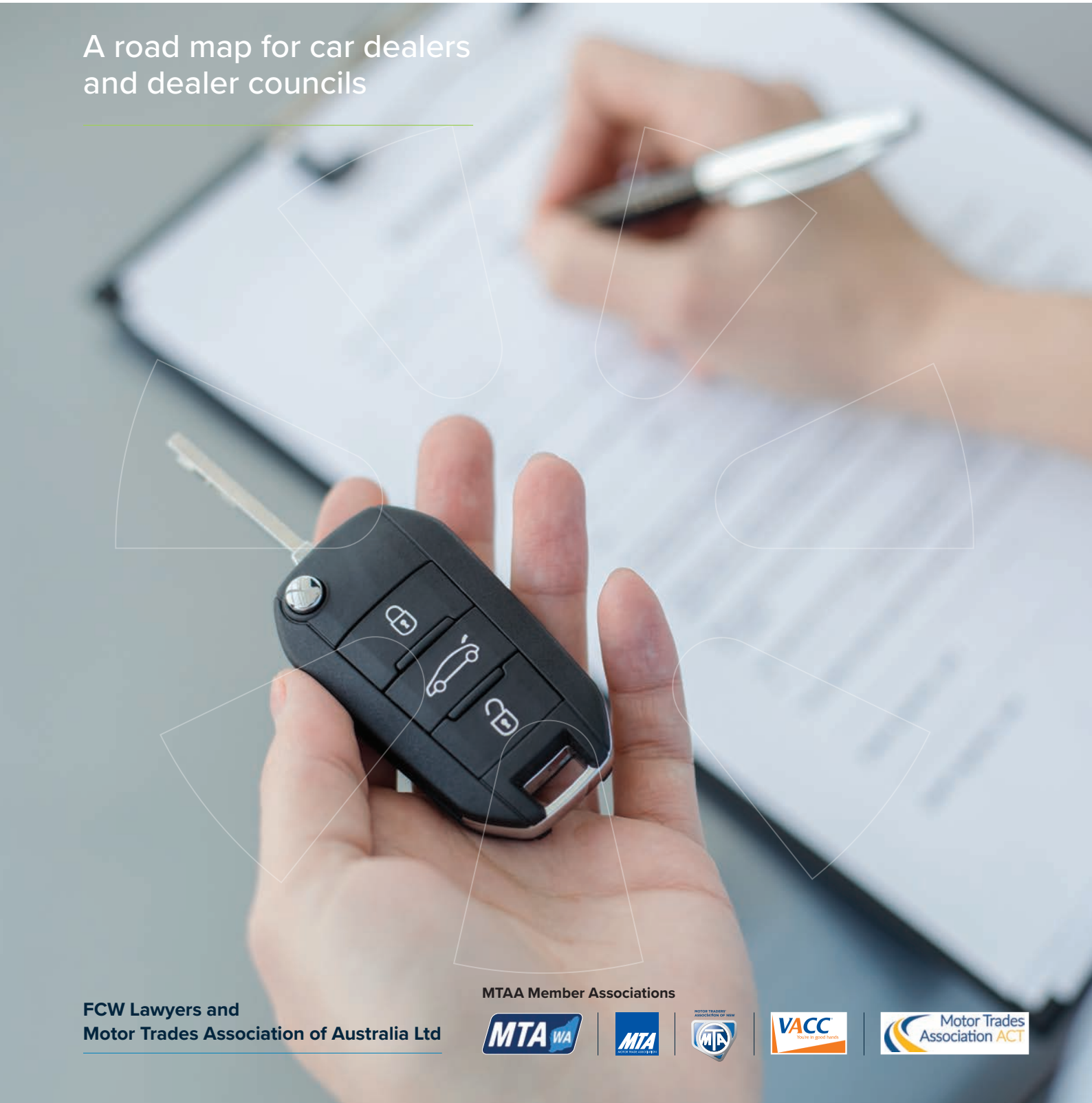
Navigating recent automotive regulatory reforms

A road map for car dealers and dealer councils



FCW Lawyers and
Motor Trades Association of Australia Ltd

MTAA Member Associations

This guide has been written specifically for dealers and dealer councils. Notably, this guide provides a roadmap for how dealers and dealer councils can use various reforms to effectively and efficiently improve their bargaining position.

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First Edition

This is the first edition of the Guide. Throughout this Guide, there are references to reforms announced by the Government, which are yet to be enacted at the date of publication. We will update this Guide to ensure that content accurately reflects the current regulatory landscape. Please email connect@fcwlawyers.com.au to register your interest to receive updates to the Guide once available.

Foreword

Navigating a new era in manufacturer/dealer relations

The legislative and regulatory reforms for motor vehicle dealers achieved in 2020 and early 2021 are the most profound in over 20 years. They will fundamentally change the way dealers can negotiate new dealer agreements and manage existing and future relationships with manufacturers / distributors / importers.

The following Guide to navigating these reforms assist dealers in maximising the opportunities these changes represent for them to get fairer, more resilient and better-balanced agreements and relationship outcomes.

The Motor Trades Association of Australia (MTAA) and its State and Territory Member Associations have been at the forefront of advocacy and representations to address the growing power imbalance between internationally headquartered car manufacturers and Australian dealers.

Over two decades, MTAA fought for change in Commonwealth policy and regulatory settings to address this power imbalance.

MTAA provided submissions and input to numerous *Australian Consumer Law, Competition and Consumer Act*, Franchising Code, and other reviews/ investigations to highlight the power imbalance's manifestations in day-to-day dealer operations. MTAA and Members also called for investigations into manufacturer/dealer relationships and was instrumental in securing the critical 2017 Australian Competition and Consumer Commission (ACCC) Market Study into New Car Retailing.

MTAA and Members also played a vital role in calling for parliamentary investigations into the Franchising Code of Conduct and some car manufacturers' behaviour and conduct, leveraging the significant impact on dealers of General Motors' decision Holden to vacate the Australasian market.

The findings and recommendations of the ACCC landmark study and the Commonwealth Parliamentary Committee *Fairness in Franchising* inquiry provided the precursors to specific Government investigations to reform franchising and specifically address car dealer concerns.

MTAA is the only peak automotive sector representative organisation to provide solution options for a standalone code or a Schedule of Amendments specific to car dealers as part of the Code reform investigations. MTAA was also the first peak automotive sector organisation to draft and present a set of principles to underpin future manufacturer and dealer relationships and agreement negotiation in its submissions to these investigations.

The reforms achieved are significant, comprehensive, and not contained to just changes to the Code and the inclusion of a Schedule of Amendments specific to new car dealers.

Other announcements, including increasing penalties, a class exemption for franchisees, including dealers, access to a simplified Collective Bargaining process, and the extension and additional improvements to Unfair Contract Terms, complete the policy and regulatory suite of change impacting dealers.

Seizing all the opportunities provided by these changes is not simply applying the Code's changes and the Schedule of Amendments specific to car dealers. It is also about potentially using these other related changes such as bargaining together as dealers in negotiating a new agreement rather than as individuals. Looking for terms and conditions in 'take it or leave' agreement drafts that might be considered unfair to the dealer upon closer examination. Using the opportunities presented by the changes to engage in good faith negotiations to include fair and reasonable compensation in the event of termination. And for comprehensive dispute resolution processes, including mediation and binding determination of a matter in the event of mediation failing.

MTAA, from discussions with Member Associations and their dealer constituents, recognised the quantum, interdependency and application of these changes might be challenging.

Therefore, MTAA using its national footprint and coverage of the entire automotive supply chain, engaged one of Australia's leading automotive franchising experts, Robert Gardini and an expert team at FCW lawyers led by Sotheary Bryant to produce this Guide to navigating the reforms.

Our collective voice has achieved these reforms, and it is now up to dealers to take advantage of them.

Richard Dudley
Chief Executive Officer
Motor Trades Association of Australia Ltd

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1. Introduction to the Guide

2020 was a significant and challenging year for the automotive industry and business in general. Covid-19 came on the back of a sustained decline in new car sales for more than 20 consecutive months.

The COVID-19 crisis brought new challenges to new car dealers, particularly in Victoria, where dealers were forced to shut down their showrooms and limit servicing to essential workers for a significant period.

However, there were some significant and positive developments in 2020 and 2021 for car dealers in law reform to better protect dealers in their dealings with motor vehicle distributors.

After completing a detailed review of the franchising legal framework, a new schedule specific to new car dealer agreements was inserted into the existing Franchising Code of Conduct. Following this landmark development, other existing laws were reformed, and new initiatives introduced, such as:

- A review of the existing Unfair Contract Terms laws
- The introduction of six best practice principles for dealer agreements
- Announcement of a class exemption to allow eligible businesses, including franchisees like new car dealers, to form a group to negotiate with their distributor collectively.

Dealers need to be informed on all the recent law reforms to maximise the benefits on offer and utilise the new reforms to leverage negotiations and their interactions with their distributor to achieve fairer outcomes.

This Guide has been written specifically for dealers and dealer councils. Notably, this Guide provides a road map for how dealers and dealer councils can use the various reforms to effectively and efficiently improve their bargaining position. This Guide's content will inform and assist dealers in navigating the existing laws and identify opportunities to improve their bargaining position to achieve better outcomes.

We are pleased to say that we are the first in the market to release a comprehensive and commercially focused guide for new car dealers on the law reforms announced in 2020 and 2021.

To ensure that the content of this Guide is not simply a summary of the current laws, it has been co-authored by Robert Gardini – a consultant and corporate adviser to heavy weights in the automotive industry.

Additionally, this Guide has been reviewed and approved by the MTAA to ensure the content is relevant, practical and meaningful for its members. We extend our thanks and gratitude to Richard Dudley and the MTAA for their valuable contribution and support – your insightful feedback has greatly assisted us in fine tuning the Guide.

FCW Lawyers intends to update this Guide following:

- the announcement of a commencement date for the class exemption for collective bargaining announced by the ACCC in October 2020
- the enactment of the mandatory best practice principles (expected to form part of the Franchising Code) and legislation to extend the law of Unfair Contract Terms to all franchisees
- any other reforms that may arise out of the Senate Committee's report into the relationship between car dealers and distributors.

In addition, the Government is presently considering amendments to the general provisions of the Franchising Code arising out of the 2019 *Fairness in Franchising Inquiry*.

2. Road Map for Dealers and Dealer Councils – Maximising Benefits of the Recent Regulatory Changes

In 2020, the Federal Government announced and implemented significant changes to automotive retail franchising.

These changes offer improved protection for dealers provided dealers and dealer councils use these regulatory reforms in an effective and coordinated manner. While less than what might be considered necessary to provide complete protection from exploitative conduct by some motor vehicle distributors, they nonetheless represent the most significant reforms in two decades.

The key regulatory reforms are as follows:

1. New Part 5 of the Franchising Code of Conduct (the Code) that for the first time, introduces specific provisions relating to new vehicle dealership agreements dealing with:
   a. End of term obligations;
   b. Capital expenditure; and
   c. Resolution of disputes.
   The new Part 5 commenced on 1 June 2020.
2. On 11 December 2020, the Government announced six voluntary best practice principles to be included in new dealership agreements. Three months later, on 12 March 2021, it was further announced that these principles would become mandatory in 2021.
3. The ACCC has made a class exemption that will allow franchisees, including car dealers, to negotiate with a distributor collectively. The act of two competing businesses coming together to negotiate with a supplier or franchisor can constitute a breach of the *Competition and Consumer Act 2010* (Cth) (CCA). The class exemption provides protection for dealers to collectively negotiate with a distributor without having to obtain authorisation from the ACCC or lodging a notification. This provides the potential for dealers and dealer councils to have fairer terms in dealer agreements. A commencement date for the class exemption has not been announced but it is expected to commence in 2021.
4. In November 2020, Commonwealth, State, Territory, and New Zealand Ministers for Fair Trading and Consumer Protection announced significant changes to the Unfair Contract Terms (UCT) law to increase the eligibility threshold that would likely apply to most car dealers. Ministers also agreed to make UCTs unlawful and to give courts the power to impose a civil penalty. When enacted, these reforms will require distributors to remove or amend many UCTs that appear in most if not all dealer agreements. Draft legislation is expected to be released in 2021.
5. In 2020, the Government released an 'Exposure Draft' that set out many proposed changes to the Code. These amendments will affect the rights of dealers and include changes to the Code's dispute resolution process. The Government is currently finalising changes which are expected to be introduced to Parliament in the coming months.
6. On 12 March 2021 the Government also announced that it would increase penalties to $10M for wilful, egregious and systemic breaches of the Code. It is not yet known whether these penalties will be incorporated in the general provisions of the Code or the New Part 5 however, insiders take the view that these strengthened penalties will be enacted in the general provisions of the Code. That being so, franchisors and distributors in broader industries will face greater penalties for high level breaches of the Code.

