



MTAA

PO Box 6298 Kingston ACT 2604



25 June 2020

Committee Secretary
Senate Education and Employment Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via Email: eec.sen@aph.gov.au

Dear Senate Education and Employment Committee

The Motor Trades Association of Australia Limited (MTAA) thanks the Senate Education and Employment Committee for the opportunity to provide a submission on the decision by General Motors to withdraw the Holden brand and its operations from Australia.

MTAA is a peak not-for-profit automotive sector organisation whose members are the State and Territory Motor Trades Associations and Automobile Chambers of Commerce. MTAA Member organisations have new vehicle dealers as a core membership group who have provided specific details and input to this submission through their State and Territory Associations.

Some of MTAA's Member organisations have provided separate submissions to the Committee, while other MTAA Members input is provided specifically in this overarching submission by the MTAA. Any submissions provided by MTAA Members should be read in conjunction with this submission.

MTAA also thanks the Committee for the additional time to submit because of the impacts of the COVID-19 pandemic crisis. This has also allowed MTAA to observe and include critical input on the compensation negotiation process and outcome, which has significantly disadvantaged Holden Dealers. This process serves as important and critical indicator of what needs to be done to better protect Australian automotive businesses in the future.

Please contact Mr Richard Dudley, CEO MTAA, if any further information or clarity is required regarding this submission

Yours Sincerely,

Richard Dudley
CEO MTAA LIMITED

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



1. Executive Summary

- The Motor Trades Association of Australia (MTAA) respectfully suggests the execution of General Motors Holden (GMH) decision to vacate the Australasian market has comprehensively illustrated and informed ongoing calls by MTAA and other organisations on the need for further specific government intervention through legislation and / or regulation in the Australian automotive retail market.
- MTAA argues that the processes and actions of GMH in dealing with its dealers, suppliers and the wider community post the February 2020 decision serves as an ultimate exemplar and manifestation of now recognised and accepted significant power imbalances in the relationship between motor vehicle manufacturers and / or their importers / distributors / representatives, and car dealers / agents / resellers.
- The Commonwealth Government has taken considered action to address some of these recognised power imbalances and the detriment they cause to dealers and consumers. MTAA long championed for and welcomes the introduction of a schedule of amendments to the Competition and Consumer Act Cth 2014 (industry Codes – Franchising) Regulations on 1 June 2020, specific to car dealers. This schedule has provided the legislative instrument to strengthen accountability, requirements and obligations and address some concerns impacting the franchising agreements in the automotive new vehicle retailing sector.
- However, other critical issues impacting the relationship, including unfair contract terms and conditions, compensation, tenure and provision of warranty and adequate compensation for warranty work, amplified by the decision and subsequent actions of General Motors Holden, have not been addressed because of the complexities of policy and regulatory solutions to these critical issues and the potential for unintended consequences across the broader economy.
- MTAA respectfully suggests an outcome of the Committee's investigations is that there is further government intervention through increased regulation, using the recently enacted car dealer specific amendments, to ensure legislators and regulators have the appropriate policy settings and regulatory enforcement capability. This must include a penalty regime of substance for breaches that cannot be brushed aside when foreign multi-nationals vacate the Australian market or substantially restructure their market presence to the detriment of Australian businesses and consumers.
- To assist the Committee's thinking in this area the MTAA proposes a five-step approach to addressing outstanding franchise relationship matters that have been exacerbated by the GMH decision and behaviour of some other manufacturers since that decision.

MTAA National Industry Associations





MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



- MTAA is of the view that having created and enacted a schedule of amendments to the Competition and Consumer Act Cth 2014 (Industry Codes – Franchising) Regulations specific to car dealers, this legislative instrument now provides an opportunity to address these critical issues through additional amendments. Because they are specific to car dealers, the suggested approach effectively quarantines potential regulatory solutions from other parts of the franchising industry and broader economy, minimising risk and potential for unintended consequences.
- **Five steps:**
 1. **Improved clarity** regarding the applicability of amendments to include ‘Agent’ Agreements or other forms of agreement that may be deployed by car manufacturers and / or their importers / distributors / representatives. as outlined under Part 1 (Introduction); Division 2 (definitions); Clause 5 - *Meaning of a franchising Agreement*. MTAA suggests the new service agreement offered by GMH to cover ongoing warranty and servicing requirements, despite clauses contained in that agreement to the contrary, would be covered by this clarification.
 2. **Mandated Tenure** – a method of linking capital investment and appropriate time to obtain a fair and reasonable return on such investment by linkage to minimum tenure terms.
 3. **Compensation Principles and creation of enforceable provisions ‘triggered by a decision to vacate the market or substantially restructure, reorganise or change a retail distribution network or model** – suggested for inclusion in Schedule 1, Part 5, Division 2 Clause 47 (End of Term Obligations).
 4. **Compensation scheme of last resort for new car dealers**
 5. **Determined Work program** to address other concerns in a timely manner through known scheduled investigations and existing work by Commonwealth Departments and Agencies. For example:
 - Ensuring the review of the Franchising Cod and recommendations take into account any relevant findings and recommendations of the GMH Inquiry.
 - Remove threshold constraints currently preventing motor vehicle dealers from accessing unfair contract terms and conditions that are currently being investigated by the Treasury and bring forward changes to Unfair Contract Terms and Conditions legislation changes;
 - Ensure certain terms and conditions that otherwise would be considered unfair are incorporated into proposed changes; and
 - Warranty provision and obligations including compensation being addressed by Consumer Affairs Ministers and Treasury.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



- The commercial decision of GM / GMH to cease right hand drive vehicle production and vacate the Australasian market is not in question. What are appropriate questions MTAA respectfully suggests are those that relate to how and when the actual decision was made, the timing of the announcement and communications to Holden Dealers and suppliers and behaviours and actions by GM and GMH in dealing with 185 Australian businesses operating at 203 sites employing 9,000 Australians including 555 apprentices just starting out on their careers.

