



# FRANCHISING CODE OF CONDUCT EXPOSURE DRAFT

MTAA SUBMISSION

OCTOBER 2024



## INTRODUCTION

---

Thank you for the opportunity to submit our feedback to the exposure draft of the *Competition and Consumer (Industry Code-Franchising) Regulations 2024* to remake the Franchising Code of Conduct (the Code). The Motor Trades Association of Australia (MTAA) appreciates this chance to provide our feedback on an area that is highly critical to the business environment faced by our members and the broader automotive sector.

As the national automotive industry body, the MTAA serves as the unified voice for Australia's automotive sector. We are dedicated to identifying and monitoring issues across the industry, advising governments on the impacts and trends affecting it, and actively participating in the development of sound public policy. Our focus encompasses various elements, including the retail motor trades, the Australian vehicle fleet, and the mobility needs of local communities.

Our membership comprises over 15,000 businesses, including dealers, repairers, tow truck operators, service stations, and a diverse range of automotive retail operations. Collectively, these organisations form a critical backbone of the Australian economy, responsible for selling, servicing, repairing, refuelling, and maintaining the country's motor vehicle fleet of 21.2 million vehicles. This sector alone contributes approximately \$39.35 billion annually to Australia's GDP, representing 2.1% of the total.<sup>1</sup>

The MTAA is unique in its position as the only Australian member association representing the entire spectrum of automotive franchise dealer participants. Our representation extends to new car dealers, motorcycle dealers, farm machinery dealers, industrial machinery dealers, and aftermarket repairer franchisees. This broad perspective allows us to advocate effectively for the diverse interests of our members.

We actively participated in the Independent Review of the Franchising Code of Conduct, led by Dr Michael Schaper, providing comprehensive input on the essential changes needed to better protect automotive franchisees. While we acknowledge the report tabled in February 2024, and appreciate the Government's response to the report recognising that the Code requires modifications to enhance its functionality and effectiveness, we believe it did not go far enough.

Although the Government agreed, or agreed in principle, to all 23 of Dr Schaper's recommendations, we feel that these measures still fall short of what is necessary for robust protection of franchisees in the automotive sector.

---

<sup>1</sup> MTAA. (2021). *Directions in Australia's Automotive Industry – An industry report 2021*. Available at: [https://vacc.com.au/Portals/0/Publications/Industry%20Report%202021/2021%20Directions%20in%20Australias%20Automotive%20Industry\\_pp.pdf?ver=2021-05-20-14](https://vacc.com.au/Portals/0/Publications/Industry%20Report%202021/2021%20Directions%20in%20Australias%20Automotive%20Industry_pp.pdf?ver=2021-05-20-14) (Accessed: 14 October 2024).

## MTAA RESPONSE

---

A strengthened Franchising Code is critical for several reasons, one of which being the imminent New Vehicle Efficiency Scheme (NVES) and the very real risk of OEMs dumping stock prior to commencement of the program on dealers. The commencement of the NVES from 1 January 2025 could affect supply chain stability and the financial health of dealerships. Acknowledging and responding to this risk is essential for creating a supportive regulatory environment.

Currently, the NVES compliance point occurs at vehicle importation meaning an OEM could push stock onto dealers to comply with the standard. Dealers typically purchase the vehicles wholesale upon arrival at the port thereby placing them in a position where they must shoulder financing costs until the vehicles are sold.

Of the Code changes that we proposed and were accepted, we are particularly pleased with the amendment to the definition of a motor vehicle dealership which will clarify that the definition encompasses all aspects of sales, service and repair work, thereby ensuring comprehensive coverage for dealers.

Additionally, we welcome the introduction of a requirement that all franchise agreements must provide franchisees with a reasonable opportunity to make a return on their investment during the term of the agreement. This provision, previously applicable only to new vehicle dealership agreements under Part 5, will now extend to all franchise agreements, including those for trucks, motorcycles and farm machinery.

Furthermore, the establishment of a Taskforce within Treasury to conduct a comprehensive cost-benefit analysis of introducing a licensing regime for the franchising sector is a promising step forward. However, it is critical that such a scheme is active and well-resourced. We look forward to engaging with the Taskforce once it is created to ensure that these objectives are met.