Purpose of the FCW Lawyers / MTAA Guide

The purpose of this Guide is to set out in simple English practical road map (see Schedule 1) for dealers and dealer councils to use in navigating reforms and better protect the substantial investments in dealerships.

The Guide examines how dealers and dealer councils can maximise the benefits of the recent regulatory changes. Importantly the Road Map does not only consider and comment on each of the regulatory changes, but refers to a number of changes that a distributor may propose to a dealer agreement, the network or business mode. It also suggests how dealers and dealer councils can use one or more of the regulatory changes to better protect their overall interests.

It is now up to dealers with professional advice to make the most of the regulatory reforms. It is also important that any weaknesses of these reforms be documented so that these can be used as evidence of the need for further regulatory change.

Schedule 1 – the Road Map

The events outlined below, which dealers and dealer councils experience regularly, should be subject to certain recommended actions to protect car dealers' interests better. These events are examples of critical changes or proposed changes made by distributors to dealer agreements or the franchise model. These events are not intended to be a comprehensive list but examples of crucial parts of relationships where the reforms may apply.

New Dealer Agreement

Variations or Amendment to the Dealer Agreement

Distributor Proposes Change to Distribution Model

Distributor proposes changes to dealer standards or policies that are likely to have an adverse financial impact on dealers

Distributor Proposes Change to or a Review of the Dealer Network

Distributor Proposes Change to or a Review of Prime Market Areas (PMAs)

The recommended steps to be taken by dealers and dealer councils with each of the above events are set out clearly in the following charts.

New Dealer Agreement

1. Consider Collective Bargaining – ACCC class exemption and appointment of negotiator
2. Seek advice on Unfair Contract Terms
3. Seek advice on insertion of terms incorporating the mandatory principles of best practice terms for dealer agreements
4. Consider Part 5 of the Code including the capital expenditure requirements and request written disclosure of capital expenditure obligations and a discussion of the expenditure including likelihood of recoupment.
5. Request distributor to insert FCW desired commercial terms

Variations or Amendments to the Dealer Agreement

1. Consider Collective Bargaining – ACCC class exemption and appointment of negotiator
2. Seek advice on Unfair Contract Terms
3. Seek advice on insertion of terms incorporating the mandatory principles of best practice terms for dealer agreements
4. Consider capital expenditure requirements and determine whether Part 5 of the Code applies:
   - was the dealer agreement entered into before 1 June 2020 and was the disclosure document created or updated before 1 June 2020?
   - is the dealer agreement being renewed or extended after 1 June 2020 and is the disclosure document created or will it be updated after 1 June 2020?

   If Part 5 applies, then the distributor must also satisfy the requirements in clause 51 of the Code.
5. Request distributor to insert FCW desired commercial terms

Distributor Proposes Change to Distribution Model

1. Consider Collective Bargaining – ACCC class Exemption and appointment of negotiator
2. Seek advice on Unfair Contract Terms
3. Seek advice on insertion of terms incorporating the mandatory principles of best practice terms for dealer agreements, including fair compensation as referred to in Principle 5.
4. Request distributor to insert FCW desired commercial terms

Distributor proposes changes to dealer standards or policies that are likely to have an adverse financial impact on dealers

1. Consider Collective Bargaining – ACCC class exemption and appointment of negotiator
2. Seek advice on Unfair Contract Terms

Distributor Proposes Change to or a Review of the Dealer Network

1. Consider Collective Bargaining – ACCC class exemption and appointment of negotiator
2. Seek advice on Unfair Contract Terms
3. If a review of the dealer network has implications for capital expenditure by dealers then consider whether Part 5 of the Code applies.

Distributor Proposes Change to or a Review of PMAs

1. Consider Collective Bargaining – ACCC class exemption and appointment of negotiator
2. Seek advice on Unfair Contract Terms
3. If a proposed change or review of PMAs has implications for capital expenditure by dealers then consider whether Part 5 of the Code applies.

3. Franchising Amendment (New Vehicle Dealership Agreements) Regulation 2020 – Part 5 of the Franchising Code of Conduct

3.1. Introduction

The Competition and Consumer (Industry Codes – Franchising) Amendment (New Vehicle Dealership Agreements) Regulations 2020 (the Amending Regulations) commenced on 1 June 2020.

The Explanatory Statement to the Amending Regulations specifies that its purpose is to "address the effects on commercial arrangements arising from the power imbalance between car manufacturers as franchisors and new car dealers as franchisees".

It should be noted that the Amending Regulations are inserted as a new schedule to the Code being Part 5; it is not separate from the Code. Part 5 deals with the following matters:

- end of term obligations;
- capital expenditure requirements; and
- dispute resolution.

Unless otherwise specified in Part 5 of the Code, the remainder of the Code will continue to apply to 'new vehicle dealership agreements' as that term is defined in the Code. While the Code contains a broad definition of a 'motor vehicle' which extends beyond passenger vehicles to include light goods vehicles, motorcycles, boats, and machinery and tractor dealers, Part 5 contains a narrower definition with the effect that the Amending Regulations will only apply to 'new vehicle dealership agreements' that were entered into, renewed or extended on and from 1 June 2020 relating to dealerships that predominantly deal in new passenger vehicles or light goods vehicles (or both).

3.2. Application

3.2.1. Which dealerships does Part 5 of the Code apply to?

Part 5 of the Code took effect on 1 June 2020 and applies only to 'New Vehicle Dealership Agreements'.

New vehicle dealership agreement means 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) (see clause 4 of the Code).

New passenger vehicle means a new vehicle of a kind referred to in clause 4.3 of the Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005 (see clause 4 of the Code).

New light goods vehicle means a new vehicle of the kind referred to in clause 4.5.5 of the Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005 (see clause 4 of the Code).

Motor vehicles

This involves first establishing that the dealership only deals with new passenger vehicles or new light goods vehicles, which has a much narrower definition under Part 5 the Code compared to the general provisions of the Code. The remainder of the Code will apply to dealerships that deal with other types of motor vehicles, such as motorcycles, tractors, motorised farm machinery, motorised construction machinery, aircrafts or motorboats.

Motor vehicle means a vehicle that uses, or is designed to use, volatile spirit, gas, oil, electricity or any other power (except human or animal power) as the principal means of propulsion, but does not include a vehicle used, or designed to be used, on a railway or tramway.

Note: Examples of motor vehicles are as follows:

(a) motor car;
(b) motorcycle;
(c) tractor;
(d) motorised farm machinery;
(e) motorised construction machinery;
(f) aircraft;
(g) motor boat.

(see clause 4 of the Code).

Despite this broad definition of 'motor vehicle' for Part 5 to apply, new vehicle dealership agreements must still predominantly deal with new passenger or new light goods vehicles. Dealership agreements that predominately deal with other types of motor vehicles are specifically excluded from Part 5.

New passenger and new light goods vehicles

The definitions for the terms 'new passenger vehicles' and 'new light goods vehicles', do not come from the Code but instead come from clauses 4.3 and 4.5.5 of the Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005 (Standards).

What the Standards say is that 'new passenger vehicles' are those which have up to 9 seating options and that 'new light goods vehicles' cannot have a gross vehicle mass exceeding 3.5 tonnes.

This means that most dealers selling new passenger vehicles will fall within the definition of 'new vehicle dealership agreements' so long as most of their vehicles adhere to the above rules. Used car dealerships will therefore be excluded.

Agreements made after 1 June 2020

Part 5 of the Code will only apply to dealer agreements entered into on or after 1 June 2020 or dealer agreements entered into before 1 June 2020 that are renewed or extended on or after 1 June 2020. The concept of 'extension' under the Code is very broad.

Extend:

(a) in relation to the scope of a franchise agreement, means a material change to:
  (i) the terms and conditions of the agreement; or
  (ii) the rights of a person under or in relation to the agreement; or
  (iii) the liabilities that would be imposed on a person under or in relation to the agreement; or

(b) in relation to the term of a franchise agreement, occurs when the period of the agreement is extended, other than because of an option exercisable by the franchisee during the term of the agreement. (see clause 4 of the Code).

Renew, in relation to a franchise agreement, occurs when the franchisee exercises an option during the term of the agreement to renew the agreement. (see clause 4 of the Code).

In view of the definition of 'extend', Part 5 will likely apply to agreements entered into before 1 June 2020 if the terms of the dealer agreement have subsequently been varied, even if not formally renewed or extended. The definition of 'extension' may also apply to dealer agreements that are in a holding over period but the Code is unclear on this point.

Whilst Part 5 does include new vehicle dealership agreements that are renewed after 1 June 2020, the majority of dealership agreements do not contain options.

There is one exception to the requirement in Part 5 that the dealer agreement needs to be entered into/renewed/extended after 1 June 2020. If a dealer agreement was entered into/renewed/extended on or after 1 June 2020 but the disclosure document was completed before this date, then the new capital expenditure provisions of Part 5 may not apply.

Other considerations – where the Code does not apply at all

Although there are some specific situations where the Code may not apply, one of potential general interest is where another industry code applies, such as the Food and Grocery Code of Conduct.

3.2.2. What subject matters are dealt with in Part 5?

Part 5 deals with the following subject matters, which are discussed in more detail in the subsequent sections of this Guide:

- end of term obligations;
- capital expenditure requirements; and
- dispute resolution.

3.2.3. Do the general provisions of the Code (not Part 5) still apply to car dealers?

Except where expressly stated that new vehicle dealerships are excluded and the new Part 5 will apply instead, the general provisions of the Code will continue to regulate dealer agreements. This will be the case for subject matters dealt with in the general provisions of the Code which are not dealt with in Part 5, as Part 5 is limited to end of term obligations, capital expenditure requirements and dispute resolution. The general provisions of the Code will also apply to dealer agreements that fall outside the scope of Part 5 as outlined above, such as motorcycle, tractor or motorboat dealerships.

New Vehicle Dealership Agreements entered into/extended/renewed after 1 June 2020

- New Part 5
- General Provisions of the Code (except where New Vehicle Dealership Agreements are specifically excluded)

New Vehicle Dealership Agreements entered into before 1 June 2020 (and not extended, renewed etc after 1 June 2020)

- General Provisions of the Code

All other franchise agreements that are not New Vehicle Dealership Agreements

- General Provisions of the Code

Where another mandatory industry code applies to the agreement (for example, the Oil Code)

- The Code does not apply at all

Agreements for dealerships that predominately deal with used cars, motorcycles, tractors, motorized farm machinery, motorized construction machinery, aircrafts and motor boats

- General Provisions of the Code

3.2.4. What does this mean for dealers?

A dealer needs to know whether Part 5 and the general provisions of the Code apply to its dealer agreement or whether only the general provisions of the Code apply as it will impact the dealer's rights and liabilities and the relationship with its distributor. As specified in the diagram in section 3.2.3, there are very limited circumstances where the Code will not apply at all.

As explained in the following sections, Part 5 of the Code impose specific obligations on distributors regarding end-of-term obligations, capital expenditure requirements, and dispute resolution.

