MOTOR TRADES ASSOCIATION OF AUSTRALIA

PO Box 6298
Kingston ACT 2604
02 51008239
admin@mtaa.com.au
www.mtaa.com.au

30 October 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 Committee for the opportunity to provide a further submission on the regulation of the relationship between car manufacturers/distributors and car dealership models in Australia.

MTAA notes this additional examination is in addition to the Committee's investigations into the decision of General Motors Holden to vacate the Australasian Market and related matters. MTAA and Member Associations welcome the expanded focus.

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. This submission also draws on materials provided by State and Territory Associations and previous MTAA submissions on the topic matter.

Please contact Mr Richard Dudley, CEO MTAA, if the Committee requires any further information or clarity regarding this submission at [redacted] or [redacted].

Yours Sincerely,

Richard Dudley
Chief Executive Officer
Motor Trades Association of Australia Limited

MOTOR TRADES ASSOCIATION OF AUSTRALIA

## 1. Executive Summary

- The Motor Trades Association of Australia Limited (MTAA) welcomes the additional exploration of the relationships between car manufacturers/distributors and new car dealers. MTAA suggests there has been more policy and regulatory change impacting these relationships in 2020 than at any other time in the past 20 years.

- Much of this reform and change is the culmination of:

    - Previous reviews and inquiries into *Australian Consumer Law* (Cth) 2010 (ACL), and the *Competition and Consumer Act* (CCA) including Industry Codes (Franchising and Oil Codes).

    - Additional focussed investigations by the Australian Competition and Consumer Commission (ACCC) New Car Market Study in 2016/17, the Australian Parliament Joint Parliamentary Inquiry into *'Fairness in Franchising'* in 2018/19, and resulting investigations by the Franchising Task Force, and the Treasury and Industry Departments.

- The decision of General Motors retire the Holden brand and for GMH to vacate the Australasian market and the treatment of GMH dealers and their employees in executing that decision– a previous focus of this inquiry – is also informing this policy and regulatory work.

- Announced and planned regulatory changes action many of the MTAA's primary advocacy positions over the past two decades including:

    - The introduction of a Schedule of Amendments to the Franchising Code of Conduct, specific to car dealers, to address recognised power imbalances.

    - Further changes to the entire Franchising Code of Conduct that impact new car retailing relationships – now being finalised - that seek to address recognised power imbalances.

    - ACCC to introduce a class exemption for collective bargaining for small businesses, franchisees, and fuel retailers in early 2021 that will include new car dealers.

    - Clarification work on definitions of major versus minor failures as they impact consumer guarantees and manufacturer/dealer accountabilities.

    - Additional work is on elements of the ACL.

    - Exposure draft legislation for mandating access to motor vehicle service and repair information is imminent.

- Currently, MTAA and other stakeholders are involved in additional work on the development of industry-led principles to outline expected requirements and conduct in car manufacturer/dealer relationships.

- MTAA has also provided additional submissions and suggestions on extending Unfair Contract Terms to a car, motorcycle, and farm machinery dealer franchisees.

- By any examination, the amount of reform and change achieved in 2020 is significant. MTAA is aware of commentary by some that the reforms and changes are 'not worth the paper they are written on' and 'do little to address complaints of dealers in their treatment by some manufacturers/distributors'. MTAA suggests that these sentiments are understandable given the focus on GMH, actions by other manufacturers/distributors to move to alternative business models, and the significant impacts of COVID-19.

- However, and as reflected by commentary from legal firms and professional service organisations on reforms to date, the changes are not insignificant. They offer the potential for improved relationships if adopted in full by stakeholders.

- MTAA believes there is now a lack of awareness, education and guidance material on how all the reforms and changes interact and could assist in the negotiation, development and operation of dealer agreements governed by the Franchising Code.

- MTAA is acutely aware there is a limit to the amount of legislation and regulation introduced in a relatively short period to address now formally recognised power imbalances. MTAA is also mindful reform and change must be balanced and not jeopardise the value of franchising to the Australian economy and its use by the automotive retailing industry.

- MTAA also understands the complexity and difficulty some outstanding matters pose to legislators and regulators. MTAA is cognisant of the limited capacity of the Commonwealth to identify and implement solutions due to constitutional, enforcement, or other factors. MTAA is of the view that if solutions were readily available, such solutions would have been identified during two years of detailed investigations and presented as part of reforms already introduced or planned to be.

- However, while appreciative and a supporter of work to date, this does not mean that together industry and government should not continue to seek and implement additional enhancements as quickly as possible while there is the current concentrated focus on the sector.

- MTAA continues to work with the Government and stakeholders, providing suggestions and the Committee's investigations will aid practical solutions to try and address some of these outstanding matters.

## 2. Recommendations

- MTAA recommends the urgent finalisation of the following outstanding matters:
    - Agreement and formalisation of agreed industry principles that outline expected conduct and requirements of franchisors and franchisees in the development, operation and end of dealer agreements including:
        - Arrangements for fair and reasonable compensation in the event of termination, non-renewal, or business model/dealer network change.
        - Process and methodology for recognition of goodwill and arrangements for inclusion in compensation arrangements.
        - Further strengthened dispute resolution mechanisms including mediation, determination, and arbitration, be included as a requirement included in dealer agreements using the Dairy Code and ACCC Digital Media regulations as base reference documents.
        - Process for recognition in dealer agreements of adequate tenure terms to ensure sufficient time to secure proper returns on investment.
    - Mandate the principles by the inclusion of a provision in the Schedule of Amendments.
    - Alternatively, as a temporary measure, implement the principles as voluntary but with a government commitment and requirement for effective monitoring by regulators. With this compromise, MTAA would require a commitment and surety for additional regulatory change within a specific timeframe if compliance breaches of the principles are detected.
    - Provide clarity on 'agent' agreements and whether the Franchising Code or other legislation and regulation will govern such agreements.
    - Provide further clarity on warranty provisions, and the provision of additional protections for proper, fair and reasonable reimbursement of all costs associated with warranty work.
    - Develop comprehensive awareness and education materials to detail the totality of reforms /changes/requirements and the actions available to car dealers to improve balance in future relationships.