2. Recommendations

1. The Committee include in its inquiry the appropriateness of actions, processes and behaviours of General Motors and General Motors Holden in vacating the Australian new car market including:
 - a. When was the actual decision made and the chronology of events leading to the February 2020 announcement?
 - b. Why GMH executives continued to provide assurances and engage with dealers on plans and progress with new facilities as late as two weeks before the announcement.
 - c. Why General Motors enforced provisions that did not permit other franchise opportunities to be taken up by Holden Dealers in the previous three years, if consideration was being given to vacating the market?
 - d. Why continued capital investments were being demanded if consideration or a decision had already been made to withdraw from the Australian market?
 - e. How was the compensation package as part of the GMH 'Transition Plan' determined given GMH is on record that is reflected the same formula as set for New Zealand dealers, yet the construct of agreements in Australia including differences in margins and other factors are exclusive to Australian dealer agreements are different.
 - f. What is GMH's view on what it regards as good faith negotiations and whether there is substance to widespread commentary that GMH executives were told to 'hold the line' or words to that effect as 'dealers will eventually cave-in' in the offered compensation.
 - g. The appropriateness of including a future service agreement as part of acceptance of compensation terms. Other matters relating to the Service Agreement including:
 - i. Why was it necessary to include explicit provisions excluding the service agreement from being covered by the Franchising Code.
 - ii. What are the operations manual / guide or other documents referred to in the Service Agreement and why have these not been disclosed to participants if they contain materially important information on how the service agreements are to be performed?

MTAA National Industry Associations





MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



2. Consideration be given to addressing outstanding critical relationship issues between car manufacturers and dealers including:
 - i. Improved clarity
 - ii. Mandated tenure
 - iii. Compensation Principles and Enforceable Provisions for compensation
 - iv. Potential for a compensation scheme of last resort for car dealers
 - v. Timely finalisation of other issues including application of unfair contract terms to car dealers, guarantees on warranty accountability and compensation and others.

3. Terms of Reference

- The announcement, by General Motors on 17 February 2020, to withdraw the Holden brand and operations from Australia, with particular reference to:
 - a. The impacts of that decision on:
 - i. Holden employees,
 - ii. the Holden dealership network (small and medium sized businesses and family enterprises, and their employees),
 - iii. the Holden research and development facilities, and
 - iv. owners of Holden vehicles (including service and repair).
 - b. The role of the Franchise Code and the Government's proposed dealership amendments to the Franchise Code.
 - c. Government or other policy settings on manufacturing, research and development, business support and transition, and employee support; and
 - d. Any related matters.

4. Industry Consultation

- MTAA has sought information from Member organisations and through Member Associations and directly Holden and other franchised new car dealer constituents. This submission summarises the views of MTAA Members and their constituents in response to the Terms of Reference outlined above. Some of MTAA's Member organisations have provided separate submissions to the Committee, while other MTAA Members input is provided specifically in this overarching submission by the MTAA. Any submissions provided by MTAA Members should be read in conjunction with this submission.
- MTAA has also drawn on its considerable knowledge base and long-standing advocacy and representations on franchising and the relationship of Australian Consumer Law, the Competition and Consumer Act and Codes including the Franchising Code to the automotive sector and industries within it in preparing this submission.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



5. Introduction

- The commercial decision of GMH is not in dispute, but the behaviours and actions of the manufacturer prior and subsequent to the announcement emulate difficulties face by dealers with some foreign based manufacturers in the negotiation of franchise agreements, their operation, and what occurs when agreements are terminated or not renewed.
- For example, MTAA suggests it is incomprehensible that (as reported by a Holden Dealer constituent) a GMH business development executive can travel from one side of the nation to the other in the first week of February 2020 to consult a dealer on plans for a new facility, the capital investment and requirements of GMH for that facility, and progress being made on those plans, when only 14 days later an announcement is made to end the Dealer's franchise agreement and vacate the Australian market.
- MTAA respectfully suggests that if there is anything to be learned from the decision of General Motors Holden to vacate the Australian market is that there must be further government intervention to better protect Australian businesses and Australian jobs from decisions that are made in corporate boardrooms in other parts of the world by multinational, internationally headquartered companies.
- Such decisions are not unique internationally or here in Australia. Some manufacturers have previously vacated the Australian market and, in some cases, returned some years later. Others have made substantial changes to their retail distribution networks and retail methods in response to changing markets and influences on those markets.
- Some car manufacturers and / or their importers / distributors have handled such decisions and resulting actions relatively well, minimising the risk and impacts on Australian automotive retailing and supply chain businesses, and the Australians employed by them.
- Others have not.
- MTAA and Members believe it important to note that concerns and problems arising from power imbalances in the car manufacturers and retail franchised dealers' relationship are not uniform or applicable to every relationship. There are good examples of relationships that work well, where conflicts are the exception rather than the norm, and can usually be traced back to transparency and genuine demonstrated commitments to negotiating in good faith. Generally, market leading manufacturers demonstrate greater transparency in negotiation, collaboration, communication, dispute resolution and warranty and recall performance leading to mutually beneficial outcomes for manufacturers their importers / distributors, dealers and consumers.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



- This observation has been confirmed by MTAA Members through dealer surveys and workshops including two dealer surveys conducted by VACC in 2018. It is important also to note that market leading manufacturers also do not participate in cyber car practices and support their dealership and consumer network when faced with warranty or Australian Consumer Law (ACL) claims.
- However, there is evidence that as pressures mount and market share reduces then dealers can and have experienced changes in behaviour by manufacturers where previously sound relationships, built up over years, can evaporate seemingly overnight. MTAA respectfully suggests this is now best illustrated by GMH in dealing with difficult market conditions and actions subsequent to its decision to vacate the market.
- These dealer businesses, and indeed businesses across the broader economy, need stronger protections, clearly articulated, and mandated in law, to ensure that when a foreign based multinational companies make commercial decisions to exit the Australian market or significantly restructure their market presence, they do so with an understanding that such a decision will 'trigger' additional rules, obligations and requirements under Australian Consumer Law and the Competition and Consumer Act; and that they will be held to account for the impacts and consequences of such decisions. It is a cost and obligation of doing business and selling product in Australia.
- This requirement should not be interpreted as the reintroduction of protectionism for the sake of preserving a status quo, but to recognise that such commercial decisions can and have had serious implications and impacts on Australian businesses, Australian jobs and Australian communities.
- The significance of the GMH decision and resulting behaviours and actions cannot be underestimated. Just as with car manufacturing in Australia - one company has 'blinked' and there is already evidence other car manufacturers and / or their representatives may follow with decisions to either vacate the Australian market or substantially restructure their presence.
- These events along with now recognised significant power imbalances in the relationship between car manufacturers and dealers reflected through unfair and often one -sided 'take it or leave it' contractual arrangements have informed MTAA and Members in long standing advocacy and representation efforts to gain increased protections for car dealers and others impacted by these relationships when they do not work as effectively or efficiently as they should.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



