompli, and left to manage the business fallout on their own.

Example 4

A prominent farm machinery dealer based in remote Victoria had their franchise agreement terminated by a US- based franchisor in 2016 – without explanation. The agreement with the

36 Husqvarna Group , Dealer Agreements, the Franchising Code of Conduct and our ACCC Undertaking (2018).

37 More can be supplied upon demand and in camera.

38 Honda News , Honda is set to exit the ATV Market in Australia (Media 20 April 2021 <www.motorcycle.honda.com.au>[1].

39 ABC News ,third quad bike manufacturer pulls out of Australian market due to government regulations, <<https://www.abc.net.au> > (2020) 2-3.

40 Honda News (n 39) [5-7].

41 Ibid 2-3 [20-26].

franchisor allowed for a 30-day notice of termination. The dealer had been a franchisee for almost 30 years.⁴²

The lack of 'end of term arrangements' saw the franchisor and franchisee fall into dispute regarding excess stock parts that were part of the dealer's inventory. A period of 11 days' notice was provided by the franchisor, to the franchisee to have the parts repackaged and processed for return to the franchisor. Further, the franchisee had a complex piece of farm machinery known as a 'Seeder Bar'. This piece of machinery would end up being financed by the dealer under the dealer floorplan finance as the franchisor refused to take the stock item back. This cost the dealer many thousands of dollars.

The franchisor, when requested to buy back the Seeder Bar from the dealer, advised that *this unit belongs to the franchisee so I suggest you get busy and go find a buyer, it will not be the franchisor.*⁴³

Example 5

History shows a trail of a lack of good faith shown by franchisors towards its franchisees in automotive retail franchising disputes. Well before the recent disaster that saw Holden exit the Australian market, VACC has observed many examples of where a lack of good faith between franchisor – franchisee was evident.

There is a case law precedent in the 2001 landmark car rental case of *Bamco Villa Pty Ltd v Montedeen Pty Ltd*,⁴⁴ it was found by Mandie J that a franchise agreement has an implied term of good faith and fair dealing, and that the duty of good faith is a legal incident of a franchise agreement.

Further, good faith requires a contracting party to act in good faith, not only in relation to the performance of the franchise contract, but also in the power conferred by the contract as found by Finkelstein J in *Garry Rodgers Motors (Aust) v Subaru (Aust) Pty Ltd*.⁴⁵

Example 6 – see Appendix 3

In September 2020 a Victorian Western Districts farm machinery dealer was informed of their termination after 20 years as a Goldacres Franchise by letter in the mail. This was after a phone call the advising of the letters pending arrival. The franchise was handed over to another local dealership.⁴⁶

The six examples are provided as a comparator to highlight how the issues of new car dealers are also analogous to other automotive franchise sectors. The examples provided here also highlight the approach of some franchisors to deviate from their obligation to act in good faith with their dealership network.

8.3 Which option do you consider to be the most effective solution and why?

In the immediate short term, the amendments to the Franchising Code active from July 1, 2021 are the most effective. Supported by pre-contractual arbitration and allowing for the benefits of the Collective Bargaining process to be connected, the current amended code will be of immediate relief for new car dealers. If common sense prevails, this will also be related to commercial vehicle, motorcycle, and farm machinery dealers.

The introduction of a standalone code may require a lengthy introductory process that will see franchisees in the commercial vehicle, motorcycle, farm, and industrial machinery franchised sectors exposed to franchisors to act unconscionably. For example, ongoing communications sent by franchisors who evade their obligations under their current agreements or using dealer bulletins to unilaterally introduce changes to agreements.

42 Details of franchisee and franchisor have been redacted. Evidence available on demand.

43 Ibid.

44 [2001] VSC 192.

45 (1999) ATPR.

46 Letter from Goldacres to Franchisee advising of immediate termination (see appendix 3).

VACC has received copies of dealer bulletins issued by franchisors with misleading and unilateral statements that are favorable to the franchisor. These include:

- *“These Standard Terms and Conditions may be changed at the Company’s discretion from time to time, or may be modified by special programs applicable to particular products and are to be read in conjunction with the Company’s Dealer Agreement”*⁴⁷
- *“It is expressly understood and agreed that the xxxx reserves the right to modify the dealer manual, the Dealer Operating Parts Guide, the Warranty Manual and the Dealer standards unilaterally at its sole discretion”*.⁴⁸

It is VACC’s view that unilaterally changing terms and conditions to a dealer agreement via a dealer bulletin is unfair and obstructive to the relationship between the franchisor and franchisee.