- Reexamine the application of penalties for specific provisions in the Schedule of Amendments specific to car dealers to give better incentives for compliance.

## 3. Terms of Reference

On 7 October 2020, the Committee resolved to investigate the regulation of the relationship between car manufacturers/distributors and car dealership models in Australia. The Terms of Reference are:

**Terms of Reference A -** Practices employed by manufacturers/distributors in their commercial relations with dealers, with a specific focus on:

- investment required and tenure provided
- termination and compensation practices
- performance requirements
- behaviour around warranty claims and Australian Consumer Law
- unfair terms in contracts
- goodwill and data ownership.

**Terms of Reference B -** Existing legislative, regulatory and self-regulatory arrangements.

**Terms of Reference C -** Current and proposed government policy.

**Terms of Reference D -** Dispute resolution systems and penalties for breaches of the Franchising Code of Conduct.

**Terms of Reference E -** Current and proposed business models in selling vehicles.

**Terms of Reference F -** Legislative, regulatory and self-regulatory arrangements found in international markets; and

**Terms of Reference G -** the imposition of restraints of trade on car dealers from car manufacturers.

## 4. Industry Consultation

- MTAA has sought information from Member organisations and their new car franchise constituents in response to the Terms of Reference outlined above. Some of MTAA's Member organisations may have provided separate submissions to the Committee reflecting views expressed in this submission or providing jurisdictional material.

MOTOR TRADES ASSOCIATION OF AUSTRALIA

- MTAA has also drawn on its considerable knowledge base and longstanding advocacy and representations on franchising and the relationship of Australian Consumer Law, the Competition and Consumer Act and Industry Codes, including the Franchising Code, to the automotive sector and industries within it, in preparing this submission.

## 5. Introduction

- MTAA advocacy efforts behalf of franchised new car, motorcycle and farm machinery dealers has never been about punishing car manufacturer/ distributor franchisors or making legal and regulatory burdens punitory.
- Representations have consistently called for a more outstanding balance, fairness and reason in a crucial automotive sector relationship.
- The contribution of more than 1500+ new car dealers operating from more than 2600+ facilities nationwide is rarely fully understood or recognised.
- It is much more than the core of selling and servicing cars, motorcycles, or farm machinery on which the nation relies. It is about:
    - The number and value of new vehicle sales as an economic indicator.
    - The jobs of 55,000+ Australians including over 4,000 apprentices.
    - The $5b+ in wages.
    - The $2b+ paid by the industry in taxes.
    - The $1b+ in taxes and duties collected on behalf of governments.
    - The $600m+ in revenues to State and Territory Governments from new vehicle registrations.
    - The more than $14m per annum in community support including provision of vehicles, sponsorships, grants, and other assistance to charity organisations, health and allied services, sporting, and community groups.
- These facts are an essential consideration in any examination of the relationship between car manufacturers/distributors and franchised new car dealers and the impacts of now recognised power imbalances in these relationships.

- Notably, and fortunately, sometimes destructive relationships between car manufacturers/distributors and dealers are not a uniform problem. Many manufacturers/distributors and their dealer networks enjoy positive, mutually respectful, and beneficial relationships where matters rarely arise.

- However, it is MTAA and Members' experience some manufacturers/distributors or their distributor representatives pay 'lip-service' to the attributes of a professional and mutually respectful and beneficial business relationship and engage in exploitative conduct to the detriment of their dealers and potential consumers. It is also MTAA, and Members experience that relationships can be cyclical where once previously, positive relationships sour and can become toxic.

- MTAA, Members and their car, motorcycle and farm machinery dealer constituents, have advocated for two decades on the impacts of this conduct and the need for legislative and regulatory intervention to address a significant power imbalance in manufacturer/distributor and dealer relationships.

- MTAA suggests the execution of General Motors Holden (GMH) decision to vacate the Australasian market, without reasonable warning and mid agreement, and subsequent 'negotiation' of end of agreement term arrangements including compensation, has comprehensively illustrated the need for additional protections for Australian businesses and jobs.

- MTAA suggests 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 exemplar of prevailing 'take it or leave it' conduct that is a hallmark of poor relationships in the industry.

## 6. The Australian new car industry

- With 67 brands and more than 400 model variants of those brands, the Australian new car retailing industry is the most competitive and volatile right-hand-drive markets in the world.

- By comparison, only 35-40 brands are servicing the automotive needs of the 320milion people in the United States market.

- National characteristics, including geography and relatively small population, maintains our ongoing reliance on road transport and use of motor vehicles for the foreseeable future.

- The Australian new car retailing industry is undergoing significant structural adjustment resulting from:
  - Globalisation
  - Influences impacting the production of the right-hand versus left-hand drive vehicles.
  - Emerging alternative propulsion technologies, including hybrid, electric, and hydrogen.
  - Relative rapid application of new and emerging technologies driven by increased ICT, including increasing automation.
  - Changing consumer behaviours and requirements.
  - The emergence of ride-sharing and shared ownership models.
  - Consolidation of new car franchise dealerships by:
    - Traditional' family-owned and operated single brand' dealerships consolidating to larger multi-franchise, multi-site businesses, and
    - Acquisition of private dealerships by public owner dealership companies.
  - The increasing emergence of alternative business models to traditional franchising, including 'Agent' models, direct online sales, and alternative sale channels.

- Current estimates have the number of new and used car business establishments at around 4600 Of these: more than 1500+ new car dealer franchises operating from approximately 2600+ new car retailing facilities.

- General descriptors of the new car retailing supply chain often fail to adequately recognise the intrinsic role and importance of all profit centres and individual components of a successful dealer business. For example, new car sales are not the sole profit centre in a new car dealer business. A successful, profitable dealership business model is reliant on multiple profit centres, including finance and insurance products, service, parts, and others.