- GMH Holden dealers have invested significant capital in facilities, product and equipment over many years of loyalty to the brand and General Motors. Many of these franchisees are family based operations who have made calculated business decisions in good faith based on commitments from Holden that they were staying in Australia. Not understood is that for many of the principals of these businesses, assets including the family home are used as security to secure the necessary finance to maintain the business and meet the demands made by manufacturers.
- The MTAA and Members view the Senate Inquiry as an opportunity for the Senate to look at the broader context of the Franchising Code. It is recognised the GMH outcome cannot be fixed but by reviewing the way Holden has withdrawn, it will provide the necessary information needed to help other dealership franchises in the future.

Overview of the Australian automotive new car industry

- Many factors contribute to Australia's unique automotive market. Geographic dispersal of a comparatively small population; one of only 75 global right hand drive markets (as opposed to 165 left hand drive markets); national reliance on road transport for goods and service delivery and community connection; and trade policy including free trade agreements.
- Australians are spoilt for choice. 25 million people have a choice of more than 60 individual brands and more than 400 model variants across those brands. This compares with less than 50 brands servicing the automotive needs of the 320-million-plus-strong United States market.
- In the Australia there are more than 775+ motor vehicles per 1000 Australians highlighting the nation's reliance on motor vehicles. MTAA would suggest the Australian new vehicle market is the most competitive right-hand drive market in the world, despite only 20% of total global production of 92 million vehicles in 2019 being right hand drive.
- Usual Australian motor vehicle sales top 1 million sales per annum with more than 8 million vehicles joining the national fleet between 2011 and 2019. This has ensured the 20 million strong Australian motor vehicle fleet is one of the youngest in the world with the average age 10.1 years. Of these vehicles purchased, and despite increasing harmonisation with international standards, each is peculiar to Australia due to design rules and regulatory requirements. So even though a particular make and model of vehicle may look the same as one sold internationally, it has attributes that can only be found in Australia.

MTAA National Industry Associations





MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



- On the one hand, this buoyant market maintains growth and strengthens competitiveness, creating enhanced retail opportunities. On the other hand, it also places increased pressure on franchised dealers in such a highly competitive market. Tightening returns, on margins that are already lean, encourages dealers to increase emphasis on finance and insurance and servicing revenue streams to gain even a modest return on investment. Since 2018 this emphasis has been undermining and severely impacted by targeted regulatory changes to the provision of finance and insurance products by dealers. These changes have had a significant contribution to declining new car sales that has been further compounded by the impacts of the COVID-19 pandemic.
- The landscape of automotive retailing has changed significantly over the past decade. Dealerships are now more likely to be multi- franchise operations, with multiple brands on one site, or even multiple sites. There has also been significant growth in public listed dealership entities, which now account for almost 20% of total dealerships nationwide. Traditional family-owned-and-operated, or private, dealerships continue to survive, but in decreasing numbers, and these are arguably dealers who are impacted most by decisions of car manufacturers and / or their distributors / importers to vacate the Australian market or substantially change their retail distribution network or method of retailing.
- The new motor vehicle sales sector carries significant post sale requirements in terms of warranty provision and recall requirements rarely encountered in other retail areas because of the cost, complexity, and nature of modern motor vehicles. MTAA and Members have long argued that in terms of the franchising industry, it is a sector that is unique. These are all factors that need to be considered in the context of General Motors Holden decision to vacate the Australian Market and the implications of this decision on the market, franchising arrangements and indeed the social and economic fabric of Australian communities.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



6. Responses to Terms of Reference

Response to Term of Reference A

- Although GM has indicated that it believes the impact of Holden's departure is primarily limited to its new car sales staff, it fails to recognise the flow on effects to other dealership employees including finance, service, customer relations and administration.
- The compensation package offered by GMH under the 'Transition Plan' makes no mention of nor offers any compensation or assistance for the costs associated with Holden associated staff in these areas being made redundant.
- The broader impacts to supply chains and secondary businesses are difficult to quantify but are expected to be significant. A conservative estimate puts 33,000 people employed in the automotive components sector alone as likely to be affected nationally.
- The impact of the GMH decision in regional and rural communities, already reeling from decisions by financial institutions and other national businesses to close shopfronts and facilities are expected to be pronounced. For example: In a small town of 900 people in Western Victoria the Holden Dealership, which has operated as a single franchise for decades, employs over 20 people and is one of the community's largest employers. However, it is also fair to suggest that this dealer is the epicenter of the local business community with many other small businesses dependent on and providing services to that dealer and this dealer in turn providing work to many of those small businesses. This dealer like all dealers has made significant long-standing contributions to the community as part of its role in that community.
- It is plausible that Executives and Directors in Detroit USA, did not / do not truly understand the depth of community connections of Holden (and other) dealers and the importance of an iconic brand considered to be part of the fabric of Australian society. MTAA is of the view that these are essential components of goodwill established in the brand and that this is an important consideration in the makeup of compensation.
- There appears to be no understanding that Holden dealerships (like all dealers) are generous contributors to their communities, particularly in regional and rural Australia, where they sponsor local sporting teams, provide vehicles and assistance for various charities, support their communities through donations and other forms of assistance – all contributing significantly to brand image and brand value. This was most recently evident during bushfires and other disasters impacting many States.