Despite these positive developments however, we are disappointed that the independent review did not go far enough in providing adequate protections for franchised dealers against the actions of franchisors. In particular, the review failed to incorporate several critical recommendations we previously put forward, which we believe are essential for ensuring fair treatment and support for franchisees. These include:

- > Improved protections for dealers' investments in goodwill
- > Removal of 'no fault' termination rights that disproportionately affect dealers
- > Expansion of the 'unfair contractual terms' regime to encompass all franchises and dealers
- > Establishing minimum terms for dealer agreements to ensure stability while allowing dealers to exit the agreement by mutual consent, with the flexibility to determine the agreement's duration

The single most crucial outcome for MTAA members is the inclusion of additional automotive industry franchisee sectors. Motorcycle, commercial vehicle, and agricultural/industrial machinery franchise dealers should be appropriately recognised and included in the automotive dealer-specific reforms that are being enacted by the Government (as well as the existing automotive dealer-specific sections).

There is fundamentally no difference between truck dealers and car dealers for instance; often, they are the same Original Equipment Manufacturer (OEM). Their operations are very similar, and they face comparable power imbalances and investment requirements. It is vital that these sectors receive the same level of protection and consideration in the reform process.

The absence of the protections outlined above in the Government's response and exposure draft is highly concerning, as they are essential for leveling the playing field between dealers and OEMs. Unfortunately, the Schaper review, the Government's response to the review, and the exposure draft of the Competition and Consumer (Industry Code – Franchising) Regulations 2024 do not address these shortcomings.

As mentioned above, with the NVES soon to commence we have growing concerns that dealers may become increasingly vulnerable to manufacturers exiting the Australian market, potentially leaving them with stranded investments. The ongoing transition toward electrification and automation in the automotive industry further heightens the likelihood of disputes between manufacturers and dealers, emphasising the urgent need for stronger protections for local automotive businesses.

The MTAA has a long-standing commitment to advocating for specific franchise protections tailored to the automotive industry. We would like to reiterate the key requests we made during the Schaper review which we strongly believe need to be revisited:

1. Extend the Franchising Code to cover motorcycle, farm machinery, industrial machinery, and truck dealers
2. Acknowledge the right of dealers to be compensated for established goodwill within the Franchising Code
3. Allow dealers the right to sell their dealerships and recover their investment in goodwill if a new dealer agreement is not offered upon expiration of the current agreement or renewal
4. Provide compensation for established goodwill if dealers are not offered a new agreement and are not permitted to sell their dealership
5. Prohibit 'no fault' termination rights from applying to dealer agreements
6. Clarify that franchisors cannot include clauses in dealer agreements suggesting that the terms offered provide a reasonable opportunity for a return on investment as a means of compliance with the Code
7. Grant a minimum five-year term for dealer agreements (or a term at the dealer's discretion) to ensure certainty for recovering investments, while also allowing for an exit by mutual agreement
8. Protect against unfair contracts and unjust conduct as established for dealers in New South Wales under the *Motor Vehicle Dealers and Repairers Act 2013* (NSW)



9. Create a specialised Franchise Dispute List in the Federal Circuit Court of Australia to facilitate quicker and lower-cost resolution of franchise disputes.

Specific points we wish to raise in reviewing the proposed drafting are as follows:

### **Expand Definitions**

We recommend amending the definitions within the Code to remove specific references to ‘light vehicle’ or ‘passenger vehicle’. Broadening these definitions will ensure that all types of automotive franchises, including those dealing with commercial vehicles, are covered under the Code. This would prevent limitations on franchise types and encourage a more inclusive approach.

### **Include automotive repair and service providers**

Many dealers may face the risk of losing protections if OEM agreements are terminated, leaving them solely with service and parts agreements. It is crucial to ensure that all dealership activities, whether in sales or service, are protected under the Code.