- The Deloitte Motor Industry Services dealership benchmarks for 2020[1] state:

  - Net profit as % of sales* 2.6-3.1%
  - Days to dealership breakeven** 25 days

  * This compares to the NP %S of the average Volume dealer of 1.0%
  ** Based on a full month, i.e. 30 days
  The Deloitte benchmarks are a measure of 'best practice' drawn from the top 30% of dealers in the Deloitte eProfitFocus database - a dataset of more than 900 dealers. Deloitte Motor Industry Services states 'the benchmarks provide a 'guide' for dealership performance. Some dealerships, due to specific geographic or demographic circumstances, cannot achieve all the guidelines'.

[1] https://www.eprofitfocus.com/media/1577/deloitte-motor-industry-services-benchmarks-2020_aus_web_20200228.pdf

- New car retailers, or dealers, vary from a family-owned, independent, single brand, single location, dealership to multiple brands, and numerous location dealerships in either private or public companies. While larger dealerships may have increased capability and capacity to negotiate improved or better outcomes, this is not always the case when confronting a global international manufacturer.

- New car retailing is consolidating with growing business closures over the past five years and shifts from traditional models. The Australian new car retailing industry closely relates to the European market in terms of market concentration ratios and distributive structures and participants, recognising market shares are considerably different.

- Increasing pressure is mounting on the family-owned single brand/facility dealerships. Acquisitions by public and private companies will continue, but a 'natural ceiling' is likely to occur where this trend will plateau. There is also increasing evidence of 'natural attrition' with dealerships closing because of the impacts of a changing market. It is possible additional closures may occur due to the implications of Covid-19 on some businesses.

- As an industry directly impacted by the state of the world and domestic economies, world car production, fuel price, and consumer financial health, new car retailing is cyclical.

- Almost all dealerships are lean, with little room for internal growth with primary revenue sources, including sales, service/repair/parts supply, and finance and insurance products. Some are exploring diversification into the operation of ride-sharing and shared ownership platforms and other services, including body repair.

- Most importantly, new car retailers are in constant competition for customers, employees and used vehicles. The two-tier franchise distribution system is the sole source of intra-brand competition and is critically important in underpinning a healthy competitive environment.

MOTOR TRADES ASSOCIATION OF AUSTRALIA

# 1. Responses to Terms of Reference

## Terms of Reference A - Practices employed by manufacturers in their commercial relations with dealers

- Manufacturers/distributors set relationship rules in the highly competitive and volatile Australian automotive retail market. These rules are usually presented fait accompli with little, if any opportunity for negotiation, affecting every element of a dealership operation. These rules present as 'take it or leave it' terms and conditions contained in dealer agreements predominately governed by the Franchising Code, the Competition and Consumer Act (CCA) and the Australian Consumer Law (Cth) 2010.

- Vehicle manufacturers/distributors traditionally use a franchise-like operation as the primary retail distribution mechanism for the localised stocking, display, demonstration, sale, pre-delivery, accessories, service, parts supply, and warranty provision, safety recall, financing, and marketing, of their vehicles.

- Core to the manufacturer /distributor /dealer relationship "Dealer Agreements", which are, are governed by Australian Competition Law (ACL), the Competition and Consumer Act (CCA), the Franchising Code as an industry code prescribed in the CCA, and various State and Territory legislation, regulation and licensing requirements.

- A new car dealer, unlike many other franchise businesses, is an independent business. The dealer may represent one or more brands, and no two new car dealerships are the same. Metropolitan, rural, regional, are all different. The buildings, staff, structure, marketing, financial systems are all individual and unique to that dealership business. The investment profile and personal exposure to failure are significant.

- Dealers are provided access or limited rights to a brand for a prescribed period which is essentially regulated by a "dealer agreement". This agreement intends to 'standardise' rules and requirements on all dealers with usually only minor variations. attributes of an individual dealer, their location, community, or structures and processes deployed that may be unique to that business.

- The term "Dealer Agreement" infers terms and conditions that are negotiable, agreeable to the dealer and the manufacturer/distributor. In reality, the new car dealer has practically no choice but to accept presented agreements. If the dealer does not sign the deal, then the dealer does not have access to the brand.

- Dealer agreements meet compliance requirements of legislation and regulation with standard clauses and provisions. Most include references to copious pages of 'operations, policies and procedures manuals', but often do not form the content of the agreement. These additional documents detail specific operational requirements, commitments, and conditions.

- It is MTAA's view that generally there is inequality in many dealer agreements regarding manufacturer/distributor accountabilities, performance, and the provision of mechanisms where dealers can access reciprocal assessment of franchisor commitments.

- The obligations and accountability of dealers to manufacturers/distributors are usually quite precise and clear. They include but are not limited to:
  - Market share expectations for a geographic location.
  - Target achievement (these targets are rarely agreed and usually reflect a manufacturer/distributor's requirement/ambition purely).
  - Customer satisfaction indices.
  - Product sales mix by model.
  - Accessory sales.
  - Warranty repairs.
  - Targets for trade and retail parts sales.
  - Training and compliance.
  - Manufacturer and broader policy compliance.
  - Compliance with manufacturer guidelines/ requirements.
  - Staff and structure.
  - Tools and equipment.
  - Stock levels and mix.
  - Customer resources, including service loan cars, evaluation, and demonstrator vehicles, point of sale material.
  - Facilities including aesthetics, signage, amenities, lighting, furniture, reception, etc.

- The balance of power lies clearly in favour of the manufacturer/distributor.

- Again, it is essential to acknowledge that not all manufacturers/distributors choose this option, although it is available to them all.