MTAA National Industry Associations





MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



- MTAA rejects assertions made by GMH and others that dealers, particularly those operating multiple franchises can amortize the loss of the Holden brand with these other franchise operations. This belies the facts that the franchise agreement between GMH and Dealers, like most if not all arrangements between manufacturers and dealers make it a condition that facilities including sales areas, service bays, etc. are dedicated to that particular brand. Most provisions within agreements make it clear it will be considered a breach of the agreement – potentially used as causation for termination – if there is any cross utilization of facilities, tools equipment, business programs and software etc. Dealers having spent millions in capital investment on facilities, plant and equipment to meet the demands of GMH which is now obsolete and difficult if not impossible to repurpose, even under another brand. As the committee is aware one dealer in South Australia had almost completed a \$6.5 million facility at the time of the announcement.
- Ultimately, the Government's response to the GM decision will set a precedent for how other OEMs look to their operations in Australia, particularly against the backdrop of significant global economic uncertainty and a rapidly evolving industry.

Response to Term of Reference B

- MTAA had for two decades highlighted through advocacy and representations the need for specific recognition of new car dealers in legislation and / or regulation relating to Australian Consumer Law and the Competition and Consumer Act because of matters specific to motor vehicle franchise operations and the relationships between car manufacturers and / or their distributors / importers / representatives and new car dealers.
- Central to advocacy and representations are matters that can only be found in the high value of motor vehicle products, franchise arrangements to sell and service these vehicle products, and the specific legislated requirements for warranty and recall, particularly for safety and security of vehicles. The urgent need for action to address power imbalance matters were most recently reinforced by MTAA and Member advocacy and business owner testimony to the Wein Review of the Franchising Code of Conduct, ACCC Market Study into New Car Retailing, the Joint Parliamentary Inquiry into the Effectiveness of the Franchising Code, and investigations into Unfair Contract Term protections.
- MTAA in all of these investigations has been consistent in calling for a significant rebalancing in the dealer / manufacturer relationship, through the use of government intervention to ensure fairness and equity. It has championed either the creation of a specific mandated industry code for automotive or the introduction of a schedule of amendments to the mandated Franchising Code specific to car dealers.

MTAA National Industry Associations





MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



- On 1 June 2020 the Federal Government enacted a schedule of amendments to the Competition and Consumer Act Cth 2014 (Industry Codes – Franchising) Regulations specific to car dealers in response to these calls and recognition by these investigations of power imbalances and the need for government intervention. The MTAA welcomed and strongly supports the new schedule of amendments
- The introduction of a schedule of amendments to the Competition and Consumer Act Cth 2014 (industry Codes – Franchising) Regulations on 1 June 2020, specific to car dealers, has provided the legislative instrument to strengthen accountability, requirements and obligations and address some franchising concerns impacting the automotive new vehicle retailing sector.
- MTAA members and their dealer constituents have expressed general satisfaction that the following matters have been included in the schedule of amendments:
 - End of term obligations
 - Capital expenditure requirements and specific disclosure requirements
 - Resolving disputes through multi-franchisee dispute resolution, and
 - Penalties for breach of the code
- However, because of the complexities of identifying policy and regulatory solutions and the potential for unintended consequences of these solutions across the broader economy, some other critical concerns, that have been amplified by the February 2020 decision of General Motors Holden, are yet to be addressed. These include:
 - Tenure security – reflecting the significant capital investment required by vehicle manufacturers
 - Compensation arrangements including requirements to buy back remaining new vehicle and demonstrator stocks
 - Dealing with definitions that fail to recognise the potential for other alternative agreements to be used to ‘bypass’ regulations required under the Competition and Consumer Act (Industry Codes) such as ‘Agent Agreements’.
 - Warranty and warranty compensation where there is an increasing practice of franchisors shifting the costs of legislative compliance to the franchisee when they are dealing with warranties. Dealer constituents have advised of many examples where the manufacturer would not reimburse costs associated with the disposal of component, despite the requirement to do so under Australian law with significant penalties for non-compliance, nor actual costs incurred in rectifying warranty repairs.
- The significant power wielded by OEMs can also be seen through companies such as Great Wall and Opel who setting up franchise operations in Australia, before subsequently withdrawing and leaving dealers to manage the risk associated with their significant capital expenditure. Disappointingly, Great Wall re-emerged in the Australian marketplace with no regulatory penalty from Government some years later.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



- MTAA has developed a five-step proposal to provide refreshed thinking on how to potentially address complex policy matters due to their precedent nature and potential for unintended consequences across the broader economy. To aid in timely consideration, MTAA has provided some thinking on how these may be incorporated into the recently implemented schedule of amendments.
- **Five steps:**
 1. **Improved clarity** regarding the applicability of amendments to include 'Agent' Agreements or other forms of agreement that may be deployed by car manufacturers and / or their importers / distributors / representatives. as outlined under Part 1 (Introduction); Division 2 (definitions); Clause 5 - *Meaning of a franchising Agreement*.
 2. **Mandated Tenure** – a method of linking capital investment and appropriate time to obtain a fair and reasonable return on such investment by linkage to minimum tenure terms.
 3. **Compensation Principles and creation of enforceable provisions** – suggested for inclusion in Schedule 1, Part 5, Division 2 Clause 47 (End of Term Obligations).
 4. **Compensation scheme of last resort for new car dealers**
 5. **Determined Work program** to address other concerns in a timely manner through known scheduled investigations and existing work by Commonwealth Departments and Agencies. For example, addressing threshold constraints that prevent motor vehicle dealers from accessing unfair contract terms and conditions currently being investigated by the Treasury and warranty provision and compensation being addressed by consumer affairs Ministers and Treasury.
- **Suggested potential solutions in detail**
 1. **Improved Clarity**
 - **Concern:** While MTAA understands there is significant information regarding what is regarded as a franchise agreement as outlined in the Competition and Consumer Act Cth 2014 (industry Codes – Franchising) Part 1 (Introduction); Division 2 (definitions); Clause 5 Meaning of a franchising Agreement; there remains deep concern by motor vehicle dealers about the use of 'alternative' agreements by motor vehicle manufacturers to potentially bypass or make impotent the enforceability of the Franchising Code and provisions.





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



Some manufacturers have signalled an intent to use a model of 'Agent Agreements' as opposed to a full franchise agreement.

MTAA has informally confirmed with the regulator, the ACCC, that such 'agent agreements' would in almost all circumstances be regarded as a franchise agreement and enforced accordingly. However, these assurances have not eased concerns about the potential for such alternative agreements to be dealt with appropriately if breaches occur.