As evident from the content described above, it is not always a straightforward task to determine which Code sections apply to a dealer agreement. Dealers should obtain professional advice to confirm and understand their statutory rights under the Code.

3.2.5. Flowchart – Does Part 5 apply to your Dealer Agreement?

Set out below is a flow chart which will assist in determining whether the new Part 5 of the Code applies to your dealership. Part 5 will only apply if you answer 'yes' to question 1 and 'yes' to either question 2, 3 or 4.

1. Does your motor vehicle dealership agreement predominantly relate to dealing in new passenger vehicles or new light goods vehicles (or both)? (See 1.2 above)	Yes ☐ No ☐

AND

2. Was your dealer agreement entered into on or after 1 June 2020?	Yes ☐ No ☐

OR

3. Was your dealer agreement entered into before 1 June 2020 but was renewed on or after 1 June 2020? That is, did the dealer exercise an option during the term of the agreement to renew the agreement?	Yes ☐ No ☐

OR

4. Was your dealer agreement entered into before 1 June 2020 but was extended because of a material change to the terms and conditions of the agreement, or the rights of a person under or in relation to the agreement or the liabilities that would be enforced on a person under or in relation to the agreement?	Yes ☐ No ☐

3.3. Agency Agreements

3.3.1. Background

Recent announcements by Honda and Mercedes-Benz to change to an agency model of distribution have raised the question as to whether an agency model will be subject to the Code.

The Federal Government announced on 12 March 2021 it would also ensure the Code would recognise dealers that operate as a distributor's agent in relation to the sale of new vehicles as businesses protected by the Code. As at the date of publication, the amending legislation has not been released as such, it is unclear how dealers appointed as agents will fall under the Code. Until further details are released, we suggest you work through the test described below.

3.3.2. Do the general provisions of the Code apply to Agency Agreements?

The general provisions of the Code are all of the provisions of the Code except for Part 5.

In Australia, in circumstances where a party proposes to appoint another party as its agent in respect of the sale of a product or service, it is important to determine whether the arrangement is a franchise agreement for the purposes of the Code.

An agency arrangement between a distributor and an agent for the sale of motor vehicles will be a franchise agreement for the purpose of the Code if it satisfies the test under clause 5(1) or clause 5(2) of the Code.

5. Meaning of franchise agreement

(1) A franchise agreement is an agreement:

(a) that takes the form, in whole or part, of any of the following:

(i) a written agreement;

(ii) an oral agreement;

(iii) an implied agreement; and

(b) in which a person (the franchisor) grants to another person (the franchisee) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor; and

(c) under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol:

(i) owned, used or licensed by the franchisor or an associate of the franchisor; or

(ii) specified by the franchisor or an associate of the franchisor; and

(d) under which, before starting or continuing the business, the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor an amount including, for example:

(i) an initial capital investment fee; or

(ii) a payment for goods or services; or

(iii) a fee based on a percentage of gross or net income whether or not called a royalty or franchise service fee; or

(iv) a training fee or training school fee; but excluding:

(v) payment for goods and services supplied on a genuine wholesale basis; or

(vi) repayment by the franchisee of a loan from the franchisor or an associate of the franchisor; or

(vii) payment for goods taken on consignment and supplied on a genuine wholesale basis; or

(viii) payment of market value for purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the franchise agreement.

Whether or not an agency arrangement satisfies the test under clause 5(1) will depend on the specific terms and conditions of the contract appointing the agent which may vary depending on what has been negotiated and agreed between the agent and the distributor. However, we make the following general observations:

- an agency arrangement will satisfy clause 5(1)(a) on the assumption that a distributor will likely appoint the dealer as an agent in writing and require the dealer to enter into a formal written contract;
- under an agency arrangement the dealer will be entitled to sell motor vehicles for the distributor however, the distributor will retain title to the motor vehicles and title will not pass to the dealer rather it will pass directly to the customer. We expect the dealer will offer motor vehicles for sale in accordance with terms (e.g. the sale price, payment and warranty terms) and processes largely dictated by the distributor. We would also expect the distributor to establish the dealer's marketing plan or at least have the right to exercise control over the marketing activities a dealer may engage in. That being so, clause 5(1)(b) would be satisfied;
- in respect of clause 5(1)(c) similar to the traditional dealer agreements we expect that a dealer who acts as an agent will trade using the distributor's brand and other intellectual property associated with the brand owned by the distributor or an associate of the distributor; and
- as described in clause 5(1)(d) we expect the terms of an agency arrangement may require a dealer to:
  - make an initial capital investment to make the dealership business suitable to trade as an agent,
  - buy spare parts or accessories from the distributor and/or
  - contribute to a marketing fund controlled by the distributor or an associate of the distributor.

An agency arrangement must satisfy each of the limbs described in clause 5(1)(a) - (d) in order for it to be recognised as a franchise agreement under the Code. If clause 5(1) is not satisfied then you would determine whether the deeming provisions in clause 5(2)(c) can be relied upon which provides that a motor vehicle dealership agreement is deemed to be a franchise agreement.

5. Meaning of franchise agreement

(2) 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.

A 'motor vehicle dealership' is defined in Part 1 of the Code as 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. Also, 'motor vehicle' is defined in Part 1 of the Code as a vehicle that uses, or is designed to use, volatile spirit, gas, oil, electricity or any other power (except human or animal power) as the principal means of propulsion, but does not include a vehicle used, or designed to be used, on a railway or tramway, which means that car dealers, tractor and machinery dealers, motor cycle dealers and marine (motor boat) dealers are all included as franchise agreements subject to the Code.

As the distributor will retain title to the motor vehicles under an agency arrangement, the activities of an agent may not include "buying" a motor vehicle. Even if the agency agreement documents an arrangement for the dealer agent to buy demonstrators vehicles from the distributor it is not likely this activity alone would constitute a "business of buying" motor vehicles. It is therefore necessary to determine whether the activities of a dealer who acts as an agent to sell motor vehicles for the distributor is an activity that predominantly constitutes "the business of ..... selling, exchanging or leasing motor vehicles".

We expect a dealer under an agency arrangement may be characterised as a bailee with respect to the motor vehicles under its control and possession. That being so, it is uncertain whether the activities of the dealer agent will constitute "selling, exchanging or leasing..." for the purpose of determining whether the agency arrangement is in fact a 'motor vehicle dealership' under Part 1 of the Code. However, on a broad construction we consider the business of dealer agent would likely be considered "a business of selling.... motor vehicles."

The business of a motor vehicle dealership operated under an agency arrangement will therefore be deemed to be a franchise agreement and is subject to the Code, regardless of any title which identifies it as an agency agreement or any other description. As such, any motor vehicle distributor moving to an agency arrangement must comply with the Code.

3.3.3. Does Part 5 of the Code apply to Agency Agreements?

Once it has been established that the Code applies to an agency agreement, it must be determined whether the Agreement is also subject to Part 5 of the Code.

Section 3.2 of this Guide will assist dealers to determine if Part 5 will apply to the agreement with its distributor.

3.3.4. What does this mean for dealers?

Any dealer being presented with an agreement relating to the sale and distribution of new vehicles, regardless of whether this is presented as a franchise/dealer agreement or agency agreement, will be subject to the requirements of the Code.

For any agreement to which the Code applies and which is entered into, renewed or extended after 1 June 2020, Part 5 of the Code may also apply (please see Section 3.2 of this Guide for more information).

Ensuring that an agency arrangement meets the definition of a franchise agreement under the Code will allow a dealer to rely on the requirements under the Code and, if applicable, any additional protections available under Part 5 of the Code. Sections 3.4 and 3.5 explain the additional requirements imposed on the distributor with respect to its relationship with the dealer.

3.4. End of Term Obligations

3.4.1. Notice Requirements for Distributors and Dealers

Part 5 of the Code alters the notice obligations that apply when either party wants to enter into a new agreement, extend the agreement or cease to continue the dealership arrangement.

47 Notification obligation – franchisor (distributor)

(1) The franchisor of a franchise agreement must notify the franchisee, in writing, whether the franchisor intends to:

(a) extend the agreement; or

(b) enter into a new agreement; or

(c) neither extend the agreement nor enter into a new agreement.

48 Notification obligation – franchisee (dealer)

(1) The franchisee of a franchise agreement must notify the franchisor, in writing, whether the franchisee intends to:

(a) renew the agreement; or

(b) enter into a new agreement; or

(c) neither renew the agreement nor enter into a new agreement.

Under the Code, a material change to the terms and conditions of the agreement or a change to the rights or liabilities of a person under the agreement is considered an extension and the notice requirements will apply. Previously and what is still the case for dealer agreements that fall outside the scope of Part 5, the notice period for distributors to give to dealers is six months.

How much notice does the distributor need to give under Part 5?

The rest of clause 47 details how much notice a distributor must give to a dealer when it wants to either offer a renewal of the dealer agreement, extend the term or provide a non-renewal notice. The notice will depend on the length of the dealer agreement where the following rules apply:

- Agreements with a term that is 12 months' or longer: a distributor must give at least 12 months' notice
- Agreements with a term of at least six months' but less than 12 months': six months' notice must be provided
- Agreements with a term of less than six months': at least one month's notice must be provided

If a distributor provides notice of intention to grant a new dealer agreement, the distributor must provide a statement outlining that the dealer can request a disclosure document.

If a distributor provides a non renewal notice, the distributor must provide reasons for this decision and the decision must have been made in good faith.

Although 'Good faith' is not expressly referred to in Part 5 of the Code, the obligation to act in good faith applies and is referenced in clause 6 of the Code. This obligation extends to the entire relationship from dealings between the distributor and the dealer prior to entering into the dealer agreement, during the term of the agreement as well as during a dispute related to the dealer arrangement.

The Code references the meaning of good faith within the 'unwritten law from time to time' meaning that the common law test of good faith in the context of commercial contracts and arrangements is relevant and must be used in assessing whether a distributor has acted in good faith.

Generally, the obligation of good faith requires a party to act reasonably, honestly and not use their powers for an ulterior purpose. Clause 6(3) further notes that a court may have regard to the following when determining whether a party acted in good faith:

- Whether the party acted honestly and not arbitrarily; and
- Whether the party cooperated to achieve the purposes of the agreement.

Civil penalties apply to these notice obligations, which means distributors could face fines of up to $66,600 for non-compliance.

It is our view that in circumstances where a distributor provides a non renewal notice, the obligation of good faith requires the distributor to provide reasonable detail when disclosing reasons for its decision not to renew the dealer agreement to enable the dealer to understand why the distributor has elected to end the arrangement. Additionally, if the primary reason given is related to under performance then we consider the good faith obligation requires a distributor to demonstrate that it had consulted with the dealer on its performance prior to making its decision.

How much notice does the dealer need to give?

Dealers are governed by the same notice requirements as distributors and need to abide by the following rules which are outlined in clause 48:

- **Agreements with a term that is 12 months or longer:** a dealer must give at least 12 months' notice
- **Agreements with a term of at least six months but less than 12 months**: six months' notice must be provided by a dealer
- **Agreements with a term of less than six months:** at least one month's notice must be provided by a dealer

Dealers will also need to provide reasons to the distributor if they intend to neither renew the agreement or enter into a new agreement in giving notice.

Unlike for distributors, civil penalties do not apply to dealers for a breach of these requirements.

3.4.2. Mutual winding down obligations

If either the distributor or the dealer elects not to continue the dealer agreement, the parties must agree to a written plan to manage the winding down of the relationship.

49 Obligation to manage winding down of agreement

(1) This clause applies if:
  (a) under clause 47, the franchisor gives the franchisee a notice that the franchisor intends to neither extend the agreement nor enter into a new agreement; or
  (b) under clause 48, the franchisee gives the franchisor a notice that the franchisee intends to neither renew the agreement nor enter into a new agreement.

(2) The parties must, as soon as practicable, agree to a written plan (with milestones) for managing the winding down of the dealership, including how the franchisee's stock (including new vehicles, spare parts and service and repair equipment) will be managed over the remaining term of the agreement.