- One of the worst aspects of power imbalance in dealer agreements is a unilateral variation or the right of manufacturers/distributors to amend or change any policy, procedure, requirement, at will, without discussion, or negotiation, and irrespective of the impact and consequence of the variation. MTAA and Members field numerous complaints each year on matters not limited to:
  - Plant, equipment, signage and facility investment.
  - The processes for performing warranty work and compensation or reimbursement for warranty work
  - Factory audit processes
  - Mandatory tool requirements
  - Rationale and actions relating to manufacturer/distributor decisions impacting Prime Market Areas (PMAs) or other acronyms used to describe the market area assigned to a new car dealership in a geographic location.
  - Marketing and advertising including web-based services
  - Trading margins / bonus payments /campaigns
  - Stock policies

MOTOR TRADES ASSOCIATION OF AUSTRALIA

## Investment required and tenure provided

- It is not unusual for the establishment costs of a franchise dealership to be in a range of $10 to $20 million. Significant refurbishments can be between $500k to $3-5m depending on the requirements and the size and scope of alterations required. Even in situations where another brand is established and collocated at an existing site with other brands, the costs are rarely any less due to manufacturers/distributor requirements.

- Many factors influence the investment required. First and foremost, the conditions of the manufacturer/distributor. Employee, training, tools and equipment costs, architectural diagrams, submissions and approvals from local government and other authorities.

- Changes to disclosure requirements are likely to improve transparency and clarity. Further proposed changes for greater disclosure and independent validation of return on investment forecasts and assumptions underlying them will also aid. However, ongoing concerns centre on fair, reasonable, and agreed terms of time required by franchisees to achieve a proper return on the investment (ROI).

- MTAA notes many manufactures/distributors have amicable negotiations and arrive at fair and reasonable outcomes at around five years, plus the potential for an extension of an additional five years. Some manufacturers/distributors may require the same levels of investment but only offer three years or less with no potential for extension. In some cases, some manufacturers have provided reasonable tenure periods. Still, because of market conditions, falling market share, or other factors, the same franchisors then offer only three years with no change on the levels of investment required. Some might argue that these are commercial considerations, and if franchisees do not like the terms including tenure, then they simply do not take up the franchise. MTA would argue it is not as simple as that, particularly if it is a renewal of an existing franchise, where considerable investments have already occurred and where returns have not been accomplished.

- MTAA also understands the significant limitations and challenges posed by imposing legislation and regulations to dictate minimum or maximum terms for the tenure of a franchise agreement. If tenure requirements are stipulated by regulation, then this could raise other significant issues for both franchisor and franchisee.

- Unparalleled capital investments, financial exposure of other financial arrangements including the purchase, bailment, sale and constant turnover of stock, training, equipment, tools, refurbishment, marketing and branding, must be better recognised and reflected in agreement terms and conditions, specifically tenure. Indeed, it is fair and reasonable that if a franchisee after considering and negotiating a franchise and deciding to invest millions of dollars in a franchise then is afforded a minimum reasonable time to secure a return on the investment.

- MTAA has provided suggestions to Department of Industry officials and others on the development of a process or methodology of linking the quantum of the investment to minimum tenure as one possible solution.

- Alternatively, MTAA has also suggested one of the industry/government principles being developed to address expected conduct and requirements of outstanding concerns includes fair and reasonable tenure. MTAA is supporting the concept of industry-led principles to finalise matters such as compensation, tenure, dispute resolution etc. However, these principles are being promoted as voluntary. MTAA has significant reservations that without oversight, regulation or enforcement, there is nothing to deter poor conduct and compel compliance. In short, all can simply agree to any principle, but without compliance and enforcement, then parties can simply walk away from it, irrespective of commitments given.

**Recommendations**

1. Minimum tenure requirements:
   A. Develop and implement a process/method for linking sizeable capital investment and minimum tenure of three to five years or longer to ensure time to secure adequate ROI, or
   B. Finalise a principle for the conduct and requirements of franchisors in recognising and including in dealer agreements minimum tenure of three to five years or longer to ensure time to secure adequate ROI
   c. Provide provisions in the Schedule of Amendments specific to car dealers for compliance of any process/method/ principle determined to provide adequate tenure terms and that these provisions are enforceable.

MOTOR TRADES ASSOCIATION OF AUSTRALIA

## Termination and compensation practices

- To a new vehicle dealer, the termination, or cancellation, of their dealership agreement remains the most significant concern and has been amplified by the GMH decision.

- Invariably, dealers have a personal investment in their operations that, on many levels, exceeds the core capital investments. Individual and family financial exposure is often inextricably linked to the finances and financial performance of the business.

- Dealers who face 'take it or leave it' propositions, but demonstrate resistance, or wish to negotiate, or display an unwillingness to comply, sometimes find themselves subject to bullying behaviour from some franchisors. Compliance with a franchisor's policy and procedures manual – including performance targets, market share, customer satisfaction, and even warranty claim procedures - might suddenly become an area of particular scrutiny, or audit, by that franchisor. Targets and other requirements may suddenly evolve and become unattainable. Support might suddenly disappear. Ultimately accepting presented terms is the only option dealers believe they can take.

- Even in amicable circumstances, termination events can bring to the surface the potential for significant disadvantage to franchisees in the new vehicle, motorcycle, farm machinery, and other automotive sectors. As mentioned in this submission, dealers have several separate profit centres core to their operations. These are also essential considerations in termination and payment of compensation.

- Due to the floorplan financial arrangements and individual exposure, confidence in being able to expect stock buyback at fair and reasonable prices in the event of termination is critical. United States jurisdictional laws provide this surety. It is not unreasonable that the same surety applies to Australian dealers and that process and formula are subject to regulation and enforcement.

- Similarly, the same expectations and surety of adequate compensation on termination or end of the agreement must apply to other dealer profit centres where the franchisor has required detailed and specific requirements.

- The full extent of parts and service operations are less obvious to most observers. Dealers may well typically have over a million dollars of parts in stock. These are parts needed for:
    - counter sales to members of the public
    - account sales (to other independent, workshops and collision repairers for example); and,
    - as workshop/service 'consumables'.

- Much larger dealers will have more extensive stock holdings and can be parts suppliers themselves to other, smaller dealerships.

- A critical point to be considered regarding parts stock holdings in dealerships in the context of franchising is that the dealers invariably own their parts stock as part of capital investment and, therefore, the risk exposure. In termination events, franchisors can be under no obligation whatsoever to relieve the dealer of the remaining spare parts holdings. Parts stock can be as irrelevant to the details of the termination as the refrigerator in the dealership lunchroom.