- **Potential solution: Option 1:** Include in the wording of Clause 5: Meaning of a franchising agreement, specific wording to capture 'alternative or agent type agreements' will be treated as franchising agreements; or **Option 2:** The ACCC develop and issue guidance material making it clear that irrespective of the type of contractual arrangement between a manufacturer and dealer that such arrangements will be treated as a franchise agreement and be bound by the Act and Regulations.

2. Mandated Tenure

- **Concern:** MTAA recognises the complexities of specifying tenure terms in regulation and the potential this poses for unintended consequences for the broader franchising industry and economy. MTAA also recognises there may be potential to weaken or negatively impact good faith negotiations in agreement formulation.

There are many examples where motor vehicle manufacturers have negotiated in good faith and produced fair and reasonable tenure arrangements as part of agreements. This is supported by some recent agreements specifying between 5- and 10-year tenures.

However, there are also numerous examples of where some motor vehicle manufacturers have not engaged in meaningful good faith negotiations and tenure arrangements specifically and an agreement in general which are then presented as 'take it or leave it'.

More recently the decision of General Motors Holden Australia has highlighted that even when negotiations have concluded in good faith and have generally been agreed between the parties, a decision can still be made in a board room across the other side of the world that has disastrous impacts on businesses, communities and the economy as a whole without seemingly requisite concern for such impacts and with apparent scant regard for obligations and requirements.

The potential for this to reoccur has always been present and has in the past caused considerable hardship and MTAA respectfully suggests there is heightened potential for this situation to occur more frequently in the future.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



Evidence of this potential has played out over recent months with the GMH decision seemingly triggering responses of other multinational foreign headquartered motor vehicle manufacturers to consider significant restructuring, reorganisation or change (Honda) and a noted increase in moves towards one-year agreements. There is now increased potential for some other manufacturers to also vacate the Australian market.

There is a critical need to better balance the effective operation of the new car market but to also strengthen the obligations and requirements of foreign companies who enjoy significant power imbalance over vehicle dealers. Tenure is a critical aspect of this power imbalance.

- **Potential solution:** MTAA is of the view that the following potential solutions can be accommodated within the new schedule of amendments introduced by the Government on 1 June 2020. By utilising the schedule of amendments under Part 5 the instrument now provides for differentiation between car dealers and the remainder of the franchising industry and broader economy, thereby quarantining the solution and mitigating the risk of such provisions being utilised in a wider context. Arguably this is now only possible because of the introduction of the schedule. Inclusion in the schedule of amendments specific for car dealers as a regulation better enables ongoing review, change or repeal if necessary.

The rationale for the inclusion of this provision is the unique requirements surrounding motor vehicle recall, warranty service provision and other characteristics specific to new vehicle retailing including the large original cost of products and the ongoing requirements for safety, security, and environmental compliance.

This proposed solution links the quantum of capital investment required by a motor vehicle manufacturer to minimum tenure terms in order for a dealer / agent / reseller to have sufficient time to secure a return on such investment and to accommodate the unique warranty and product recall characteristics.

MTAA has not had sufficient time or resource to fully investigate detail and presents this potential solution as a high-level draft recognising additional work may be required.

It is suggested this requirement is specified as an amendment under Part 5 Clause 47 – Notification Obligation – Franchisor, or a new clause. Wording may include the following:

Option 1:

The franchisor (motor vehicle manufacturer and / or distributor / importer / representative) is required to include minimum tenure of five (5) years in any agreement if substantial investment of between \$1m and \$5m is required and disclosed as required under the Act. This recognises the product recall and warranty obligations over part of the life of the product and enables fair and reasonable time for ROI by the franchisee or dealer.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au
**Option 2:**

The franchisor (motor vehicle manufacturer and / or distributor / importer / representative) is required to include minimum tenure arrangements in any agreement if substantial investment is disclosed as required under the Act. This recognises the product recall and warranty obligations over part of the life of the product and enables fair and reasonable time for ROI by the franchisee or dealer.

Significant capital investment and fair and reasonable time to secure a return on investment is provided in the following table recognising there are many factors influencing market performance.

Size of investment	Suitable time for ROI
\$1m or less	2 years
\$1m-\$2m	3 years
\$2m-\$3m	4 years
\$3m-\$5m	5 years +

There is no impediment to the franchisor and franchisee negotiating or agreeing to shorter or longer tenure terms outside of these requirements. But if this is to occur then such agreements are required to be notified to a register of car dealer agreement exceptions.

(it is suggested this register could be managed by the regulator or other nominated department or agency.

3. Compensation Principles and creation of enforceable provisions**Compensation Principles**

- Industry Principles for Compensation to motor vehicle dealers / agents / resellers will be activated where an agreement is terminated or cancelled due to bankruptcy, a decision to vacate the Australian Market, or a decision to substantially and significantly restructure, reorganise or change the retail distribution model or model for distribution of motor vehicle products in the Australian market impacting more than one third of market participants.

Principles:

- The payment of fair and reasonable compensation in accordance with Australian Commonwealth legislation and regulations by a motor vehicle manufacturer and / or that company's importer/ distributor representative/s, addresses identified uncontrolled market power imbalances, supports market integrity and promotes the fair treatment of Australian market participants and consumers.