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

The clause explains that the plan must include milestones, relate to the remaining term of the agreement and should factor in the management of new vehicle stock, spare parts stock and service and repair equipment. There is also an obligation for both parties to cooperate to reduce the dealer's inventory over the remaining term which we consider is intended to avoid the dealer being laden with excess or aged stock at the end of the term and having to sell vehicle stock and spare parts at a significant discount.

While these winding down provisions have some utility, it is considered reflective of the best practice that dealer agreements contain fair and reasonable provision for the repurchase by the distributor of stock, parts, special equipment and signage upon cessation of the dealership business by way of termination or non-renewal.

3.5. Capital Expenditure Requirements

3.5.1. What changes does Part 5 make in relation to capital expenditure?

Part 5 of the Code introduced new provisions explicitly relating to capital expenditure requirements in new vehicle dealership agreements entered into, renewed or extended on or after 1 June 2020.

3.5.2. What are the existing capital expenditure requirements under the general provisions of the Code?

The general provisions of the Code prohibit a distributor from requiring a dealer to incur significant capital expenditures during the term of the agreement. However, some exceptions apply to the prohibition, including if the distributor provides the dealer with a written justification for the expense. The written justification statement must include details relating to the following matters:

- rationale for the investment;
- amount of capital expenditure required;
- anticipated outcomes and benefits; and
- expected risks associated with the investment.

30 Capital expenditure

(1) 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.

(2) For the purpose of subclause (1), significant capital expenditure excludes the following:

(a) expenditure that is disclosed to the franchisee in the disclosure document that is given to the franchisee before:

(i) entering into or renewing the agreement; or

(ii) extending the term or scope of the agreement;

(b) if expenditure is to be incurred by all or a majority of franchisees – expenditure approved by a majority of those franchisees;

(c) expenditure incurred by the franchisee to comply with legislative obligations;

(d) expenditure agreed by the franchisee;

(e) expenditure that the franchisor considers is necessary as capital investment in the franchised business, justified by a written statement given to each affected franchisee of the following:

(i) the rationale for making the investment;

(ii) the amount of capital expenditure required;

(iii) the anticipated outcomes and benefits; (iv) the expected risks associated with making the investment.

(3) This clause does not apply in relation to a new vehicle dealership agreement.

In effect, clause 30(2)(e) permits a distributor to require a dealer to incur significant capital expenditure during the term of the agreement if it gives written justification for doing so. The consequences of this on dealers can be significant where the capital works directed by a distributor are major and particularly where prior to the dealer accepting the dealer agreement the distributor gave no indication that major capital investments might be required in future. In a worst case scenario a dealer may find itself unable to comply with the distributor's requirement to upgrade the facility due to lack of funding which may lead to a non-renewal notice or a premature end of the dealer agreement.

However, clause 30(3) of the general provisions of the Code provides that the general provisions of the Code relating to capital expenditure do not apply in relation to a new vehicle dealership agreement. This means that a distributor cannot rely on the above exemption if the agreement meets the definition of a new vehicle dealership agreement (in which case clause 50(1) of Part 5 of the Code will apply, as explained below).

30 Capital expenditure

(3) This clause does not apply in relation to a new vehicle dealership agreement.

Note: For new vehicle dealership agreements, see Division 3 of Part 5.

3.5.3. What changes to capital expenditure requirements were introduced by Part 5?

Part 5 of the Code provides additional protections for those dealers who have a dealer agreement that falls within the scope of Part 5 of the Code.

The additional protections remove a distributor's ability to rely on clause 30(2)(e) to require a dealer to incur capital expenditure during the term of the agreement by providing a written justification.

Under Part 5, to require a dealer to incur significant capital expenditure, the expenditure must have been disclosed to the dealer in the disclosure document before the dealer entered into, renewed or extended the agreement - as opposed to being provided at any time during the course of the dealer relationship.

Clause 51 requires a distributor to disclose information about the expenditure including:

- the rationale
- the amount, timing and nature of the expenditure
- the anticipated outcomes and benefits
- the expected risks associated with the expenditure.

In addition, the distributor must discuss the expenditure obligations with the dealer before the dealer agreement is signed, such discussion must include the likelihood of the dealer recouping the expenditure having regard to the geographical area of the operations of the dealer or prospective dealer.

50 Significant capital expenditure not to be required

(1) 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.

(2) For the purposes of subclause (1), significant capital expenditure excludes the following:

(a) expenditure that is disclosed to the franchisee in the disclosure document that is given to the franchisee before:

(i) entering into or renewing the agreement; or

(ii) extending the term or scope of the agreement;

(b) if expenditure is to be incurred by all or a majority of franchisees— expenditure approved by a majority of those franchisees;

(c) expenditure incurred by the franchisee to comply with legislative obligations;

(d) expenditure agreed by the franchisee.

3.5.4. What do these changes mean for dealers?

The current exception under the Code, which provides that a distributor can require a dealer to incur significant capital expenditure during the term of a dealer agreement, provided that a written justification is provided for doing so, will continue to apply to all existing agreements (entered into prior to 1 June 2020), until renewed or extended.

Once a dealer enters into a new agreement or renews an existing agreement from 1 June 2020 onwards all capital expenditure obligations must be included in the disclosure document provided by the distributor either when the dealer first entered into the arrangement or when the dealer agreement was renewed.

If a disclosure document does not include the capital expenditure requirements the distributor cannot require the dealer to incur those costs, unless another exception under clause 50(2) of the Code applies.

Other exceptions under clause 50(2) of the Code include circumstances where the expenditure:

- is to be incurred by all or a majority of dealers (and is approved by a majority of those dealers);
- is incurred to comply with legislative obligations; or
- is agreed by the dealer.

Clauses 50 and 51 present a significant 'win' for dealers by removing the risk of the distributor requiring major facility upgrades part way into a term. In addition, once enacted the mandatory best practice principles will require distributors to include terms in dealer agreements that provide for fair and reasonable tenure for dealers to secure a return on investments that have been required by the distributor.

In view of the above, it is open to dealers and dealer councils to question a distributor about the contents of a justification statement and seek their own professional advice on whether the capital investment is justified. It is also open to dealers to use the ACCC Collective Bargaining exemption (as discussed in Section 5 of this Guide) to negotiate reasonable terms surrounding capital expenditure expectations with the distributor.

3.6. Dispute Resolution

Part 5 does not have its own dispute resolution procedure, meaning the process outlined in the general provisions of the Code apply to new dealer vehicle agreements as well as all franchise agreements. Part 5 does however contain a provision which allows for dealers to make a request to a distributor to participate in a multi-franchisee dispute. A distributor is not required to agree to participate however, it must act in good faith in considering and responding to the request.

The Government has released a new 'Exposure Draft' of the Code which is expected to be implemented some time in 2021. If enacted in its current form, the Code's dispute resolution processes will be amended and will provide dealers with more alternative dispute resolution options. This section summarises the current state of the law, and will be amended once the changes are brought in.

3.6.1. Internal complaint handling procedure

The Code requires that all franchise agreements must have an internal complaint handling procedure which adheres to the requirements set out in clauses 38 and 39.

38 Notification of dispute

(1) The complainant must tell the respondent in writing:
  (a) the nature of the dispute; and
  (b) what outcome the complainant wants; and
  (c) what action the complainant thinks will resolve the dispute.
(2) The parties should then try to agree about how to resolve the dispute.
(3) If the parties cannot agree how to resolve the dispute within three weeks, either party may refer the matter to a mediator for mediation under:
  (a) a franchise agreement; or
  (b) this code.
(4) If the parties cannot agree on who should be the mediator, either party may ask the mediation adviser to appoint a mediator.

This clause emphasises that distributors and dealers need to first try and resolve their disputes between themselves before they can seek to mediate a dispute. Subclause (1) clarifies that a party must inform the other (about the nature of the issue in writing before it can be sought to be resolved. The use of the word 'may' in subclause (3) means that the choice to mediate by a party after three weeks of not being able to resolve the dispute is discretionary. Clause 38 also means that this process should be spelt out in the dealer agreement.

39 Mediation

(1) Subject to subclause (2), a mediator appointed for a dispute may decide the time and place for mediation.
(2) The mediation must be conducted in Australia.
(3) The parties must attend the mediation.
(4) For subclause (3), a party is taken to attend mediation if the party is represented at the mediation by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.
(5) The parties must try to resolve the dispute.
(6) After the mediation has started, the mediator must advise the mediation adviser, within 28 days, of that fact.

Clause 39 sets out the mediation requirements where a dealer or distributor refers the dispute to mediation under clause 38. It requires that the parties attend mediation where a fine of up to $66,600 may be payable by a party who does not attend. Clause 36 provides examples of conduct or actions that indicate a party is genuinely trying to resolve the dispute, as required by the obligation in the above subclause (5). Some examples include attending the meetings, not taking action that might damage the franchise system's reputation and abiding by the mediation's confidentiality obligations.

The process outlined in the internal complaints handling procedure applies to both dealers and distributors equally. It will not affect a party's right to bring legal proceedings.

3.6.2. Code complaint handling procedure

Dealers and distributors can also attempt to resolve a dispute under the Code rather than through the internal complaint handling procedure.

In practical terms, the process should be the same as the above as clauses 40 and 41 mirror clauses 38 and 39. This means that parties must notify each other of the dispute in writing, try to resolve the dispute themselves and then attend mediation if either party refers the dispute to mediation after three weeks of being unable to resolve the issue.

The Code's complaint handling procedure also contains two additional clauses which are not required to be outlined in a dealer agreement's internal process. These are clauses 42 and 43.

42 Termination of mediation

(1) This clause applies to the mediation of a dispute if:
  (a) at least 30 days have elapsed after the day that mediation began; and
  (b) the dispute has not been resolved.
(2) The mediator may terminate the mediation at any time unless satisfied that a resolution of the dispute is imminent.
(3) However, if either party asks the mediator to terminate the mediation, the mediator must do so.
(4) If the mediator terminates the mediation of a dispute under this clause, the mediator must issue a certificate stating:
  (a) the names of the parties; and
  (b) the nature of the dispute; and
  (c) that the mediation has finished; and
  (d) that the dispute has not been resolved.
(5) The mediator must give a copy of the certificate to:
  (a) the mediation adviser; and
  (b) each of the parties to the dispute.

This clause gives either party or the mediator the power to terminate the mediation if no resolution has been achieved within 30 days. A certificate must then be issued to the parties stating the dispute could not be resolved. Once a certificate is issued either party would be free to progress the dispute to formal litigation through the courts.

43 Costs of mediation

(1) The parties are equally liable for the costs of mediation under this Subdivision unless they agree otherwise.
(2) The parties must pay for their own costs of attending the mediation.
(3) In this clause: costs of mediation under this Subdivision include the following:
  (a) the cost of the mediator;
  (b) the cost of room hire;
  (c) the cost of any additional input (including expert reports) agreed by both parties to be necessary to conduct the mediation.

Clause 43 simply states that each party to mediation must bear their own costs, unless agreed otherwise. Dealers should check their dealer agreements to see if the issue of costs is dealt with in the agreement and ensure the dealer agreement does not require the dealer to bear the costs of any mediation.

If mediation is unsuccessful, the next step would be to commence legal proceedings. A party can also commence proceedings initially if neither party seeks to have the dispute mediated.

As at the date of publication of the Guide, the Government is consulting with industry bodies regarding binding arbitration as an additional dispute resolution method for disputes arising between dealers and distributors. Notwithstanding any reforms that may be released in the future, dealers and dealer councils should consider the merits of including a binding arbitration term in their dealer agreements as a next step where mediation fails to resolve a dispute. Dealers could utilise the class exemption for collective bargaining (discussed in Section 5 of this Guide) to approach a distributor to negotiate this issue.

3.6.3. Multi-franchisee dispute resolution

Part 5 does have one dispute resolution provision, which applies to new vehicle dealership agreements regardless of whether they were entered into, renewed or extended before or after 1 June 2020.

