



Committee Secretary
Senate Education and Employment Committees
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Canberra ACT 2600

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Review of: General Motors Holden Operations in Australia

Dispute Resolvers previously provided the management services for the dispute resolution functions of the Office of the Franchising Mediation Adviser, Office of the Horticulture Mediation Adviser and Office of the OilCode Dispute Resolution Adviser under Commonwealth Government contract.

As the former appointed Mediation Adviser to the Minister for Small Business, Minister for Agriculture and Minister for Environment and Energy, I have an in depth knowledge both of Code functions as well as the legislated dispute resolution processes.

I provided detailed submissions on beneficial changes to the Franchising industry Code of Conduct to the Senate Inquiry that were adopted and published in its report, '*Fairness in Franchising*'.

Dispute Resolvers provides this review, limited to solely our area of expertise, the dispute resolution processes provided to achieve the Franchising Code of Conduct objectives in relation the role of the Franchise Code and the Government's proposed dealership amendments to the Franchise Code;

Your faithfully,

Derek Minus

[Accredited Mediator](#) | [Barrister-at-law](#) | [Chartered Arbitrator](#)





REVIEW- General Motors Holden Operations in Australia

Resolution of Disputes between Holden dealers and General Motors

1. On 27 February 2020, the Senate referred the inquiry into the announcement, by General Motors (GM) on 17 February 2020, to withdraw the Holden brand and operations from Australia to the Education and Employment References Committee for inquiry and report. One of the terms of reference of the General Motors Holden inquiry, relates to:
 - b. *the role of the Franchise Code and the Government's proposed dealership amendments to the Franchise Code;*
2. It has been reported that some 200 Holden new car dealers are in dispute with GM. Those Holden dealers met with Prime Minister Scott Morrison in Canberra and lobbied the Federal Government to use its powers to ensure GM pays more compensation than what has apparently been initially offered by GM. GM for its part has accepted that it has to pay some compensation as it acknowledges that it has breached its franchise agreement with its dealers.
3. Car dealers are already covered by the Franchising Code of Conduct. The Franchising Code expressly provides that a motor vehicle dealership agreement is taken to be a franchise agreement and hence covered by the Code.
4. What is a Motor Vehicle dealership? The Code defines it 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."
5. Motor vehicles are given a precise definition as:

a vehicle that uses, or is designed to use, volatile spirit, gas, oil, electricity or any other power as the principal means of propulsion."
6. The Code even provides a detailed list of examples of what is a motor vehicle, including: motor cars, motorcycles, motor boats, tractors, motorised farm machinery, motorised construction machinery and even aircraft.



Mandatory Mediation in Good Faith

7. The dispute between GM and its motor vehicle dealers is a commercial dispute between two significantly resourced groups. GM an international behemoth of the motor industry; and the individual dealers, as a group would have investments of hundreds of millions of dollars in property, equipment and stock. Ultimately the resolution of this dispute will need to be a commercial outcome, given that GM will continue to have parts and service requirements to support warranty obligations for vehicles that have been sold. The parties will need to reach a settlement to continue to provide for the provision of the ongoing service obligations.
8. This dispute, despite the number of participants involved, or perhaps because of them, is just a normal commercial dispute that should engage the dispute resolution processes of the Franchising Code of Conduct. The Code was specifically designed for all franchisees to be able to bring their claims to mediation under the Franchising Code.
9. What help is available? Individual dealers can immediately lodge a Notice of dispute and request a mediation to review and negotiate any offer they have been given by Holden. GM are required to attend and mediation in good faith. To date, I believe this has not happened.
10. As the former Franchising mediation adviser and owner of the [FranchisingCode.com.au](https://www.franchisingcode.com.au) online web service, I am aware that no disputes have been lodged with our dispute resolution service. I have not heard that the dealers have sought mediation, rather they have engaged lawyers to initiate litigation in the Courts.
11. If this is the case, the government should not intrude on the parties commercial decision to avoid the Franchising Code that was established 20 years ago and is successfully being used to resolve 80% of all referred disputes.