MTAA National Industry Associations



MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



2. The payment of fair and reasonable compensation assists in clarifying the expectations and obligations on multinational, international headquartered motor vehicle manufacturing companies in selling, supporting, and maintaining motor vehicle products in the Australian Market.
3. A motor vehicle manufacturer and / or importer/ distributor representative/s that terminates, cancels, withdraws, or discontinues an agreement with a seller (dealer, agent, reseller) of their product because of bankruptcy or decision to vacate the Australian Market or decision to substantially and significantly restructure, reorganise or change the retail distribution model or model for distribution of motor vehicle products in the Australian market impacting more than one third of dealer participants; shall pay the dealer fair and reasonable compensation.
4. Motor vehicle manufacturers and / or that company's importer/ distributor representative/s will:
 - a) Repurchase from the Dealer:
 - i. Any remaining new and demonstrator motor vehicles that were not able to be sold during any determined winding down agreement as required by Clause 49 (2) of Part 5 to the Competition and Consumer Act Cth 2010 (industry Codes – Franchising) Regulation 2014.
 - ii. Any unused, undamaged, and unsold parts, components, accessories acquired from the franchisor during a period of 12 months prior to the notice of termination or cancellation.
 - iii. Any supplies, equipment, furnishings, signage including brand / trademark materials purchased from the franchisor or approved source during a period of 36 months prior to the notice of termination or cancellation.
 - iv. Any special tools, equipment, software, IT materials which the franchisor required the dealer to purchase during a period of 36 months prior to the notice of termination or cancellation.
 - b) Pay an independently determined fair market value of the franchise as of the date of the notice of termination or cancellation, or 12 months prior to the date of notice of termination or nonrenewal, whichever is greater. Fair market value will include:
 - i. An independently determined goodwill value of the dealer's franchise in the dealer's community or prime market or geographic area.
 - ii. Reimbursement to the dealer for the cost of facility upgrades and renovations required by the franchisor within a two-year period prior to termination or cancellation.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



5. Compensation as outlined in principles 4 (a) and (b) will be determined and resolved by the implementation of a three-step process:
 - a. **Step 1:** Good faith negotiations in accordance with the Competition and Consumer Act (Industry Codes – Franchising) and the requirements outlined in these principles and contained in Clause 49 (2) of Part 5 to the Competition and Consumer Act Cth 2010 (industry Codes – Franchising) Regulation 2014 will be conducted within a three-week timeframe between the motor vehicle manufacturer or that company's importer / distributor / representative/s. the dealer and / or dealers' representatives.
 - b. **Step 2:** Failure to reach satisfactory resolution with step 1, will trigger independent mediation with an independent government appointed mediator appointed by the franchising dispute resolution services provided by the from the Commonwealth Small Business and Family Enterprises Ombudsman Office. Participation in mediation is mandatory.
 - c. **Step 3:** Failure to reach a satisfactory resolution with step 2 will result in parties being required to enter into binding arbitration with the determination final.
 - d. All parties are able to avail themselves legal processes through the courts at any time during the compensation negotiation process.
6. A compensation scheme of last resort for motor vehicle retailing industry, contributed to by participating motor vehicle manufacturers and / or their importers / distributors / representatives will be established to provide assistance in the payment of compensation or as a final safety net for compensation payment should there be no outcome from steps identified in Principle 5 or as a result of bankruptcy.

Enforceable provisions:

- It is suggested the following be included as New Amendment Number (6) under Clause 47 Notification obligation - franchisor

(6) If a franchisor (motor vehicle manufacturers and / or their importers / distributors / representative/s) gives notice that the franchisor intends to terminate or cancel an agreement as a result of a decision by the franchisor to vacate the Australian market; or substantially rationalise, reorganise or change the retail distribution network or model of product distribution, compensation will be payable and trigger compensation provisions as outlined in clause 49 (4) (new amendment)



PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



- It is suggested a new amendment (4) be added to Clause 49 – Obligation to manage winding down of agreement

(4) Upon notification of termination or cancellation of any franchise by the franchisor under clause 47 (6), the franchisor will be required to:

- (a) Pay an independently determined fair market value of the franchise as of the date of the notice of termination, cancellation, or nonrenewal, or 12 months prior to the date of notice of termination or nonrenewal, whichever is greater. Fair market value will include:
 - i. the goodwill value of the dealer's franchise in the dealer's community or territory.
 - ii. Reimbursement to the dealer for the cost of facility upgrades and renovations required by the franchisor within two years prior to termination, cancellation or nonrenewal. Such termination assistance provided for in clause 49 4 shall be in addition to repurchase obligations set out in 49 4 (b-g).
- (b) Repurchase from the dealer any new and undamaged motor vehicles of the current and one year prior model year and acquired by the dealer within 12 months of the date of notice of termination or cancellation, so long as such motor vehicles have been acquired from the franchisor or from another dealer of the same brand / trademark in the ordinary course of business prior to receipt of the notice of termination or cancellation, provided such motor vehicles have not been altered, damaged, or materially changed while in the dealer's possession.
 - i. Any new motor vehicle repurchased by the franchisor shall be repurchased at the net cost to the dealer. For purposes of Clause 49 (4.(a), a motor vehicle shall be considered new if it has less than 500 kilometres on the odometer.
- (c) In addition to the motor vehicles repurchased under Clause 49 (4.(a), the franchisor shall repurchase demonstration motor vehicles acquired by the dealer within 12 months of the date of notice of termination or cancellation, provided such motor vehicles have been acquired from the franchisor or from another dealer of the franchisor prior to receipt of the notice of termination or cancellation, provided such motor vehicles have not been altered, damaged, or materially changed, and provided such motor vehicles do not have more than 5,000 kilometres each on the odometer.
 - i. Any such demonstration motor vehicle shall be repurchased at the net cost to the dealer less an agreed depreciation as determined under 49 (2) (methodology to be determined).





MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



- (d) For purposes of 49, 4 (a) and (b), a motor vehicle shall not be deemed to have been altered, damaged, or materially changed if it has been provided with original equipment or with non-original equipment which does not alter, damage, or materially change the motor vehicle, such as paint, interior, rust and other protections and / or fitment of genuine manufacturer provided accessories.
- (e) The franchisor shall repurchase any unused, undamaged, and unsold parts which have been acquired from the franchisor, provided such parts are currently offered for sale by the franchisor in its current parts catalogue and are in saleable condition. Such parts shall be repurchased by the franchisor at the current catalogue price, less any applicable discount.
- (f) The franchisor shall repurchase any supplies, equipment, and furnishings, including manufacturer brand, trademark and / or other signage, purchased from the franchisor, or its approved source, within three years of the date of notice of termination or cancellation.
- (g) The franchisor shall repurchase any special tools purchased from the franchisor within three years of the date of notice of termination or cancellation including any special tools or other equipment which the franchisor required the dealer to purchase regardless of the time purchased.
- (h) For the purposes of 49 4 (d, e, f, and g), fair and reasonable compensation shall be the net acquisition price if the item was acquired in the 12 months preceding the notice date of the termination or cancellation, 75 percent of the net acquisition price if the item was acquired between 13 and 24 months preceding the notice date of the termination or cancellation; 50 percent of the net acquisition price if the item was acquired between 25 and 36 months preceding the notice date of the termination or cancellation; or fair market value if the item was acquired more than 36 months preceding the effective date of the termination, cancellation, or nonrenewal.
- (i) The repurchase of any item under 49 4 (a-g) shall be accomplished within 60 days of the notice date of the termination or cancellation or within 60 days of the receipt of the item/s by the franchisor, whichever is later in time, provided the dealer has clear title to the inventory and other items or is able to convey such title to the franchisor.
- (j) In the event the franchisor does not pay the dealer the amounts due under clause 49 (4) within the time period set out in 49 4 (i) the franchisor shall, in addition to any amounts due, pay the dealer interest on such amount/s. This interest shall not begin to accrue until the time for payment has expired. The interest shall be computed monthly on any balance due and the monthly interest rate shall be the notified interest rate of the Reserve Bank of Australia.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