52 Franchisees may request multi-franchisee dispute resolution

(1) This clause applies if:
  (a) a franchisor has entered into franchise agreements with two or more franchisees; and
  (b) two or more of the franchisees each have a dispute of the same nature with the franchisor.

(2) Two or more of the franchisees mentioned in paragraph (1)(b) may ask the franchisor to deal with the franchisees together about the dispute.

This clause allows multiple dealers to join together in a dispute if they have the same issue with their distributor (or if the distributor has the same issue with them). For example, suppose a distributor requires all dealers to undertake unreasonable capital expenditure requirements. In that case, those dealers can join together to attempt to resolve the dispute using the dispute resolution process outlined above.

Clause 52 seeks to try and reduce the imbalance of power that exists between dealers and distributors whilst also reducing costs for distributors, so they do not have to resolve the same dispute multiple times, and similarly, each dealer does not necessarily have to negotiate the same issue individually with the distributor.

Similar to the class exemption for collective bargaining (outlined in Section 5 of this Guide):

- Dealers who come together to resolve a dispute against the one distributor would be in a stronger bargaining position and likely obtain a better outcome to negotiations.
- A distributor is not obliged to accept the request to resolve the dispute with more than one dealer.

3.6.4. Dispute Resolution Flowchart

How Dealers can seek to resolve disputes with their distributor under the Code

Step 1 – Seek Legal Advice and Notify the Distributor
Dealers should make sure they seek strategic and legal advice so they can better understand their rights agains the distrubutor. If dealers decide to proceed with the process, they notify the distributor of their issue in writing by drafting a letter which complies with the requirements of section 38 or 40.

Step 2 – Negotiate
If the distributor agrees to negotiate with the dealers as a group, the dealers should try to negotiate a resolution with the distributor, having regard to the considerations set out in our road map (Schedule to A).

Step 3 – Mediation
If a resolution cannot be reached after three weeks, consider referring the dispute to mediation.

Step 4 – Other forms of ADR
If the dealer agreement allows for other forms of Alternative Dispute Resolution (ADR) processes, such as arbitration, this could be the next step for dealers before taking the dispute to court.

Step 5 – Court
If mediation is unsuccesful, dealers can think about whether it is worth having the dispute heard in court. This is an expensive and time consuming process and strategic and legal advice should be sought before considering this option.

Part 5—New vehicle dealership agreements

Division 1—Preliminary

46 Application of Part

This Part applies to new vehicle dealership agreements.

Division 2—End of term obligations

Note: Subdivision B of Division 2 of Part 3 does not apply to new vehicle dealership agreements (see clause 17A).

47 Notification obligation—franchisor

(1) The franchisor of a franchise agreement must notify the franchisee, in writing, whether the franchisor intends to:
  (a) extend the agreement; or
  (b) enter into a new agreement; or
  (c) neither extend the agreement nor enter into a new agreement.

(2) If the term of the agreement is 12 months or longer, the franchisor's notice must be given:
  (a) at least 12 months before the end of the term of the agreement; or
  (b) if the parties to the agreement agree on a later time—before that later time.

  Civil penalty: 300 penalty units.

(3) If the term of the agreement is less than 12 months, the franchisor's notice must be given:
  (a) if the term of the agreement is 6 months or longer—at least 6 months before the end of the term of the agreement; and
  (b) if the term of the agreement is less than 6 months—at least 1 month before the end of the term of the agreement.

  Civil penalty: 300 penalty units.

(4) If the franchisor intends to enter into a new agreement, the franchisor's notice must include a statement to the effect that, subject to subclause 16(2), the franchisee may request a disclosure document under clause 16.

  Civil penalty: 300 penalty units.

(5) If the franchisor gives a notice that the franchisor intends to neither extend the agreement nor enter into a new agreement, the notice must include the reasons for the franchisor's intention.

  Civil penalty: 300 penalty units.

48 Notification obligation—franchisee

(1) The franchisee of a franchise agreement must notify the franchisor, in writing, whether the franchisee intends to:
  (a) renew the agreement; or
  (b) enter into a new agreement; or
  (c) neither renew the agreement nor enter into a new agreement.

(2) If the term of the agreement is 12 months or longer, the franchisee's notice must be given:
  (a) at least 12 months before the end of the term of the agreement; or
  (b) if the parties to the agreement agree on a later time—before that later time.

(3) If the term of the agreement is less than 12 months, the franchisee's notice must be given:
  (a) if the term of the agreement is 6 months or longer—at least 6 months before the end of the term of the agreement; and
  (b) if the term of the agreement is less than 6 months—at least 1 month before the end of the term of the agreement.

(4) If the franchisee gives a notice to the franchisor that the franchisee intends to neither renew the agreement nor enter into a new agreement, the notice must include the reasons for the franchisee's intention.

49 Obligation to manage winding down of agreement

(1) This clause applies if:
  (a) under clause 47, the franchisor gives the franchisee a notice that the franchisor intends to neither extend the agreement nor enter into a new agreement; or
  (b) under clause 48, the franchisee gives the franchisor a notice that the franchisee intends to neither renew the agreement nor enter into a new agreement.

(2) The parties must, as soon as practicable, agree to a written plan (with milestones) for managing the winding down of the dealership, including how the franchisee's stock (including new vehicles, spare parts and service and repair equipment) will be managed over the remaining term of the agreement.

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

Division 3—Capital expenditure

50 Significant capital expenditure not to be required

(1) 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.

(2) For the purposes of subclause (1), ***significant capital expenditure*** excludes the following:

(a) expenditure that is disclosed to the franchisee in the disclosure document that is given to the franchisee before:

(i) entering into or renewing the agreement; or

(ii) extending the term or scope of the agreement;

(b) if expenditure is to be incurred by all or a majority of franchisees—expenditure approved by a majority of those franchisees;

(c) expenditure incurred by the franchisee to comply with legislative obligations;

(d) expenditure agreed by the franchisee.

Note: Clause 30 (capital expenditure) does not apply to new vehicle dealership arrangements (see subclause 30(3)).

51 Information and discussion about capital expenditure

(1) This clause applies if a disclosure document for an agreement discloses expenditure of the kind mentioned in paragraph 50(2)(a).

(2) The franchisor must include in the disclosure document as much information as practicable about the expenditure, including the following:

(a) the rationale for the expenditure;

(b) the amount, timing and nature of the expenditure;

(c) the anticipated outcomes and benefits of the expenditure;

(d) the expected risks associated with the expenditure.

Example: The information could include the type of any upgrades to facilities or premises, any planned changes to the corporate identity of the franchisor's brand and indicative costs for any building materials.

(3) Before entering into, renewing or extending the term or scope of the agreement, the franchisor and the franchisee or prospective franchisee must discuss the expenditure.

(4) The discussion must include a discussion of the circumstances under which the franchisee or prospective franchisee considers that the franchisee or prospective franchisee is likely to recoup the expenditure, having regard to the geographical area of operations of the franchisee or prospective franchisee.

Division 4—Resolving disputes

52 Franchisees may request multi-franchisee dispute resolution

(1) This clause applies if:

(a) a franchisor has entered into franchise agreements with 2 or more franchisees; and

(b) 2 or more of the franchisees each have a dispute of the same nature with the franchisor.

(2) Two or more of the franchisees mentioned in paragraph (1)(b) may ask the franchisor to deal with the franchisees together about the dispute.

Note: See also Part 4 (resolving disputes).

Part 6—Application, saving and transitional provisions

Division 1—Amendments made by the Competition and Consumer (Industry Codes—Franchising) Amendment (New Vehicle Dealership Agreements) Regulations 2020

54 Definitions

In this Division:

amending regulations means the *Competition and Consumer (Industry Codes—Franchising) Amendment (New Vehicle Dealership Agreements) Regulations 2020*.

commencement date means 1 June 2020.

55 End of term obligations

Agreements entered into on or after commencement date

(1) Division 2 of Part 5, as inserted by the amending regulations, applies to:
  (a) a new vehicle dealership agreement that is entered into on or after the commencement date; and
  (b) such an agreement as later renewed or extended.

Agreements in force immediately before commencement date

(2) Subclauses (3) and (4) apply to a new vehicle dealership agreement that was in force immediately before the commencement date.

(3) Despite the amendments made by the amending regulations, Subdivision B of Division 2 of Part 3, as in force immediately before the commencement date, continues to apply to the agreement (subject to subclause (4)).

(4) If the agreement is later renewed or extended, then, on and after the renewal or extension:
  (a) Subdivision B of Division 2 of Part 3, as in force immediately before the commencement date, does not apply to the agreement (as renewed or extended); and
  (b) Division 2 of Part 5, as inserted by the amending regulations, applies to the agreement (as renewed or extended).

56 Capital expenditure

Application of clause 50

(1) Clause 50, as inserted by the amending regulations, applies to a new vehicle dealership agreement if:
  (a) the disclosure document for the agreement is created or updated on or after the commencement date; and
  (b) the agreement is entered into, renewed or extended after the creation or updating of the disclosure document.

Application of clause 30

(2) Despite the amendments made by the amending regulations, clause 30, as in force immediately before the commencement date, continues to apply to a new vehicle dealership agreement that was entered into, renewed or extended before the commencement date.

(3) Despite the amendments made by the amending regulations, clause 30, as in force immediately before the commencement date, also continues to apply to a new vehicle dealership agreement if:
  (a) the disclosure document for the agreement was created, or most recently updated, before the commencement date; and
  (b) the agreement is entered into, renewed or extended on or after the commencement date.

Application of clause 51

(4) Clause 51, as inserted by the amending regulations, applies in relation to a disclosure document:
  (a) that is created or updated on or after the commencement date; and
  (b) that is for a new vehicle dealership agreement that is to be entered into, renewed or extended after the creation or updating of the disclosure document.

57 Resolving disputes

Clause 52, as inserted by the amending regulations, applies to a new vehicle dealership agreement that is entered into, renewed or extended before, on or after the commencement date.

58 Review of amendments

(1) The Minister must cause a review of the operation of the amendments made by the amending regulations to be conducted before 1 April 2024.

(2) The Minister must cause a written report of the review to be prepared.

(3) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the report is given to the Minister.

4. Unfair Contract Terms – Australian Consumer Law

4.1. Introduction

The *Australian Consumer Law* (ACL) (contained in Schedule 2 of the CCA) provides rights and protections to consumers who purchase goods and services. The ACL applies uniformly to all Australian states and territories and protects consumers from contracts that contain UCTs. From 12 November 2016, the prohibition against UCTs also applies to small business contracts as well as consumer contracts.

In November 2016, the ACCC released its report into unfair contracts which included the review of unfair contracts in a number of industries including the franchised section due to the prevalence of standard form contracts and an inherent imbalance of power between franchisors and franchisees. While the ACCC requested seven franchisors to participate in the review, three franchisors including two major car brands elected not to participate fully. Since the introduction of the ACL in 2010, it is the view of dealers and dealer councils that distributors have been unwilling to remove UCTs from dealer agreements.

Following a meeting of the Ministers of Consumer Affairs in November 2020, the Federal Government has proposed to make the following changes:

- expanding the eligibility definition of 'small business contract' so more businesses can access these protections;
- removing the requirement for a maximum 'upfront price payable' under the contract;
- imposing civil penalties for breaches;
- including more flexible remedies will be made available for courts;
- creating a presumption of unfairness for some terms; and
- clarify the meaning of 'standard-from contract'.

It is expected that draft legislation to give effect to the changes will be released to the public in 2021. Once enacted, it is expected that these changes together with the collective bargaining class exemption will enable dealers and dealer councils to negotiate fairer terms contained in dealer agreements.

The below sets out the current state of the law.