8.4 Could pre-contractual mandatory arbitration enable better access to justice for dealers in relation to resolving disputes?

8.4.1 Option 1: Pre-contractual arbitration model

VACC supports the introduction of compulsory, binding arbitration as a vital element that must be included. Whether it be via an amendment to the current Code or in a stand-alone code, VACC supports this model. This can be accommodated by industry-led agreement within the construct of provisions in the sugar and dairy Codes.

The access to mandatory binding arbitration will allow one of the parties to bring a dispute to an independent third party for a determination, and both parties are bound by the arbitrator’s decision.⁴⁹ This is a substantial gain for franchisees. Currently arbitration is permitted but can only be adopted if both parties agree to be involved.⁵⁰

Franchise dealers are not resourced to enter long, drawn out legal actions. Further, the current legal system does not create an equal playing field in franchisee-franchisor disputes. This is evidenced by General Motors refusing a request from the then Minister responsible for industry, Senator the Hon Michaelia Cash, to attend arbitration with Holden dealers.

8.4.2 Option 2: Arbitration model used in the Media Bargaining Code

As stated, VACC believes that any model can be accommodated by industry-led agreement within the construct of provisions in the sugar and dairy codes.

8.4.3 Option 3: Industry-led improvements to dispute resolution

VACC supports the theory that there may be certain types of disputes that can only, or should only, be determined or enforcement through the courts.

VACC does not support the creation of an industry-led scheme similar to the Mandatory Motor Vehicle Service and Repair Information Sharing Scheme. This is due to the possible outcomes, be they intended or not, will not result in natural justice for dealers when engaging with franchisors in a low-level dispute resolution. The hurdles and obstruction created by stakeholders who preside on the Mandatory Motor Vehicle Service and Repair Information Sharing Scheme make it an unattractive option for franchise dealers.

47 Available to the reviewer upon request.

48 Ibid.

49 Evan Stents et al , ‘HWL Ebsworth Lawyers Government releases discussion paper on Automotive Franchising’(Webpage 2021) <marketing.e-communications@hwlebsworth.com.au> [5].

50 Ibid.

8.5 What types of contract terms could be best suited to a pre-contractual arbitration model?

- Terms dealing with tenure. In particular, whether the term of the agreement has sufficient tenure to allow for a return on investment.
- Terms dealing with capital expenditure. Whether any requirement for capital investment is unreasonable.⁵¹
- Terms dealing with PMA.
- Terms dealing with franchise or stock being advertised on digital selling platforms without dealer consent.
- Terms dealing with exclusion periods for individual participation in industry.
- Terms dealing with multi-branded franchise operations.

8.6 What measures could be put in place to reduce any potential risks of adversely affecting the franchising relationship before the contract starts?

When a franchisor proposes a new dealer agreement, it must be mandatory that they participate in a consultation and negotiation process with dealers via their Dealer Council. This is consistent with a franchisor's obligation to act in good faith in relation to any dealing or the negotiation of a proposed agreement pursuant to section 6(2)(b) & (c) of the Franchising Code of Conduct.

Some franchisors take the view that they only need to negotiate with dealers on a 'one-on-one' basis and have no intention to collectively bargain. However, they remain unaware that the 'collective' negotiation approach is consistent with the rights conferred on franchisees to:

1. Collectively bargain over the acquisition of franchise rights under a Collective Bargaining Class Exemption Notice authorised under the *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020* issued by the ACCC.
2. Resolve disputes in the same way if two or more franchisees have the same dispute (see section 40B of the Franchising Code of Conduct).

This proposal also ensures that the franchise agreement that is offered to dealers contains terms that are fair and reasonable. One of the recent changes to the Franchising Code of Conduct is to state that for motor vehicle dealership agreements, a court may have regard for the purpose of determining whether a party has contravened the obligation of good faith, whether the terms of the agreement are fair and reasonable (see section 3A of the Franchising Code of Conduct).⁵²

'Our experience is, in this space, that the large operators, or the people with the power, choose not to, shall we say, play or not to comply if it doesn't suit their business requirements. They simply won't comply unless it's mandatory. In fact, we get told that regularly by multinationals—that, if it's not legislation, decisions will be taken in the head office in the US, Europe or whatever. That's what they tell us.'