4. Compensation Scheme of Last Resort

- It is suggested a motor vehicle retailing compensation scheme of last resort be considered to protect the new vehicle retailing industry from the potential sudden withdrawal from the Australian market of foreign based car manufacturers; and / or the collapse of contracted arrangements with distributors, importers, representatives of the franchisor; and / or the forced restructure rationalisation, reorganisation or substantive change to the retail distribution network or model of product distribution.

Background for Compensation Schemes:

- The proposed compensation scheme for motor vehicle dealers would not be unique and replicate other compensation schemes many of which are established and provided as a safety net or scheme of 'last resort'.
- There are many examples of compensation schemes and in particular compensation schemes of last resort where normal good faith negotiations break down or cannot be determined satisfactorily through dispute resolution mechanisms or where the party no longer exists, is declared bankrupt and / or is unable to meet obligations.
- For example:
 - There are fidelity funds that operate in addition to professional indemnity insurance held by solicitors. For example, solicitors practicing in New South Wales are required to hold compulsory professional indemnity insurance arranged through LawCover Insurance which currently provides cover of up to \$2 million per claim and run off cover for former principals and employees and for practices that have ceased to operate.
 - State and Territory based home warranty insurance schemes provide compensation arrangements in relation to certain building work. Most of the schemes now operate as schemes of last resort. Builders are required to take out insurance to cover client losses due to a builder's insolvency, death or disappearance.
 - Motor Vehicle Dealers already contribute to motor vehicle compensation scheme for consumers in almost all Australian jurisdictions. This scheme provides protection to consumers when buying or selling a vehicle through a licensed motor dealer. For example, a consumer can seek compensation from the fund if they have suffered a loss arising from a dealer's failure to meet warranty obligations, to repay a deposit or to pass on the proceeds of a vehicle sold on the consumer's behalf. The compensation funds are generally funded through the licensing fees paid by motor vehicle dealers.
 - The travel industry has a compensation fund to compensate travellers who suffer loss as a result of a financial collapse of a participating travel agency business.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



- And of course, there is the Compensation Scheme of Last Resort for the financial services sector, which featured in the recent Hayne Royal Commission.
- MTAA suggests there may be an opportunity for a compensation scheme of last resort to provide a future 'safety net' for retail new car dealer businesses who are inadvertently caught by a sudden market decision to vacate the Australian Market or significantly restructure, reorganise or change or where a franchisor determines that it is prepared to risk breaches of the provisions and accept potential penalty, or are not capable of meeting compensation requirements and obligations.
- Further work would need to be undertaken but the key elements include:
 - Contributions by motor vehicle manufacturers and /or their distributors / importers / representatives of an amount equivalent to \$200-\$500 per new vehicle sold. Based on a usual market of one million vehicles being sold per annum this would equate to a compensation fund of last resort of between \$200m to \$500m.
 - Contributions would be identified and remain the funds of the contributing company but held in a trust account administered by the Commonwealth Government.
 - Funds can be accessed by companies to contribute towards compensation payments or withdrawn on proof of successful compensation requirements being met including obligations for good faith negotiations.
 - Funds maybe retained and forgone by the company if compensation negotiations fail or the company fails to meet legislative and regulatory obligations or is declared bankrupt
 - Accumulated funds can be used to meet the compensation obligations as outlined above.
 - This fund could be established with a one-off contribution based on sales of motor vehicles the previous calendar year or through a smaller amount that accumulates over a five year period.
 - It is suggested that the contributions would be capped to a pre-determined ceiling.

MTAA National Industry Associations





MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



5. Work Program

- There are other unresolved matters than can be accommodated in known current work streams being undertaken by Government departments including:
 - Warranty provision and adequate compensation for warranty work.
 - Access to unfair contract terms and Conditions including definitions and thresholds for small business and inclusion of motor vehicle dealers
 - Inclusion of motorcycle and farm machinery dealers in schedule.
- It is suggested a work program with clear timeframes be established for final resolution of these issues.

Response to Term of Reference C

- MTAA suggests there should be some consideration to matters surrounding the costs associated and assistance with Dealer employee redundancies or assistance caused by the actions of manufacturers when they vacate the market or substantially restructure, reorganise or change retail distribution networks or methods.
- MTAA also suggests there needs to be greater transparency on the deliverables of any assistance provided to car manufacturers with Research and Development or other public funds.

Response to Term of Reference D

Good Faith Negotiations

- There is strong and compelling evidence that some vehicle manufacturers fall short of genuine commitment to negotiating good faith agreements. In turn, this weakens the entire vehicle and service supply chain, which ultimately puts businesses and consumers at risk. Ironically, Australia is one of the world's highest per-capita markets for new vehicle sales, but is arguably decades behind its global counterparts when it comes to its relationships with its supply chains and the broader automotive market place in Australia.
- MTAA has raised in previous inquiries and investigations the reliance of some vehicle manufacturers on 'Operations Manuals' or 'Procedures' or other documentation under the head Franchise Agreement which dictate further specific terms and conditions required of dealers. These documents generally are not negotiated and rarely included in disclosure materials. Many requirements and demands on dealers are spelt out in these supplementary documents and are often the cause of disputes and concerns.