Other Assistance

12. The Franchising Code of Conduct has been the subject of a year-long review by the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services (Senate Committee) which resulted in the publication of its report, *Fairness in Franchising* in March 2019. Amongst numerous deficiencies that the Committee of Inquiry found, were those in relation to the dispute resolution processes.
13. The Committee summarised the changes it had identified to improve the dispute resolution functions of the Franchising Code of Conduct dispute resolution processes in its final report:



15.73 The committee recommends that the dispute resolution scheme under the Franchising Code of Conduct remain mandatory and be enhanced to include:

- 1. the option of binding arbitration with the capacity to award remedies, compensation, interest and costs, if mediation is unsuccessful (does not exclude court action);**
- 2. require that mediation and then arbitration commence within a specified time period once a mediator or arbitrator has been appointed;**
- 3. restrictions on taking legal action until alternative dispute resolution is complete (along similar lines to those used by the Australian Financial Complaints Authority);**
- 4. immunity from liability for the dispute resolution body;**
- 5. to include a requirement that if a franchisor takes a matter straight to court, the franchisor must demonstrate to the court's satisfaction that the matter cannot be resolved through mediation, and if not the court should order the parties to mediation;**
- 6. the capacity for a mediator or arbitrator to undertake multi-franchisee resolutions when disputes relating to similar issues arise (as determined by the mediator or arbitrator).**

Items 1 (availability of binding arbitration) and,

Item 6 (arranging for multi-franchisee mediations and arbitrations),

- are especially relevant to this review and are discussed in the context of proposed changes to the Franchising Code which can be introduced now, to assist Holden dealers in their dispute with GM.

Multi-Party Mediation

- 14. Can dealers join together?** Rather than having separate mediations, can dealers join together and have a mediation over the single issue of the method of calculating fair compensation? The Australian Competition and Consumer Commission (ACCC) recommended they should be able to do so, at the recent Senate Inquiry. Multi-party mediation in the context of franchising would generally involve a number of franchisees with similar issues all mediating with the franchisor at the same time.
- 15.** In its submission to the Franchising Inquiry of 11 May 2018 entitled, *Inquiry into the operation and effectiveness of the Franchising Code of Conduct*, the ACCC identified that:

The Franchising Code does not expressly state that mediators may undertake multi-franchisee mediation when disputes of a similar nature arise within a franchise system. The ACCC is aware of Franchisors refusing to attend multi-party mediation on this basis and insisting on addressing disputes on an individual basis.

Multi-party mediation has a number of benefits, such as:

- assisting to shift the imbalance of bargaining power that exists between the Franchisor and Franchisee when resolving disputes*
- creating a more efficient process and use of resources.*



16. The ACCC therefore recommended that the Franchising Code be amended to allow a mediator to undertake multi-franchisee mediations when disputes with similar issues arise. The ACCC noted that the application of any such provision would need to be considered in conjunction with the other requirements under the Franchising Code e.g. that parties not be compelled to attend mediation in states and territories other than where their franchised business is based. However, this can be accomplished, as is being done by FranchisingCode.com.au with all mediations being conducted by videoconferencing.

17. The ACCC itself identified a clear benefit of **shifting the imbalance of bargaining power** and offered explicit support for multi-party mediations. It recommended that:

Amend the Franchising Code to allow a mediator to undertake multi-franchisee mediations when disputes with similar issues arise.

The ACCC notes that the application of any such provision would need to be considered in conjunction with the other requirements under the Franchising Code e.g. that parties not be compelled to attend mediation in states and territories other than where their franchised business is based.

18. The ACCC's recommendation was supported by the OFMA who stated in its submissions to the Committee of 1 November 2018, that:

The Adviser supports these recommendations.

The Adviser has been involved in trying to assist multiple franchisees from the same franchise network who have similar complaints about the franchise system or actions of the franchisor.

Although the Adviser's actions under the Code are limited to setting individual matters for mediation by separate mediators, where possible the Adviser has negotiated with both franchisees and franchisors to provide a single mediator to manage multiple disputes. This has allowed matters to proceed expeditiously, at a reduced cost whilst providing a more robust and involving process for all participants.

Allowing different franchisees within the same franchise system to bring common complaints together within the same mediation, assists the franchisor to better understand the range of opinions and evens out the power balance that exists between the franchisor and franchisees. Although multi-party mediations need to be skilfully executed by experienced mediators, often supported by other facilitators, particularly where the groups are large (over 20 franchisees), they have been successful in resolving matters where there has been significant ongoing disputation.



19. The Senate Committee in reviewing this material stated:

15.10 Multi-party mediation in the context of franchising would generally involve a number of franchisees with similar issues all mediating with the franchisor at the same time.

The ACCC observed that multi-party mediation has benefits such as:

- 1) assisting to shift the imbalance of bargaining power that exists between the franchisor and franchisee when resolving disputes; and
- 2) creating a more efficient process and use of resources.