*Ms. Kate Carnell, Ombudsman,
Australian Small Business and Family Enterprise Ombudsman, Senate Inquiry
'Driving a fairer deal: Regulation of the relationship between car manufacturers and car dealers in Australia' (2021)*

VACC and members of the Farm and Industrial Machinery Dealers Association, Motorcycle Industry Dealers and the Commercial Vehicle Industry Association Executive Committees are readily available to provide testimony to Treasury to further highlight the issues surrounding the lack of adequate protection afforded to those sectors under the current Code.

⁵¹ Evan Stents, HWL Ebsworth Lawyers, Legal advice to VACC (2021).

⁵² Ibid.

MACHINE


Yamaha threatens to cancel ATV franchises if dealers sell CF MOTO quad bikes

Japanese manufacturing giant Yamaha is threatening to cancel dealers' ATV franchises for an extraordinary reason — if they continue to sell one particular rival brand of quad bikes. Here is what else we know.

PETER HUNT, The Weekly Times

Subscriber only | September 8, 2020 12:20pm



 No go: Yamaha has warned dealers they risk losing their franchise if they sell CF Moto quad bikes fitted with roll bars. Picture: Chloe Smith

JAPANESE motorcycle manufacturing giant Yamaha has threatened to cancel dealers' franchises if they sell CF MOTO quad bikes fitted with operator protection devices, or roll bars.

Dealers have been told they are welcome to consider selling other brands, but not CF MOTO, which to date is the only company selling quad bikes in Australia already fitted with operator protection devices.

One dealer said Yamaha had made the threat to him and several others recently, warning it would not back down on its position of opposing OPD-fitted CF MOTO quad bikes and they risked losing their franchise if they sold them.

However Yamaha franchising manager Troy Bryant said the company's opposition to CF MOTO was long standing and had "nothing to do with OPDs".

Yamaha's bid to block dealers selling OPD-fitted CF MOTO quad bikes, while allowing them to sell other brands, has been referred to the Australian Competition and Consumer Commission.

Yamaha's threat comes as US giant Polaris issued a bulletin warning its dealers not to take on any new quad bike brands, forcing them to focus instead on the company's push to sell side-by-side vehicles.

"Side x Side vehicles are similar to quad bikes and accordingly, before a dealer can take on a franchise to sell any new quad bikes, it needs to obtain Polaris' written consent (per clause 14.1 of the dealer agreement)," the bulletin states.

6th September 2018

To all our Dealers

Dealer Agreements, the Franchising Code of Conduct and our ACCC Undertaking

As we have foreshadowed in our dealer meetings in recent weeks, Husqvarna Australia Pty Ltd has given an enforceable undertaking to the ACCC regarding our trading relationship.

As the relationship between Husqvarna and its dealers is a franchise agreement it is subject to the protections of the Franchising Code of Conduct (FCC).

Husqvarna was notified by the ACCC that our existing agreement with our dealers contains clauses that may breach the Australian Consumer Law (ACL) and FCC.

To address the ACCC's concerns, Husqvarna provided the ACCC with an undertaking which states that, among other things, Husqvarna will:

- offer all new dealers a new agreement that complies with the FCC and does not contain these unfair terms;
- provide all existing dealers a written notification, in a form approved by the ACCC, that the FCC applies to their current dealer agreement, as well as the opportunity for existing dealers to transition to the new agreement;
- not enforce any of the unfair terms in the old agreement;
- provide all new and existing dealers a disclosure document and any other documents required by the FCC; and
- implement and maintain an ACL training and compliance program for a period of 3 years.

You will shortly receive from us a letter with more details and documents as required by the undertaking. This notification is to alert you to this and is also disclosure as required under clause 17(2) of the FCC.



GOLDACRES
Australia's World Class Sprayers

[REDACTED]

[REDACTED]

[REDACTED]

Dear [REDACTED],

In line with our strategic growth plan, Goldacres is constantly reviewing our Dealer network and operations.

Our objective is to create an Australia wide dealer network that best exemplify the Goldacres model.

Due to a recent dealer expansion, unfortunately [REDACTED] will no longer be required by Goldacres as its representative in [REDACTED]

This was not the decision of any one individual, nor was it based on your current performance.

We will keep your parts account open for a period of 3 months, to assist with any ongoing business.

Goldacres would like to thank you for your support as a dealer and wish you well in the future.

If you have any questions please don't hesitate to call me directly.

Goldacres Trading Pty. Ltd. A.C.N. 061 306 732
3 Morang Crescent, Mitchell Park Vic 3355
P: 03 5342 6399 F: 03 5342 6308 info@goldacres.com.au



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