4.2. Application to Dealer Agreements

> **23 Unfair terms of consumer contracts and small business contracts**
>
> (1) A term of a consumer contract or small business contract is void if:
>
> (a) the term is unfair; and
>
> (b) the contract is a standard form contract

Clause 23(1) tells us there are three limbs to the test as to whether a contract may be subject to the UCT law:

1. The contract is either a small business contract or a consumer contract;
2. The contract is a standard form contract; and
3. The relevant term is unfair

If the above three things can be shown, then the term will be considered void and cannot be relied upon by either party to the contract and the rest of the contract will continue to apply to govern the relationship between the parties unless it is impossible to do so without the unfair term.

The first limb – is the contract a 'small business contract'?

The UCT law applies to all consumer contracts for the sale of goods or services however, will only apply to contracts between businesses if the contract is a 'small business contract' as defined in clause 23(4).

> **23 Unfair terms of consumer contracts and small business contracts**
>
> (4) A contract is a small business contract if:
>
> (a) the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
>
> (b) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
>
> (c) either of the following applies:
>
> (i) the upfront price payable under the contract does not exceed $300,000;
>
> (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000.

While a dealer agreement will always be a contract for goods and services dealers will be ineligible for protection under the UCT laws where the number of employees in the dealership exceeds 20 and the dealer agreement meets one of the limbs of the test described under clause 23(4)(c).

Casual employees will be treated as an as employee of the dealer where they are employed on a 'regular and systematic basis'. Whether this is the case will depend on the circumstances. A regular roster or clear pattern or work, rather than irregular or occasional work, will be a good indicator of this. The employee does not have to work on the same days each week to meet this requirement.

The second limb – is the contract a 'standard form contract'?

27 Standard form contracts

(1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

(2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);

(e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;

(f) any other matter prescribed by the regulations.

What this clause highlights is that not just one factor will determine whether a contract is a standard form contract. However, generally a contract will be considered a standard form contract where:

- it is a pre-prepared contract and its offered to the dealer on a 'take it or leave it' basis.
- there is a clear imbalance of bargaining power where the dealer has little or no room to negotiate the terms of the dealer agreement.

If a dealer is given scope to negotiate the terms of the dealer agreement, it will probably not be a standard form contract. It is the burden of the party alleging it is not a standard form contract to prove otherwise. This means it will generally be the responsibility of the distributor to show it is not a standard form contract.

In the event that distributors are willing to enter into collective bargaining with dealers (or dealer councils) in respect of the terms of a new dealer agreement then the UCT laws are not likely to apply because the dealer agreement would be subject to negotiations and therefore, would no longer be seen as a standard form contract.

4.3. The third limb - what is an 'unfair term'?

If a dealer can show that its agreement is both a small business contract and a standard form contract, then any unfair term contained in that agreement will be void.

The meaning of 'unfair'

24 Meaning of unfair

(1) A term of a consumer contract or small business contract is unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) the extent to which the term is transparent;

(b) the contract as a whole.

Clause 24(1) is broad, however it focuses on one party having an unreasonable advantage over the other. The next clause goes on to describe some examples (discussed below) which provide more guidance on what sort of terms will be unfair.

Importantly clause 24(2) notes that the entire contract should be considered when determining whether a term is unfair. For example, a term that overly benefits a distributor may not be unfair because other terms in the agreement are to the advantage of the dealer. In addition, the transparency of the term is also a factor. A term is transparent if it is expressed and presented clearly. For example, a term in the fine print of a dealer agreement is not as transparent as a term in the body of the agreement.

Examples of unfair terms listed in the legislation.

Clause 25 provides examples of the kinds of terms that may be unfair. It is important to note that these terms will not always be unfair and a court will still make an assessment using the meaning given in clause 24. However, these are the examples provided:

- A term allowing one party but not the other to limit/avoid performance of the agreement;
- A term allowing one party but not the other to terminate the agreement without cause;
- A term penalising one party but not the other for breach or termination of the agreement;
- A term allowing one party but not the other to vary the agreement;
- A term allowing one party but not the other to renew or not renew the agreement;
- A term allowing a party to vary the upfront payable price without the other party having the right to terminate for that change;
- A term allowing one party to unilaterally alter the goods/services/interest in land supplied;
- A term allowing one party to unilaterally determine whether the agreement has been breached;
- A term limiting one party's vicarious liability for its agents (meaning to not be at fault legally for the mistakes of employees when ordinarily this would be the case);
- A term allowing one party to assign the contract without the other party's consent;
- A term limiting one party's right to sue the other;
- A term that imposes an additional evidential burden during legal proceedings on one party; and
- A term prescribed by regulations.

Particular clause in dealer agreements that are likely to be unfair

There are a number of unfair terms that are commonly found in dealer agreements. The following clauses are often at risk of being an unfair contract term.

- Term and Renewal
- Dealer Facility Locations
- Standards and Policies
- Specialised Product
- Termination by Dealer (or rather the lack of such a right)
- Liquidator Damages
- Termination at Will
- Restraint of Trade

Terms are also capable of being unfair even if they are not explicitly stated in the dealer agreement. For example, the ACCC's report noted that every franchise agreement they reviewed contained the power to unilaterally vary the operations manual. Whilst this is a separate document, it has the potential to alter key aspects of the agreement and may be considered by a court to therefore be unfair.

It is our view that many dealer agreements will not currently qualify as a small business contract, meaning that the various terms in dealer agreements which in substance would be an unfair term within the meaning of the UCT law, cannot be excluded. Distributors are often unwilling to remove or amend a term that would otherwise be unfair as ultimately these terms benefit their interest.
A common example is where a distributor uses a general provision in a dealer agreement to unilaterally change remuneration to be performance target based rather than profit margin based. Such performance targets, which may relate to sales or customer satisfaction, are often arbitrary and difficult to meet.

This can result in a dealer's business becoming unprofitable with little ability to challenge the change. However, the good news for dealers is that more dealer agreements will fall within the scope of UCT law when the reforms are brought in by the Government.

Excluded terms

There are a few types of terms that are excluded from being viewed as UCTs and will not be unfair even if all the above requirements are fulfilled.

26 Terms that define main subject matter of consumer contracts or small business contracts etc. are unaffected

(1) Section 23 does not apply to a term of a consumer contract or small business contract to the extent, but only to the extent, that the term:
  (a) defines the main subject matter of the contract; or
  (b) sets the upfront price payable under the contract; or
  (c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.

(2) The upfront price payable under a contract is the consideration that:
  (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
  (b) is disclosed at or before the time the contract is entered into;

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

Clause 26 prevents terms that are central to the operation of the agreement from being void. This includes the upfront price payable, which is the consideration (usually a monetary amount) provided under the contract where it is known at the time the agreement was entered into. This clause also prevents terms expressly approved by law to be considered unfair.

4.4. What to do if your dealer agreement contains an unfair term

The ACCC, along with its equivalent State and Territory bodies, is responsible for ensuring compliance with the UCT law. If a dealer qualifies for protection (under clause 23) and it believes its dealer agreement contains a UCT, then it can make a complaint directly to either body. They can also try to re-negotiate the offending term directly with their distributor.

A dealer may also commence legal proceedings to have an unfair term in its existing dealer agreement declared void, but this is a much more time consuming and costly process. In which case and because it is likely the offending term is also in other dealer agreements at first instance dealers should consider utilising the class exemption for collective bargaining to approach a distributor to negotiate a change or the removal of the term. As noted in Section 5.4 a distributor is not obliged to agree to negotiate with a group of dealers however, if the dealer group demonstrates the offending is very likely a UCT within the meaning of the law then this will assist to compel the distributor to negotiate with the group.

4.5. *Motor Dealer and Repairers Act 2013* (NSW)

Dealers in New South Wales have additional protections under the *Motor Dealer and Repairers Act 2013* (the NSW Act) which contains the same provisions as the ACL which prohibit UCTs.

The difference between the NSW Act is that the NSW Act applies to all dealer agreements, which means dealers in NSW do not have to prove their agreement is a small business contract or a standard form contract. However, the only way to challenge a UCT under the NSW Act is to lodge a complaint to the NSW Business Commissioner whose powers are limited or to commence legal proceedings. This will likely be a burdensome process for dealers meaning it will be difficult for dealers in NSW to access the protections afforded by the NSW Act.

As noted above, dealers should consider forming a group and using the class exemption to approach a distributor to negotiate any terms that may be a UCT.

Secondly, if Part 5 applies to the dealer agreement in question then dealers will have the additional option of commencing a multi franchisee dispute if the distributor refuses to accept the request to collective bargain with the group of dealers.

4.6. Legislation

It is expected that legislation extending existing UCT laws to dealer agreements will be introduced in 2021. This Guide will be updated once the proposed reforms are enacted.

5. ACCC Class Exemption for Collective Bargaining

5.1. What is collective bargaining?

Part IV of the CCA contains provisions that restrict specific types of trade practices with the aim to protect and promote industry competition. Collective bargaining is a form of anti-competitive behaviour and any business that wishes to engage in anti-competitive conduct such as collective bargaining runs the risk of breaching these provisions and facing legal action from the ACCC. Collective bargaining occurs when two or more competitors come together to negotiate with a customer or distributor over contract terms, conditions and arrangements.

On 22 October 2020, the ACCC announced a class exemption, due to commence in early 2021, which will allow dealers to engage in collective negotiations with distributors and franchisors without prior approval from the ACCC. Schedule 1 to this section of the Guide contains the class exemption determination.

Once the class exemption becomes effective, eligible businesses will only be required to complete a brief, one page form, at no cost or fee, notifying the ACCC of their intent to rely on the exemption to collectively bargain with another party. See Schedule 2 to this section of the Guide.

In essence, the class exemption provides automatic protection to eligible businesses from conduct protected by the class exemption that would otherwise be conduct amounting to a breach of the competition laws.

5.2. Period within which negotiations can take place

As at the date of publication of this Guide the ACCC has not announced a start date for when the class exemption will apply. However, it has been announced that the exemption will remain in force until 30 June 2030 unless it is revoked earlier.

5.3. What businesses are eligible to use the exemption?

This class exemption is the first exemption the ACCC has introduced and will apply to:

- businesses and independent contractors who belong to a bargaining group, and who have an aggregated turnover of less than $10 million in the financial year before the bargaining group was formed; and
- all businesses who are subject to the Code will be eligible to for protection under the exemption, irrespective of aggregated turnover.

In effect almost all Australian businesses will be eligible for protection under the class exemption.

The exemption allows businesses to appoint another party (e.g. an industry body) to represent the collective shared interests and concerns of the businesses and negotiate with another party (e.g. a supplier, manufacturer or distributor) on their behalf.

This means a group of dealers can rely on the exemption to initiate negotiations with a distributor which would otherwise be anti-competitive within the meaning of Part IV of the CCA.

Any dealer who is a member of a formed group must notify the ACCC on behalf of the other participating dealers, or an industry association (e.g. dealer council) of the intent to engage in collective negotiations with a distributor. The notice to be provided will be in the form of a one page form available on the ACCC website. Schedule 2 contains a draft of the notice as well as a link to the ACCC website.

Protection from breach of the competition laws under the Act will only apply to:

- the members who are part of the group disclosed to the ACCC; and
- the conduct, activities or matter(s) proposed by the group to be subject to collective bargaining.

Legal protection for the collective bargaining activities undertaken by the group and their members automatically commences once the ACCC has been properly notified and the ACCC has confirmed receipt of the notice.

Collective bargaining conduct should not take place before the ACCC is notified and a copy of the notice is given to the distributor. Specifically, such conduct will not be protected under the class exemption if negotiations occur earlier than 14 days before notice is lodged with the ACCC.

If the notice to the ACCC identifies specific businesses as members of the dealer group and additional businesses wish to become members of the group then a new notification to the ACCC for collective bargaining under the exemption must be prepared. In this respect, it would be sensible to describe the members of the group in a general sense (e.g all Toyota dealers in the State of Victoria and NSW) rather than identifying specific legal entities.

The existing authorization and notification processes administered by the ACCC that enable businesses to apply for approval to engage in collective bargaining remains. This means that dealers who do not satisfy the eligibility requirements under the class exemption can consider using the existing processes to obtain legal protection for collective bargaining.