- Similarly, in the servicing area of the business, the dealer will have been compelled to have a range of specialist equipment, tools, software and other requirements as specified by the franchisor. In termination events, these items are rarely reflected appropriately or in sufficient detail in termination arrangements and not appropriately compensated if at all.

- The GMH experience in 2020 demonstrated a considerable lack of, or inherent flaws in, enforceable regulations to ensure dispute resolution, good faith negotiations and fair and reasonable compensation outcomes. The acceptance by dealers of the termination and compensation package should not be misinterpreted. It was more to be able to walk away with something rather than walk away with nothing after, in some cases, a 40, 50 years relationship.

- MTAA refers to the Federation and Member's submissions to the GMH component of this inquiry and other parts of this submission for further information.

## Behaviour around warranty claims and Australian Consumer Law

- MTAA welcomes the Committee, including this specific area of examination in its inquiry as it remains a significant concern and source of power imbalance and in some cases obfuscation of accountability.

- The imbalance is apparent when the issue of warranties and compliance with the ACL is unpackaged. There would be very few dealers operating today who are not acutely aware of their obligations and requirements under the ACL, the CCA, other jurisdictional needs, consumer requirements, and those of manufacturers/distributors.

- Too often the dealer is left to confront the consumer, without any support or involvement of the manufacturer over matters which are a product fault and are not of the dealer's influence or control. Too often delays in parts supply, lack of information, lack of support, unrealistic work process expectations and procedures in undertaking warranty work, disputes over whether the required repair is a warranty problem or not, are forced on the dealer as the only intermediary with the consumer.

- MTAA and Members over recent years have been fielding increasing verbal reports regarding manufacturers/distributors and distributors further tightening the area of warranty definitions and processes to reduce manufacturer costs. Of course, like many elements in a relationship that has soured, there is an evident reluctance to provide written evidential material because of fear of retribution and the absence of a 'good enough' safe harbour.

- A constant complaint to MTAA Members is that many dealers do not receive adequate or any compensation for some elements of an approved warranty repair. Matters often not included in the cost of warranty repairs can consist of:

    - Initial and potential ongoing diagnostic work (when often a problem is presented which is previously unknown).
    - Unrealistic times set by the manufacturer/ distributor for repair.
    - Administration costs, including reimbursement of time taken to assist customers.
    - Freight costs.
    - Reimbursement of loan vehicles supplied to customers during warranty work.

- One dealer, on a condition of anonymity, provided MTAA with details of documentation relating to changed warranty provisions within the dealer agreement, presented as a unilateral variation, that was not able to be discussed or negotiated. MTAA suggests such examples highlight the power imbalance and exploitation of dealers.

**Case Study: The influence of manufacturer requirements on dealers in relation to warranty work (2016)**

- In April 2016 Dealerships of a prominent brand received advice regarding changes to 'a warranty audit process'.
- The internal correspondence to Dealers outlined revised requirements of the manufacturer / distributor to substantiate a dealer claim for warranty work performed, and future 'audit' processes outlining levels of charge back and rights of appeal.
- Of critical concern was the inclusion of changed policy indicating that any warranty claim would be rejected if it failed to meet '12 mandatory steps' outlined in the correspondence and required by the manufacturer / distributor.
- It is understood that failure to meet one of the '12 mandatory steps' would trigger rejection of the claim with no right of appeal. This would force the Dealer either to satisfy consumer requirements by absorbing the costs or alternatively not undertake the repair exposing the consumer to lengthy delays to a resolution bought about because of the 'rules' of the manufacturer.
- The '12 mandatory steps' along with other requirements it is understood would require a total of 31 different processes to support one (1) warranty claim.
- There is usually no consideration of reimbursement of administrative costs in dealing with this process, nor the potential time impost on the consumer and the business.

- Also, and despite investigations, there remains work to clarify better relationships between manufacturers warranties and consumer protections provided by the ACL. The Treasury Department is in the final stages of consultation on delivering clarity on major versus minor failures as they apply to consumer guarantees at the time of writing this submission.

- While welcome, it remains to be seen whether this work will address the overall confusion of a major product failure versus a minor failure and the inter-dependency with what is fair and reasonable wear and tear.

- The proliferation of computing technology in new modern motor vehicles can cause faults that through diagnosis are rectified. While understanding the need for broad policy, a motor vehicle is not the same as a toaster, refrigerator, computer or television.

- There is also inconsistency in consumer complaint and rectification treatment with some jurisdictions taking differing interpretations of major failure, minor failure, fair and reasonable use of the motor vehicle, age, and other factors. In other submissions to inquiries into Unfair Contract Terms, Franchising, and the ACL, MTAA has highlighted issues and case studies of the impacts this differing interpretation and treatment can have on dealers. Significant consequences for dealers has occurred when in the view of MTAA, accountability should have been with the manufacturer.

- To illustrate this matter MTAA Member, the MTA NSW has recently submitted to a NSW Government review of the *NSW Motor Dealers and Repairers Act 2013* a growing trend for consumers taking automotive businesses to the NSW Civil and Administrative Tribunal (NCAT) for interpretation of the Act and the Australian Consumer Law (ACL). Consumers are also contacting the NSW Department of Fair Trading to make complaints and MTA-NSW members have provided feedback that consumers are informed dealer or repairers have to make good. In several cases, it appears that manufacturers should have played a larger role. In some others, it appeared complaints raised were an opportunity for the consumer to get a financial advantage, and the complaint may have been vexatious if there was consistency in interpretation.

- The experience of automotive businesses in NSW is they are susceptible to different opinions of what is fair and reasonable under the ACL and even in NCAT when it comes to warranty. There is currently no consistency in the interpretation of what is acceptable quality or fit for purpose for used vehicles. MTA-NSW is of the view that legislative guidelines on these concepts as well as the appointment of a specialist unit with persons having industry experience will assist in providing guidance, consistency and certainty.