MTAA National Industry Associations





PO Box 6298 Kingston ACT 2604

MTAA

www.mtaa.com.au



- Most franchise agreements are presented as 'Take it or Leave it' contracts. Even when there are attempts to negotiate in good faith there are rarely changes made to what are essentially pro-forma agreements written to favor the franchisor.
- MTAA suggests there should be urgent action to include car dealers in Unfair Contract Terms and Conditions legislation by reviewing the thresholds that currently preclude car dealers from being able to access these protections.
- Further consideration should be given to a standing authorisation to enable collective bargaining by car dealers to enable unfair or poor provisions or conditions to be negotiated.

Ongoing Service provision contract

- MTAA is concerned that participation in ongoing service provision via a 5-year contract (despite assurances of GMH that it will meet consumer obligations for the next 10 years) was part of the 'Transition Package' and a condition of the offered compensation package. MTAA respectfully suggests this contract and provisions within it should have been de-coupled from the compensation package and negotiated separately when the matters surrounding compensation are completed.
- MTAA views the offering of ongoing service provision as a component of compensation negotiations as an inappropriate 'carrot' to 'entice' Dealers to accept the compensation package. MTAA suggests this is a further example of not negotiating in good faith by making an important contract that has implications for the sustainability of many businesses part of the compensation package.
- MTAA has viewed a copy of the agreement and has significant concerns in regard to some of the clauses and conditions in the contract including emphasis that it is not a franchising agreement (and thereby not bound by requirements of the Franchising Code) and references yet again to undetermined and unknown 'operations manuals or procedures' which seemingly do not form part of the agreement. This may have significant ramifications for businesses who have taken up the contract in order to obtain compensation as negotiations continue.
- There are also concerns regarding the lack of clarity regarding GMH ongoing consumer obligations to warranty and recall and compensation for future problems that may occur for GMH product and the lack of specificity on what service providers (former dealers) obligations and requirements are versus those of GMH as the product manufacturer.

MTAA National Industry Associations





MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



7. MTAA and Member organisations in context

- The Automotive sector and the multiple industries within it, are undergoing unprecedented structural adjustment brought about by external global influences including automation, the rapid application of advanced technology, increasing influence of increasingly larger and consolidated market participants, and changes to consumer purchasing behaviours.
- Modern motor vehicles are now highly complex, integrated, and increasingly inter-connected products. Increased safety, efficiency, environmental, mobility and connectivity outcomes are being achieved with increasing reliance on computerisation, often with multiple third-party Original Equipment Manufacturers (OEMs) creating and supplying technologies particularly in advanced systems and sub- system integration.
- MTAA Limited is the national association of participating State and Territory Motor Trades Associations and Automobile Chambers of Commerce Members, and discrete national industry associations that exist under the MTAA umbrella providing unparalleled coverage and access to the nation's automotive and related businesses.
- MTAA and members represents and is the national voice of the 69,365 retail motor trades businesses which employ over 379,365 Australians that contributed \$37.1 billion to the Australian economy in 2015/16, which equates to 2.2% of Australia's GDP. Most of these businesses are small, and family owned and operated enterprises.
- MTAA member constituents include automotive retail, service, maintenance, repair, dismantling recycling and associated businesses, that provide essential services to a growing Australian fleet of vehicles fast approaching 20 million (expected by 2020) that has rapidly advancing technological systems and capabilities.
- MTAA Limited Members have almost all industries (more than 95%) of the automotive sector represented as business member constituents. This allows MTAA Limited Members the ability to understand the operations, issues, concerns and risks of participating automotive industries including but not limited to:
 - New car retailing (including service)
 - Used car retailing (including some who service)
 - New and used motorcycle retailing (including service and recycling / dismantling)
 - Vehicle body repair (smash repair)
 - Independent automotive servicing
 - Service station and convenience stores (franchise and independent)
 - Auto recyclers, dismantlers and part suppliers
 - Farm and industrial machinery retailing (including service and in some cases dismantling and recycling)

MTAA National Industry Associations





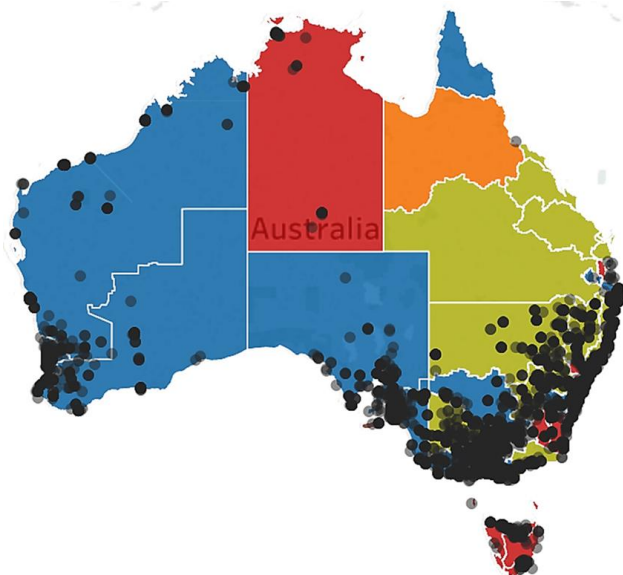
MTAA

PO Box 6298 Kingston ACT 2604

www.mtaa.com.au



- Tyre retailing, retreading and recycling
 - Towing
 - Bus and coach
 - Heavy vehicle
 - Specific service professions including glass, transmission, engine replacement and reconditioning, brakes, steering, automotive electrical and air- conditioning
 - Vehicle Rental
- Most MTAA Limited members are also automotive sector training providers and possess extensive operations and facilities in apprenticeship training and skills development and post trade qualifications. In many jurisdictions MTAA Members are the largest employers of automotive apprentices and trainees.



MTAA Member business constituents

8. Conclusion

- MTAA thanks the ACCC for the opportunity to present this submission and for consideration and the allowance of extra time for members and their constituents during the unprecedented impact of COVID 19. MTAA remains available to provide any additional information and feedback as required and looks forward to continuing to work with the ACCC in its endeavours. Please contact Mr Richard Dudley, MTAA CEO if any further assistance is required.

MTAA Secretariat

June 2020

MTAA National Industry Associations