15.11 However, the Franchising Code 'does not expressly state that mediators may undertake multi-franchisee mediation when disputes of a similar nature arise within a franchise system'.

15.12 More problematically, the ACCC 'is aware of franchisors refusing to attend multi-party mediation on this basis and insisting on addressing disputes on an individual basis'.

15.13 OFMA has been involved in trying to assist multiple franchisees from the same franchise network who have similar complaints about the franchise system or the franchisor. OFMA noted that multi-party mediations have successfully resolved disputes that have involved over 20 franchisees.

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15.60 Nevertheless, the committee affirms the recommendation put forward by the ACCC that the Franchising Code be amended to expressly allow a mediator to undertake multi-franchisee mediations when disputes with similar issues arise. Such an amendment would improve efficiency as well as ameliorating the power imbalance that exists between franchisor and franchisee in dispute resolution.

15.61 The ACCC did not provide further information on what may constitute a 'similar issue' in its submission. The committee considers that the notion of a similar issue needs to be sufficiently broad to allow franchisees to bargain collectively on a dispute even though the disputed issue may have had a varying impact on franchisees (that is, some may have been severely impacted and others less so; or the impact may not affect all franchisees simultaneously). The committee also considers that a mediator or arbitrator should be able to make decisions for each individual franchisee's circumstances, or a decision that applies to all franchisees involved in the dispute.

20. As the former OFMA, I regularly, at the request of franchisees, undertook to arrange multi-franchisee mediations. Franchisors would usually balk at attending, on the advice of their lawyers, that there was no requirement contained in the Franchising Code of Conduct for them to do so. They would often agree to, on the basis of the reduced costs of having a single mediation rather than the expense of individual mediations with each franchisee, to cover the same issues.

21. Ultimately, the Senate Committee of Inquiry recommended that the dispute resolution scheme under the Franchising Code of Conduct be amended to include multi-party mediation (and arbitration) described as:

the capacity for a mediator or arbitrator to undertake multi-franchisee resolutions when disputes relating to similar issues arise (as determined by the mediator or arbitrator)



RECOMMENDATION

22. Consistent with the existing power of the mediator to set the circumstances of a mediation that both parties must attend, any new multi-party dispute resolution clause should provide the mediator with similar powers, to set the date and time of the mediation when all parties must be present at a mediation conference to engage in discussions with a view to resolving the dispute. Where such a meeting can be conducted by video-conference.

Collective Bargaining – Exemption

23. The existence of a possible exemption for collective bargaining should also be considered in the context of multi-party mediation and arbitration.
24. A collective bargaining group occurs when two or more competitors get together to negotiate terms, conditions and prices with a supplier or customer. These arrangements can sometimes be prohibited by the provisions of the *Competition and Consumer Act 2010*.
25. The Senate Committee discussed this issue and made the following recommendation:

Collective action

The committee recommends that the Government implement the ACCC's proposal for a class exemption to make it lawful for all franchisees to collectively bargain with their franchisor regardless of their size or other characteristics. The committee recommends that franchisees be empowered to undertake collective action, such as joint negotiation, mediation and arbitration to resolve problems and disputes. This would provide a significant mechanism to address the power imbalance between franchisees and franchisors and intimidatory behaviour by franchisors.

26. On 23 August 2018, the ACCC released a paper requesting submissions on whether the ACCC should approve franchisees forming a collective bargaining group and on what terms. The ACCC is currently developing a class exemption for collective bargaining which will provide a 'safe harbour', allowing eligible businesses, including farmers, to form collective bargaining groups without risk of breaching the specified provisions of the *Competition and Consumer Act*. Once a class exemption is in place, businesses that fall within the criteria of the class exemption won't need to separately lodge a notification or authorisation, and will be able to rely on the exemption without delay or additional cost.
27. In May 2019, a *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2019* was released as an Exposure Draft. Given that it has been released for nearly a year, this should be given legislative assent so it becomes available for all small business covered by the determination. This would amend the Franchising Code dispute resolution process to explicitly provide that groups of franchisees from the same system that are in dispute with their franchisor in respect of a similar issue, when banding together can seek support and share the costs of dispute resolution by participating in a single mediation.