- Dealers are also defined as a distributor of motor vehicle products and thereby accountable for product fault and rectification required by some legislation and regulation. MTAA believes this definition must be investigated and changed to reflect better the role and obligations of car manufacturers and their Australian headquartered distributors. MTAA contends dealers are not distributors of the product even though they may have the responsibility and capacity to undertake repairs on behalf of the manufacturer/distributor.

- Increased protections to address these concerns remains outstanding.

- MTAA recognises warranty requirements, issues with warranty relationships between car manufacturers/distributors and dealers and the intersect of consumer protections and guarantees, are not matters that can be resolved through the Franchising Code and the recently introduced Schedule of Amendments. However, ongoing revision of the ACL should contribute to improved clarity.

- MTAA suggests there is merit in the creation of an Automotive Ombudsman within the office of the Australian Small Business and Family Enterprise Ombudsman Office (ASBFEO). The ASBFEO has excellent networks with State Small Business Commissioners and government departments.

- MTAA believes more outstanding timeliness and streamlining of dispute resolution in areas including warranty repairs and compensation, could be achieved by extending the powers and role of ASBFEO through a dedicated automotive position. The creation of such a position will aid dispute resolution. It will also provide Increased consistency given:
    - The introduction of the Schedule of Amendments specific to car dealers,
    - Changes to the broader Franchising Code.
    - The increased role of ASBFEO in franchising and franchising complaints, and
    - planned legislation and regulations for access to motor vehicle service and repair information that will also have dispute resolution requirements.

MOTOR TRADES ASSOCIATION OF AUSTRALIA

**Recommendations**

1. Develop a provision for inclusion in the Schedule of Amendments to the Franchising Code specific to car dealers to properly define warranty repair accountabilities, increase protections for dealers in meeting warranty repair obligations and ensure proper and adequate compensation requirements.
2. Alternatively develop and incorporate a specific principle to properly define warranty repair accountabilities, increased protections for dealers in meeting warranty repair obligations and ensure proper and adequate compensation requirements. Provide a mechanism to ensure compliance with the principle.
3. Create an automotive ombudsman position in the ASBFEO office to investigate, coordinate, facilitate complaints handling, mediation and dispute resolution.

## Unfair Contract Terms and Conditions

- MTAA supports calls by the ACCC Chairman Rod Sims and the Commonwealth Small Business and Family Enterprise Ombudsman (ASBFEO), to make Unfair Contract Terms illegal and subject to harsh penalties. These calls echo representations of MTAA for several years.

- MTAA also supports calls by ASBFEO for monitoring and enforcement capabilities of regulators to be enhanced to assist in determinations if terms are unfair.

- MTAA reiterates calls for the inclusion of new car dealers in Unfair Contract Terms and Conditions legislation and supporting regulations.

- MTAA is of the view dealer inclusion can be achieved by one of two options.

    1. Lift thresholds to a level that would enable the inclusion of dealers.

    2. Alternatively provide an exemption for the inclusion of dealers as franchisees, not dissimilar to the criteria recently announced by the ACCC for the application of the class exemption for collective bargaining. Dealers will be able to take advantage of the collective bargaining class exemption as franchisees, irrespective of thresholds.

- There have been examples where the lack of such protections provides an environment for manufacturers distributors to engage in exploitative conduct.
- Turnover thresholds are not representative of dealer profitability.
- There are examples where terms of a dealer agreement could be considered unfair, including:
    - Terms of the agreement are too short of securing an adequate return on considerable investment.
    - Ability to issue unilateral variation of terms during the operation of the dealer agreement, including further unspecified and unnotified investment changes to performance processes, warranty provision and reimbursement, and marketing plans.

**Recommendations**

1. Include car dealers in UCT protections by:
    A. Lifting or removing thresholds to a level that would enable the inclusion of dealers; or
    b. Provide an exemption for the inclusion of dealers as franchisees, not dissimilar to the criteria recently announced by the ACCC for the application of the class exemption for collective bargaining.
2. Make Unfair Contract Terms illegal and subject to harsh penalties.
    a. Strengthen regulators monitoring and enforcement capabilities.

## Goodwill and data ownership.

- Franchisors demonstrate scant regard for any goodwill that might have generated for their brand, by their franchisee.
- For example, MTAA is aware of circumstances in which many dealers carried significant risks in the early days of (at the time virtually unknown) entrants to the Australian vehicle market. Over time, dealers built community linkages, return business and built long-term goodwill not only in their business but also the brand of their franchisor. It is a shared benefit with one dependent on the other.
- But at cancellation, non-renewal or termination the dedication and inputs of the dealer are rarely recognised. There have also been cases where the franchisor has deliberately unduly influence the dealer's ability to sell the business or to limit other dealers ability to purchase a dealership that is not being renewed.

- The following example is representative of how once respectful and mutually beneficial relationships can turn sour and goodwill means little to nothing.

**CASE EXAMPLE – Threat to terminate**

- A multi-generation family dealer with continuous operations of over 40 years with one prominent motor vehicle brand (they were a single brand, single-site franchise dealership) faced being forcibly relocated by the franchisor or face potential termination.
- The family name is inextricably linked with the brand in that location. It is recognised and respected for values, their sales, service and professionalism, which translated into large repeat business, often from generations of the same customers.
- Like almost all dealerships, their connections with their market went far beyond business but included enduring relationships with the community of which they were part. They contributed to the community through sponsorships (sport and social welfare), assistance to community groups and individuals, and many other touchpoints, in a genuine relationship that mutually benefitted not only their business but the franchisor brand they represented.
- The franchisee possessed arguably a far better understanding of their market; backed by research, analysis, and intelligence from the franchisees' connections with that community, local and state government, customers, and other stakeholders; and had a significantly better understanding of future growth potential than the franchisor.
- At first, these attributes were seemingly understood and accepted by the franchisor who agreed to franchisee plans to invest in a significant redevelopment and upgrading of the dealership facility following the franchisor requirements.
- Then matters took a turn for the worse. By using outdated market intelligence, the franchisor determined that it would change the prime market areas for this and surrounding dealerships. The franchisor and informed the franchisee that if they wished to remain a dealer for that brand, they would need to relocate and that another dealer would subsume the majority of their market (and their community).
- The agreed position on redevelopment, costing millions of dollars, was scrapped and the only option was to agree to their demands on a 'take it or leave it' basis. The threat of potential termination if the demands were not met was real.
- The franchisee did the sums. The demanded move was illogical. It would:
  - expose the business to millions in capital investment (both land and facility) in a market where they did not have the relationships;
  - Was based on the market and other research that did not stack up with their own (or that of an independent study commissioned by the franchisee that supported their position);
  - ignored, ongoing problems of brand market share and product, and
  - with little to no capacity to obtain a return on the investment due to the lack of tenure.