5.4. Will the class exemption benefit dealers?

Dealers that operate the same brand could rely on the exemption and appoint a dealer council to collectively bargain with the distributor on shared issues of concern relating to their dealer agreements or proposed changes to such agreements.

Doing so is an attractive alternative to dealer councils engaging in good faith discussions with a distributor or individual dealers negotiating separately with a distributor for a number of reasons:

- **Access to legal protection:** generally, the competition laws require competing businesses to operate independently each other. This means that competitors are at risk of breaching the competition laws if they engage with each other and make decisions regarding pricing (e.g. price for their products or services), which businesses to deal with (e.g. suppliers) or the terms and conditions on which they operate. In effect, eligible dealers who retail the same brand can rely on the class exemption to negotiate the terms of their dealer agreement with the distributor – such conduct would otherwise be in breach of the competition laws unless the dealers had authorization from the ACCC or worked through the notification process.
- **Mutual cost and time savings:** rather than each individual dealer negotiating separately with the distributor, engaging a dealer council to raise concerns on behalf of a group of dealers and negotiate with the distributor would be quicker. Utilizing the dealer council to engage in such negotiations is an effective way for dealers to maximize their membership entitlements and fees paid to a dealer council. The process is also advantageous for the distributor as it would streamline the negotiation process and provide time and costs efficiencies.
- **Bargaining power:** arguably a distributor may be more inclined to deal with a dealer council and collectively address concerns that are shared by multiple dealers. The benefit to the distributor is that by negotiating with only the dealer council it can be confident that any resolution it seeks to achieve will be uniform for all dealers that engaged the dealer council. Secondly, as a group the dealers are more likely to achieve better terms and conditions than if each dealer was negotiating with a distributor on its own.
- **Less administrative burden:** lastly, by utilizing the exemption dealers and dealer councils do not have to apply to the ACCC for authorization or work through a notification process. In the case of authorization, it is a lengthy and costly process. Instead of copious documentation which usually accompanies an application to the ACCC to substantiate the need for applicants to engage in collective negotiation plus payment of a $7,500 fee, under the class exemption a representative dealer (or dealer council) only needs to submit a one page form to the ACCC.

It should be noted, however, that there is no requirement for a distributor to engage with any dealer group or co-operate in any way. This means that under collective bargaining distributors may refuse to bargain with the dealer council (or group of dealers seeking to collectively bargain) and proceed to negotiate with dealers individually. Furthermore, the class exemption cannot be relied upon for dealers to engage in collective boycott of negotiations or refusal to contract with distributors, leaving little incentive for distributors to act cooperatively, nor threatening any consequence for noncompliance.

For more information, refer to the recent article we wrote about the class exemption and how it may be used to support dealers in negotiations with distributors.

When notifying the distributor and seeking its consent to engage in collective bargaining it would be advantageous to describe the benefits that would likely accrue to the distributor should the distributor agree to engage with the dealer group or the dealer council – some of which are described above.

5.5. Steps to be taken by Dealer Councils

Having regard to the Road Map set out in Section 2 of this Guide, dealers and dealer councils may wish to commence collective bargaining with a distributor in the following circumstances:

- New dealer agreements
- Variation of a dealer agreement
- Capital expenditure requirements
- Distributor proposes a change to the distribution model
- Distributor proposes changes to dealer standards or policies that are likely to have an adverse financial impact on dealers
- A change to or review of the dealer network by a distributor
- A change to or review of Prime Market Areas (PMAs) by a distributor
- Where the dealer believes a term in the dealer agreement is a UCT.

The steps to be taken by dealers and dealer councils who wish to engage in collective bargaining with their distributor

Step 1 - Seek Professional Advice

Dealers and dealer councils should seek professional advice from lawyers and accounting firms as to:

(a) major changes to the franchise model or dealer agreements and as to the utility of using the collective bargaining provisions; and

(b) whether the proposed conduct may be the subject of collective bargaining and therefore, dealers can utilise the class exemption. If dealers are not able to rely on the class exemption, dealers should consider obtaining protection to collectively bargain with the distributor by applying for authorisation or through the notification processes administered by the ACCC.

Step 2 - Authority

If dealers wish to proceed with collective bargaining under the class exemption they will need to appoint a representative for the group (such as a dealer council) authorising it to act as the group's agent to collectively bargain with the target - the distributor.

Step 3 – Notify the ACCC

The dealer council (or other appointed representative) must notify the ACCC of the intention to engage in collective bargaining with a distributor and describe the conduct, activities or matter proposed to be the subject to negotiation. The ACCC must be notified at least 14 days before any collective bargaining occurs and a copy of the notice must be provided to the distributor. The draft form to be sent to the ACCC is at Schedule 2 of this section of the Guide.

Step 4 – Request to Distributor

The dealer council should then write to the distributor seeking to collectively bargain about the designated matter and suggest a meeting with the distributor to discuss the mutual benefits, the process and a timetable.

5.6. Warning – Matters not to be the subject of collective bargaining

Dealers and dealer councils need to be aware that the ACCC class exemption for collective bargaining does not apply to collective boycott conduct. Dealers cannot agree together that they will not deal or negotiate with a distributor or that they will refuse to deal with a distributor. While it may be tempting, serious consequences are likely to follow if a group of dealers decided to take similar action (or refuse to act in some way) in their dealings with a distributor with the purpose of applying pressure on the distributor.

However, if dealers do wish to engage in conduct that may amount to collective boycott then dealers can obtain protection for such conduct by obtaining approval from the ACCC through the authorization or notification process prior to engaging in activities that may amount to a boycott.

Additionally, dealers should seek advice as early as possible prior to having any detailed discussions with other dealers about the intention to form a group to engage in collective negotiation. Advice would include how to approach other dealers to gauge their interest in a way that is lawful because it may be that initial discussions amongst dealers could itself amount to prohibited conduct.

Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020

The Australian Competition and Consumer Commission makes the following determination.

Dated

19 October 2020

The Australian Competition and Consumer Commission

Contents

Part 1—Preliminary

1 Name

This instrument is the *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020*.

2 Commencement

(1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provisions	**Commencement**	**Date/Details**
The whole of this instrument	A single day to be fixed by the Commission by notifiable instrument. However, if the provisions do not commence within the period of 12 months beginning on the day this instrument is registered, they commence on the day after the end of that period.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

(2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under:

(a) section 95AA of the *Competition and Consumer Act 2010*; and

(b) section 95AA of the Competition Code.

4 Period for which determination is in force

For subsection 95AA(3) of the Act, this determination is in force for the period that:

(a) begins on the commencement date referred to in section 2; and

(b) ends on 30 June 2030.

Note: Despite this section, this determination could be revoked sooner than the end of this period. See subparagraph 95AA(4)(b)(i) of the Act.

5 Definitions

Note 1: A number of expressions used in this instrument are defined in section 4 of the Act, including the following:

- acquire;
- authorisation;
- Commission;
- contract;
- corporation;
- give effect to;
- goods;
- party;
- services;
- supply;
- Tribunal.

Note 2: For the meaning of references to the "Competition Code", see Part XIA of the Act.

In this determination:

Act means the *Competition and Consumer Act 2010* or the Competition Code, as appropriate.

aggregated turnover, of a corporation, means the corporation's aggregated turnover as calculated in accordance with section 328-115 of the *Income Tax Assessment Act 1997*.

collective bargaining class exemption notice has the meaning given by section 9.

collective bargaining notice has the meaning given by section 93AA of the Act.

commence includes enter into force.

contract means a contract, arrangement or understanding.

contracting parties has the meaning given by section 6.

eligible corporation: a corporation is an ***eligible corporation*** in a particular financial year if it reasonably believes that, in the previous financial year, its aggregated turnover was less than $10 million.

Note 1: In the circumstances provided for in the Act, a reference in this instrument to a corporation includes a reference to a person that is not a corporation: see section 6 of the Act and paragraph 13(1)(b) of the *Legislation Act 2003*.

Note 2: For the purposes of the Competition Code (see Part XIA of the Act), a reference in this instrument to a corporation will also include a reference to a person that is not a corporation: see subsection 150C(2) of the Act.

franchise agreement has the meaning given by the Franchising Code.

franchisee has a meaning affected by the Franchising Code.

Franchising Code means Schedule 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*, as in force from time to time.

franchisor has a meaning affected by the Franchising Code.

fuel re-selling agreement has the meaning given by the Oil Code.

fuel retailer means person who is a retailer under a fuel re-selling agreement.

Note: This definition covers paragraph (b) of the definition of "retailer" in the Oil Code. It does not cover paragraph (a) or paragraph (c) of that definition.

fuel wholesaler means a supplier within the meaning of the Oil Code.

initial contract has the meaning given by section 6.

objection notice has the meaning given by section 93AA of the Act.

Oil Code means Schedule 1 to the *Competition and Consumer (Industry Codes—Oil) Regulations 2017*, as in force from time to time.

related fuel retailers: two fuel retailers are ***related fuel retailers*** if:

(a) both have a fuel re-selling agreement with the same fuel wholesaler; and

(b) those elements of the system or marketing plan under which they offer, supply or distribute motor fuel in Australia that were determined, controlled or suggested by the fuel wholesaler or an associate of the fuel wholesaler are the same.

target has the meaning given by section 6.

trade union has the meaning given by subsection 93AB(11) of the Act.

6 Meaning of *initial contract*, *contracting parties* and *target*

(1) For this determination, a contract or a proposed contract between a corporation and 1 or more other persons (the ***contracting parties***) is an ***initial contract*** if:

(a) it is about:

(i) the supply of particular goods or services to; or

(ii) the acquisition of particular goods or services from;

one or more other persons (the ***target*** or ***targets***) by the corporation and the contracting parties; and

(b) the corporation and the contracting parties made the contract for the purpose of collectively negotiating one or more contracts with the target or targets.

Note: See section 4F of the Act for the interpretation of references to "purpose".

(2) However, a contract or a proposed contract is not an ***initial contract*** if it is about the supply of goods or services to a target or targets for personal, domestic or household use by the target or targets.

Part 2—Class exemption—collective bargaining

Division 1—Class exemption

7 Class exemption—collective bargaining

(1) Subject to the limitations specified in Division 2, sections 45AF, 45AG, 45AJ, 45AK and 45 of the Act do not apply to a corporation engaging in:

(a) eligible corporation collective bargaining conduct; or

(b) franchisee collective bargaining conduct; or

(c) fuel retailer collective bargaining conduct.

Note: Sections 45AF, 45AG, 45AJ and 45AK of the Act are offence and civil penalty provisions that deal with making a contract containing a cartel provision, and with giving effect to a cartel provision. Section 45 of the Act deals with contracts that restrict dealings or affect competition.

(2) A corporation engages in ***eligible corporation collective bargaining conduct*** if:

(a) while it is an eligible corporation, it:

(i) makes an initial contract; or

(ii) engages with one or more persons in a concerted practice in relation to an initial contract; or

(b) it gives effect to an initial contract that it made while it was an eligible corporation.

(3) A corporation engages in ***franchisee collective bargaining conduct*** if the corporation is a franchisee of a particular franchisor and:

(a) it makes an initial contract in which the target is a franchisor and the other contracting parties are franchisees who have a franchise agreement with that franchisor; or

(b) it engages with one or more such franchisees in a concerted practice in connection with making such an initial contract; or

(c) it gives effect to such an initial contract.

(4) A corporation engages in ***fuel retailer collective bargaining conduct*** if it has a fuel re-selling agreement with a particular fuel wholesaler and:

(a) it makes an initial contract in which the target is the fuel wholesaler and the other contracting parties are related fuel retailers; or

(b) it engages with one or more related fuel retailers in a concerted practice in connection with making such an initial contract; or

(c) it gives effect to such an initial contract.

Division 2—Limitations

8 Exemption does not apply to collectively refusing to contract with target

(1) Section 7 does not apply in respect of an initial contract that contains a prohibited boycott provision.