Arbitration

28. **What about an adjudicated decision?** The Senate Inquiry strongly recommended that the Franchising Code be amended to allow the option of binding arbitration with the capacity to award “*remedies, compensation, interest and costs*” if mediation is unsuccessful.
29. The Holden situation relates to a commercial dispute between Holden dealers and GM involving the alleged breach of franchise agreements by GM unilaterally deciding to stop all commercial sales activities in Australia. At the present time the dispute may be heading for the courts. If it does end up being the subject of litigation, it could be a lengthy and acrimonious process, subject to numerous appeals, class actions, litigation funding and significant legal costs as well as the need for dedicated judicial resources. This is precisely what the introduction of the Franchising Code of Conduct was originally designed to avoid. It put in place preferred dispute resolution processes, early in the conflict to assist the parties.
30. In its report *Fairness in Franchising* the Senate Committee commented on the importance and availability of a binding resolution process to complement negotiation and mediation in good faith, available in the Franchising Code:

15.62 However, the committee agrees with the view put forward by OFMA, namely that a necessary condition of mediation is that the parties be willing to negotiate in good faith and try to achieve an outcome. Where this condition is missing, the mediation process will fail by design. Indeed, the evidence to this inquiry included a litany of instances where one party alleged the other party failed to engage in good faith in the mediation process, knowing that the only alternative was court action which was prohibitively expensive for one of the parties. In effect, the party in the stronger position had no incentive to reach a negotiated settlement and could effectively say to the weaker party, 'take it or leave it', or 'take it to court'. To be clear, most of the allegations put to the committee alleged that the franchisor refused to negotiate in good faith with the franchisee. In other words, the franchisor had a vested interest in impeding mediation because they knew the franchisee could not afford to take them to court.

15.63 It is in these circumstances, where all the issues are unable to be resolved satisfactorily through mediation, that a determinative procedure such as arbitration is required. Arbitration works in those situations where a party wants an investigation of the facts and a determination on the evidence.

15.64 The committee accepts that arbitration is more expensive than mediation because of the time and expertise required. But, it can deliver finality to parties who want to resolve a matter and move on. And arbitration is far cheaper and more flexible than pursuing court action, and this is the critical cost comparison in any attempt to deliver justice in a timely fashion at a reasonable price. Indeed, many of the concerns raised in the committee's 2008 report have now been addressed by a number of developments in arbitration during the ensuing decade.

15.65 Furthermore, the addition of arbitration within the overall dispute resolution framework for franchising would, in all likelihood, increase the number of satisfactory



outcomes achieved through mediation. In addition, referral to arbitration would help level the current uneven playing field where many franchisees cannot afford to take franchisors to court, or defend themselves, when franchisors take them court. To prevent this scenario, the committee considers that the Franchising Code should include a requirement that franchisors should have to demonstrate to the court's satisfaction that the matter could not be resolved through mediation or arbitration. If the franchisor is not able to do that, the court should direct the parties to mediation or arbitration. In this regard, the committee suggests that similar to mediation, arbitration must be conducted in Australia and should only be conducted in the state or territory in which the franchisee's business is based to be consistent with existing Franchising Code provisions on the jurisdiction for settling disputes.

15.66 The committee also acknowledges that there may be certain types of dispute that can only, or should only, be determined or enforced through the courts. However, acknowledging this proposition does not detract from the overall argument that the inclusion of binding arbitration would be a valuable addition to the current dispute resolution system for franchising.

15.67 In terms of how the dispute resolution scheme for franchising could be enhanced, the overwhelming bulk of the evidence from a range of stakeholders strongly argued the Franchising Code be amended to include provision for binding arbitration. In this regard, the committee notes that more modern dispute resolution schemes under the Food and Grocery Code of Conduct and the AFCA both provide for binding arbitration.

31. For these reasons the Committee recommended that:

the dispute resolution scheme under the Franchising Code of be enhanced to include the option of binding arbitration with the capacity to award remedies, compensation, interest and costs, if mediation is unsuccessful

32. Given the nature of the "Holden dispute" the introduction of an arbitration process to be conducted by a legal expert guided by technical support relating to the automobile industry, would provide the parties with a mandated alternative to litigation in the courts. Arbitration allows matters to be resolved fairly, quickly and inexpensively by a binding award.

RECOMMENDATION

33. The amended dispute resolution process to the Franchising Code should explicitly provide for the resolution of disputes by binding arbitration with the capacity to award remedies, compensation, interest and costs.

34. The possibility of the use of combined processes should also be included to facilitate greater flexibility in the dispute resolution procedures available to the parties, especially where these procedures are not available as part of the litigation process.

35. The government could assist Holden dealers and ALL franchisees by immediately legislating to bring in these reforms to the Franchising Code that have been recommended by the Senate committee after a one-year long inquiry.