We previously noted that the current drafting of the Code does not explicitly state that a stand-alone service and parts agreement qualifies as a motor vehicle dealership agreement under clause 5(2)(c). To address this, the Code should be amended to ensure that any agreement between a franchisor and motor vehicle dealer related to the operation of a dealership, including a service and parts agreement, is recognised as a motor vehicle dealership agreement under clause 5(2)(c).

The suggested amendment could be formulated as follows:

*For subclause (1), each of the following is taken to be a franchise agreement:*

- a. *the transfer or renewal of a franchise agreement;*
- b. *the extension of the term or the scope of a franchise agreement;*
- c. *a motor vehicle dealership agreement; and*
- d. *an agreement between a franchisor and franchisee that is ancillary to the operation of a franchise agreement or motor vehicle dealership agreement.*

The draft Code released for comment does not explicitly incorporate the change recommended above. However, we do acknowledge that it does include the changes highlighted in yellow in the definition of a motor vehicle dealership.

## **Chapter 1**

### **Part 2**

#### **Section 6 (page 6)**

#### **motor vehicle dealership:**

*(a) means a business of:*

*(i) 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*

*(ii) any servicing or repairing of motor vehicles by that business; and*

*(b) includes a business of:*

*(i) selling motor vehicles that is conducted by a person (for the purposes of this instrument, the franchisee) who sells the motor vehicles as an agent for a principal (for the purposes of this instrument, the franchisor); and*

*(ii) any servicing or repairing of motor vehicles by that business.*

According to the draft, a 'new vehicle dealership agreement' is defined to mean:

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

The definition of motor vehicle dealership in paragraph 3(b) now includes a business of selling motor vehicles, including as an agent, and any servicing or repairing of motor vehicles by that business.

As a result of these additions, we understand that a stand-alone service and repair agreement will, in most cases, fall under the definition of 'new vehicle dealership agreement' as it is defined as a motor vehicle dealership agreement that predominantly deals in new passenger vehicles or new light goods vehicles. Additionally, the definition of motor vehicle dealership now includes businesses that sell motor vehicles, even as agents, along with servicing or repairing vehicles.

However, the definition has limitations. It may not encompass scenarios where the service and parts business operates as a separate entity from the dealership or where the entity solely conducts a stand-alone service and parts business, as was the case with former Holden dealers. It also does not address situations where an entity has both an agency agreement and a service and parts agreement, but the agency agreement is later terminated.

This situation is anticipated for some Mercedes dealers for example, leading to a unique circumstance where the service and parts agreement is governed by the Franchising Code but not upon termination of the Agency Agreement if the service and parts agreement continues as a stand-alone entity. This would only be applicable if it meets the traditional definition of a franchise agreement in clause 5 of the Code, which can sometimes be ambiguous.

We therefore request that the Code ensures that stand-alone service and parts agreements are recognised as motor vehicle dealership agreements within the Franchising Code.

This change is necessary to safeguard dealers who may find themselves with only service agreements post-OEM agreement terminations. Clear definitions will help protect against potential gaps in coverage.

## CONCLUSION

---

The MTAA firmly believes that the Franchising Code must evolve in tandem with the changing market and distribution models. As franchisors adapt their behaviours to navigate the restrictions imposed by the Code, it is essential to ensure that the Code effectively protects the interests of dealers and fosters a fairer operating environment.

The protection of goodwill for new vehicle retailers has been a subject of discussion for many years, and the time has come for meaningful reform in this area. As the automotive landscape continues to shift, the need to safeguard dealers from franchisor opportunism, particularly the risk of being converted into agents, has become increasingly urgent.

While we urge the government to reconsider our requests in the short term, at a minimum they should be adequately addressed during the next review period which we understand is expected to be in five years' time.

Thank you for considering our submission. We look forward to continued dialogue and collaboration on this important matter as we work toward a more equitable and sustainable franchising framework for the automotive industry.

Should you wish to discuss this response further, please do not hesitate to contact Matt Hobbs, CEO MTAA on 0419 608 845 or [matt.hobbs@mtaa.com.au](mailto:matt.hobbs@mtaa.com.au).



 **MATT HOBBS, CEO**

M 0419 608 845 E [matt.hobbs@mtaa.com.au](mailto:matt.hobbs@mtaa.com.au)