(2) For this section, a ***prohibited boycott provision*** of an initial contract is a provision that has the purpose of preventing, restricting or limiting, directly or indirectly:

(a) the supply of goods or services to a target or targets; or

(b) the acquisition of goods or services from a target or targets;

by the corporation or one or more contracting parties.

Note: See section 4F of the Act for the interpretation of references to "purpose".

9 Collective bargaining class exemption notice must be given to the Commission within 14 days

(1) Section 7 applies in relation to a particular initial contract only if a notice (a ***collective bargaining class exemption notice***) relating to that initial contract has been given to the Commission in accordance with this section.

(2) The collective bargaining class exemption notice:

(a) must be in the form approved by the Commission and contain all of the information that is required by that form; and

(b) may be given to the Commission by, or on behalf of, the corporation or any of the other contracting parties; and

(c) must not be given to the Commission on behalf of any of those persons by:

(i) a trade union; or

(ii) an officer of a trade union; or

(iii) a person acting on the direction of a trade union.

(3) Section 7 applies to conduct specified in that section in relation to that initial contract only if the conduct was engaged in:

(a) on or after the date the notice was given to the Commission; or

(b) no more than 14 days before that date.

10 Copy of collective bargaining class exemption notice must be given to target

Section 7 applies to giving effect to an initial contract by:

(a) negotiating a contract with 1 or more targets; or

(b) making such a contract; or

(c) giving effect to such a contract;

only if a copy of the collective bargaining class exemption notice that relates to the initial contract has been given to the target or those targets.

Note: The copy of the collective bargaining class exemption notice could be given to the target by the corporation or by any of the other contracting parties.

11 Corporation must have reasonable expectation of contracting with target

Subsection 7(2) applies to a corporation only if, when engaging in the kind of conduct specified to in that subsection, it reasonably expects that it will make 1 or more contracts with 1 or more of the targets, about:

(a) the supply to that target or those targets of 1 or more of the goods or services to which the initial contract relates; or

(b) the acquisition from that target or those targets of 1 or more of those goods or services.

12 Class exemption does not apply in relation to certain initial contracts

(1) If any of subsections (2), (3), (4) or (5) applies to an initial contract, section 7 does not apply to engaging in the conduct specified in that section in relation to the initial contract.

Applications for authorisations

(2) This subsection applies to an initial contract if:

(a) a person has applied for an authorisation in relation to the initial contract; and

(b) the Commission has made a determination:

(i) dismissing the application; or

(ii) revoking the authorisation; and

(c) either:

(i) the Tribunal has made a determination affirming or varying (but not setting aside) the Commission's determination; or

(ii) the time for making an application for review of the Commission's determination has ended without the making of an application.

Note: Applications for authorisations are made under Division 1 of Part VII of the Act. For dismissal of applications, see section 90 of the Act. For revocation of authorisations, see section 91B of the Act. For review of determinations of the Commission, see Part IX of the Act.

(3) This subsection applies to an initial contract if:

(a) a person has applied for an authorisation in relation to the initial contract; and

(b) the Commission has prepared a draft determination proposing to deny the application; and

(c) the application is withdrawn.

Note: Applications for authorisations are made under Division 1 of Part VII of the Act. For draft determinations, see section 90A of the Act. For withdrawal of applications, see subsection 88(7) of the Act.

Collective bargaining notices

(4) This subsection applies to an initial contract if:

(a) a corporation has given the Commission a collective bargaining notice in relation to the initial contract; and

(b) the Commission has given an objection notice in relation to the collective bargaining notice; and

(c) either:

(i) the Tribunal has made a determination affirming the objection notice; or

(ii) the time for making an application for review of the objection notice has ended without the making of an application.

Note: Collective bargaining notices are given under Division 2 of Part VII of the Act. For objection notices, see section 93AC of the Act. For review of objection notices, see Part IX of the Act.

(5) This subsection applies to an initial contract if:

(a) a corporation has given the Commission a collective bargaining notice in relation to the initial contract; and

(b) the collective bargaining notice is taken to have been withdrawn.

Note: Collective bargaining notices are given under Division 2 of Part VII of the Act. For deemed withdrawal, see section 93AE of the Act.

13 Sharing of information permitted only when reasonably necessary

Section 7 applies to a corporation sharing information with, or using information that has been shared by, other contracting parties only if:

(a) the information is shared or used by the corporation to engage in the conduct specified in section 7; and

(b) the corporation believes that it is reasonably necessary to share or use that information in order to facilitate it engaging in that conduct.

Collective bargaining class exemption notice

1. Who is in the collective bargaining group?

Describe or list the current members of the group and those who may join the group in the future.

If you have a small group that will not change you can list the names of all members, but in most cases, to enable the addition of new members over time, you should provide a **general description of the members of the group**. For example*: A group of dairy farmers in the Manning Valley area in New South Wales.*

_____

_____

2. Who does the group propose to collectively bargain with?

Describe or list the target business(es) or type of target business(es) the group proposes to collectively bargain with.

If you intend to negotiate with just one particular target business, or a small number of known target businesses, you can list the names of each target business, but in most cases, to enable the addition of new target businesses over time, you should provide a **general description of the type of target businesses the group intends to collectively bargain with**. For example: *Dairy processing companies*.

_____

_____

3. What does the group propose to collectively bargain about?

Describe the terms and conditions that the group proposes to bargain about with the target businesses. For example: S*upply of raw milk.*

_____

_____

4. Contact details

Provide the contact details for a person the ACCC can contact in relation to the collective bargaining arrangements. This can be any member of the group or a nominated representative, provided they are in the position to provide the ACCC with further information about the group should it be required. Contact details will be redacted when the ACCC places this notice on its public register.

If the contact person, or their details, change, please advise the ACCC.

Contact person (name and, if relevant, position): _____

_____

Telephone number: _____

Email address: _____

Signature of contact person: _____

6. Compulsory Best Practice Principles for Inclusion in Dealer Agreements

6.1. Introduction

On 12 March 2021 the Minister for Employment, Skills, Small and Family Business announced the six best practice principles will be mandated and be compulsory obligations. The principles are intended to guide:

- the drafting of new car dealer agreements between dealers and distributors
- negotiations and improve transparency and fairness of terms and conditions in dealer agreements.

It is understood the principles will be enacted by insertion in Part 5 of the Code. It is expected the changes to mandate the principles will be completed by mid 2021 and dealers should have these principles front of mind in negotiating new dealer agreements from now.

It must be carefully noted, we expect the amending legislation may not adopt the principles in their original wording rather, there may be some changes to the wording of the principles in order to provide clarity, but the intent of each principle will be preserved.

Once the amending legislation is enacted it would be a breach of the Code if a distributor fails to include all six best practice principles in its dealer agreement.

6.2. What are the six principles?

Principle 1

Franchisors should include provisions in new dealership agreements that provide for fair and reasonable compensation for franchisees in the event of early termination resulting from:

- withdrawal from the Australian market
- rationalisation of their networks
- changes to their distribution models

Principle 2

Franchisors should not include provisions that exclude compensation in new dealership agreements.

Principle 3

The 'fair and reasonable compensation' as referred to in Principle 1 should include appropriate allowances for the loss a franchisee may incur, which can include:

- lost profit from direct and indirect revenue
- unrecovered expenditure and unamortised capital expenditure where requested by the franchisor
- loss of opportunity in selling established goodwill
- wind up costs

Principle 4

When an agreement is entered into it should provide franchisees a fair and reasonable time to secure a return on investments that have been required by franchisors as part of the agreement.

Principle 5

Agreements should include reasonable provisions for franchisors to compensate or buy back new vehicle inventory, parts and special tools, in the event of:

- non-renewal
- withdrawal from the Australian market
- rationalisation of their networks
- or changes to their distribution models

Principle 6

Agreements should include provision for timely commercial settlement and dispute resolution.

6.3. Will the principles benefit dealers?

Dealers must insist on the inclusion of all six principles into their dealer agreements.

You need only consider the recent exit of Holden from the Australian market and the recent change in business model and associated drastic reduction of many Honda dealers in Australia, to appreciate why it is critical for all six principles to be included as terms in all dealer agreements.

If a dealer agreement does not include all principles it is open to dealers and we strongly recommend dealers rely on the class exemption for collective bargaining (refer to Section 5 of this Guide) to come together and appoint the dealer council (or another representative) to approach their distributor to negotiate the inclusion of the principles into their dealer agreements. By utilising the recent reforms collectively, dealers and their dealer councils will likely strengthen their bargaining position when negotiating fairer terms in dealer agreements.

6.4. When can these principles be used?

As you can see from the Road Map in Section 2, dealers and dealer councils should insist to the distributor that all six principles are reflected in the dealer agreement in the following circumstances:

- Entering into a new dealer agreement;
- Variation or Amendment to an existing dealer agreement; and
- Where the distributor proposes a change to the distribution model.

7. How FCW Lawyers can assist

The automotive team at FCW Lawyers has acted for dealers and advised dealer councils for many years and assisted them to effectively and efficiently navigate the laws to achieve fairer and better outcomes in the following circumstances:

1. Claims about consumer guarantees and consumer warranties;
2. Warranty audits;
3. New dealer agreements or variations of dealer agreements;
4. Changes to dealer standards or policies;
5. Data sharing agreements;
6. Changes or review of dealer network;
7. Changes to or review of Prime Market Areas;
8. Change to distribution model; and
9. Dealer / distributor disputes including dealer terminations and non-renewals.

Additionally, the team at FCW Lawyers supports dealers with respect to the following matters:

1. Dealership buy sell transactions;
2. Equity agreements between owners including dealer principal arrangements; and
3. Workplace, employment and safety matters including workshops and staff compliance training on areas such as bullying, discrimination and harassment.

After reading this Guide you will appreciate that it is not always straightforward to firstly, identify how the Code and the recent statutory reforms is relevant to a dealer's specific circumstances and secondly, apply the laws to improve a dealer's bargaining position. It is noted that this Guide focuses only on the Code and recent automotive regulatory reforms, there are other laws and legislation that dealers can explore and rely on to protect their rights with respect to their dealings with distributors.

As mentioned throughout this Guide, there will be further law reform that will impact the automotive industry. This Guide will be updated as the reforms are announced and new or amending legislation is enacted. We are hopeful that the impact of the recent law reforms will result in not only strengthening dealers' rights but will also impose greater accountability on distributors and their interactions with dealers.

8. How MTAA Members can assist

MTAA Member associations, the MTA's of NSW, SA/NT, WA, ACT and the Automotive Chambers of Commerce (ACC) in Victoria and Tasmania, can assist in the provision of policy and regulatory advice regarding regulatory and policy reforms outlined in this guide.

MTAA Limited is the nation's largest automotive sector peak association. The Federation is unique among industry peers in its representation of members engaged in more than 95% of automotive supply chain industries in retail, service, repair, dismantling, recycling and more than 30 discrete professions.

The membership allows MTAA Limited and Members the unparalleled ability to understand the impacts, risks and opportunities of national policy and regulations on critical automotive industries and tens of thousands of businesses.

Most MTAA Limited members are among the most prominent and largest automotive sector training providers in the nation. They have extensive operations and facilities with Registered Training Organisations and Group Training Organisations specialising in apprenticeships, traineeships, and post-trade training and skills development.

MTAA Members are among the oldest automotive industry employer representative associations in Australia and the world. They have been leading, protecting, promoting, and representing the automotive sector and automotive industry members' interests through the car's evolution and the taxation, infrastructure, transport, fuel, and many other areas of policy and regulation that impact operations.

The Motor Trades, Traders and Trade Associations and Automotive Chambers of Commerce provide workplace and industrial relations advice and a wide range of other member services and products to assist in business operations.

This Guide is a further service to dealer members. Reach out to your local MTA or ACC to find out how we can help navigate the complexities of regulatory reforms to maximise the opportunities they present for your business.

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