**CASE EXAMPLE – Threat to terminate (continued)**

- The dealer's research clearly showed that even with the brand's market share issues and short-term lack of new product, they could still meet targets and maintain reasonable profitability – even with the capital investment requirements - at their existing site.
- The franchisee decided to fight back. After all, they had a 40 + year history and the goodwill achieved by that community relationship to protect. They had the entire families (not just one branch) financial future to consider. They had the jobs and welfare of their staff in a location that had already been hit with massive job losses to consider.
- They demonstrated they had met the requirements of the dealership agreement, including aggressive and sometimes unreasonable sales targets at a time of declining market share and reduced product offerings. They demonstrated that the baseline information on which the decision was made had significant flaws. They did their

- The intransigence and stubbornness of the franchisor, over eight years, in the above case, is breathtaking. Goodwill seemingly meant nothing, and good performance, community and brand relationships – at a time this particular brand needed it – meant nothing. The Dealers unswerving loyalty to the franchisor meant nothing.
- Other dealer franchisees are familiar with the above example only too well. MTAA is concerned such conduct may increase as manufacturers seek to reduce or alter their dealer network.
- As previously mentioned, many matters brought to the MTAA 's attention have usually been presented to the franchisee, or interpreted by them, as a 'take it or leave it' proposition. Notions of 'goodwill', and any compensation or remuneration for it, are rarely, on the table. 'Goodwill' remains, for dealers, a one-way street in that they develop it and most franchisors ignore it.
- MTAA has over many years been witness to and received countless reports of situations that escalate and transform, from a minor discomfort of a dealer about a change to a full-scale dispute to termination, all at an astounding speed (over two to three months). Such cases appear to be no more than a determined and concerted effort by the franchisor to terminate the agreement as to the first option rather than explore opportunities for a remedy.
- The Franchising Code contemplates and recognises the right to terminate may exist under a franchise agreement, and there have been amendments to improve and adopt a consistent approach including in the latest proposed changes in response to the Joint Parliamentary Inquiry into franchising.

- While there is a proposed strengthening of the recognition of goodwill requirements as part of franchisor disclosure arrangements, i.e. only whether they will be formally recognised or not, there are currently no plans to have goodwill recognised and as an enforceable provision.

- Data ownership is a contentious issue and one likely to increase if more manufacturers move towards agent model agreements that contain conditions that the franchisor solely owns data.

- Franchisors require consumer details for product warranty, recalls, marketing etc. while dealers will have spent considerable time and resources assembling large customer databases that provide valuable data for the business. Many dealers report that agreements contain provisions which fail to recognise a dealers rights to the data adequately or to own the databases.

**Recommendations**

1. MTAA recommends goodwill treatment should not only be disclosed but a formula agreed that independently assesses the value of goodwill to be compensated in the event of termination, cancellation or non-renewal.
2. Goodwill be included as a part of a compensation provision to be developed and included in the Schedule of Amendments for car dealers to the Franchising Code, or
3. Goodwill be included as a part of a compensation an agreed principle which is included or referred to in the Schedule of Amendments for car dealers to the Franchising Code

## Terms of Reference B - Existing legislative, regulatory and self-regulatory arrangements

- A significant focus of inquiries and investigations into automotive franchising and dealer agreements across car, motorcycle, farm machinery and others has been on power imbalances and the attributes and influence of this on the practical operation of agreements.

- MTAA and Members have advocated hard regarding the impacts of power imbalance, transparency, and proper recognition of dealer's limited abilities to secure fair and reasonable treatment during the initial negotiation of the agreement, its operation and particularly at the end of term or termination of the agreement.

- Relatively small incremental changes to ACL and CCA Industry Codes benefitting dealers have been secured as a result of these representations over many years including improvements in disclosure, dispute notification and other elements.

- Real progress gathered pace with an Australian Competition and Consumer Commission (ACCC) New Car Market Study in 2016/17, and specific focus by the Australian Parliament' Fairness in Franchising' inquiry in 2018/19 and subsequent investigations by the Commonwealth Treasury and Industry Departments in 2018/19/20. Additional details on the Australian legislative and regulatory environment are throughout this submission.

- There is a requirement for improved transparency and clarity of jurisdictional legislation and regulations and the interaction with ACL, CCA and Franchising Code. There is also a need for more consistent application and interpretation of the Commonwealth legislation and regulation by jurisdictions.

## Collective Bargaining class exemption

- MTAA welcomes the recent announcement by the ACCC of its intention to implement a class exemption for collective bargaining for small business, franchisees, and fuel retailers, subject to passage through the Australian Parliament in early 2021.

- MTAA suggests the ability of dealers (whose dealer agreements or proposed dealer agreements are to be governed by the Franchising Code) to bargain in the negotiation of those dealer agreements collectively is a potential game-changer and essential negotiation tool.

- Much will be dependent on the preparedness of franchisees to seize the opportunity and for franchisors to meaningfully engage in collective bargaining as a demonstration of good faith negotiations (as they are not compelled to by requirement or legislation).

- Rather than being forced to accept 'take it or leave it' terms and conditions as individual dealerships, dealers could as an entire network, or as a group, or with a representative, negotiate any terms and conditions provided the manufacturer agrees to 'sit down at the table'.

- Of significance is that employee number and turnover thresholds do not preclude dealers utilising the collective bargaining class exemption if negotiating a dealer agreement governed by the Franchising Code.

- However, there are still weaknesses. The first is that the class exemption does not include an ability to collectively refuse to contract with the target business (manufacturer/distributor). The second is there is no requirement that a car manufacturer/distributor franchisor must collectively bargain if it receives a request to do so.

- Even if 100 dealers wished to bargain and negotiate a dealer agreement collectively, the manufacturer does not have to agree to do this. MTAA is of a view that refusal to engage in collective bargaining ould be viewed as an impost on good faith negotiations.

- However, MTAA understands that authorisation for collective boycott, where businesses could refuse to contract with the target business, is still available through existing processes.

- MTAA notes the decision of the National Honda Dealer Council (NHDC) and a group of Honda dealers to bargain under existing requirements collectively.

- Honda Australia is proposing to rationalise its dealer network and introduce an agent business model. The negotiation of termination arrangements for dealers no longer required and the negotiation of a new 'agent' agreement including governance and negotiated outcomes on all of the areas mentioned in this and other submissions, will be an insightful case study.

## Terms of Reference C - Current and proposed government policy.

- In 2020 there has been more significant regulatory change reflecting the advocacy and representations of MTAA and Members than at any other time in the previous 20 years. However, highly complex areas still require additional attention.

- The Commonwealth Government has taken considered action to address some of the now recognised impacts of the power imbalance 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 gone some way to recognising the unique nature of new car retail franchising. It provides the legislative instrument necessary to strengthen accountability, requirements, and obligations.

- Also, the Commonwealth is progressing actions to further enhance the Franchising Code of Conduct following the government's response to the 'Fairness in Franchising' Joint Parliamentary Inquiry final report. MTAA also welcomes the proposed changes to areas including:
    - capital expenditure
    - multi-party dispute resolution
    - marketing funds
    - exit arrangements
    - doubling of penalties, and
    - other elements for the wider franchising industry which have implications for dealers and other automotive industries including motorcycle and farm machinery.

- However, other critical issues impacting the relationship, including unfair contract terms and conditions, compensation, tenure and provision of adequate protections for dealers regarding warranty and proper payment of warranty work, and fast dispute resolution remain elusive. MTAA acknowledges and respects that these outstanding matters are complex, and in some cases challenging, if not impossible to legislate, regulate, monitor, or enforce by the Commonwealth.

- Nonetheless, MTAA respectfully suggests an outcome of the Committee's investigations is to recommend further government intervention using the recently enacted car dealer specific amendments to the Franchising Code and where appropriate the broader Franchising Code and ACL.

- Regulators must have appropriate policy settings and regulatory enforcement capability to stamp out detrimental conduct, with a penalty regime of substance for breaches.

- Penalties must be substantial to dissuade any potential of poor conduct when foreign multi-nationals vacate the Australian market or substantially restructure their Australian market presence to the detriment of Australian businesses and consumers.

- To assist the Committee's thinking in this area, the MTAA makes the following suggestions to address outstanding franchise relationship matters that have been exacerbated by the GMH decision and behaviour of some other manufacturers since that decision.

- 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) 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 the broader economy, minimising risk and potential for unintended consequences.

MOTOR TRADES ASSOCIATION OF AUSTRALIA

## Recommendations

- MTAA recommends the urgent finalisation of the following outstanding matters:
    - Agreement and formalisation of agreed industry principles that outline expected conduct and requirements of franchisors and franchisees in the development, operation and end of dealer agreements including:
        - Arrangements for fair and reasonable compensation in the event of termination, non-renewal, or business model/dealer network change.
        - Process and methodology for recognition of goodwill and arrangements for inclusion in compensation arrangements.
        - Further strengthened dispute resolution mechanisms including mediation, determination, and arbitration, be included as a requirement included in dealer agreements using the Dairy Code and ACCC Digital Media regulations as base reference documents.
        - Process for recognition in dealer agreements of adequate tenure terms to ensure sufficient time to secure proper returns on investment.
    - Mandate the principles by the inclusion of a provision in the Schedule of Amendments.
    - Alternatively, as a temporary measure, implement the principles as voluntary but with a government commitment and requirement for effective monitoring by regulators. With this compromise, MTAA would require a commitment and surety for additional regulatory change within a specific timeframe if compliance breaches of the principles are detected.

MOTOR TRADES ASSOCIATION OF AUSTRALIA

## Terms of Reference D - Dispute resolution systems and penalties for breaches of the Franchising Code of Conduct.

- Dispute resolution, mediation, arbitration is a vexed issue that has poleaxed and polarised some manufacturer/distributor- dealer relationships that have soured and an additional source of power imbalance.

- Some of the issues are common across franchise industry disputes. Dominant or powerful market participants can invariably 'out resource', 'out wait', 'out-spend' and 'outsmart' smaller individual market participants such as dealers. Some franchisors are effective at 'divide and conquer' tactics to secure the desired result, particularly with large groups of franchisees. Smaller businesses unable to participate in a protracted negotiation or dispute reso

- Even established processes for raising and attempting to resolve disputes are complicated, time-consuming and rarely settled, if at all, within timeframes set by the action taken, or deadlines for decisions. MTAA suggests an example of this conduct was GMH refusal to budge on original deadlines for a decision to accept or reject compensation arrangements and then when essentially forced to provide additional time, after eternal pressure, final deadlines were not negotiable.

- MTAA believes the penalty regime and enforcement are not of sufficient level to act as a deterrence for poor conduct or breach given the size of international car manufacturers and their distributors. The doubling of existing penalties, as announced by the Government in its response to the 'Fairness in Franchising' final report pales against the penalty increases called for by the ACCC. Some manufacturers and their representative body suggest such changes along with other reforms to franchising may negatively influence whether a brand continues to participate in the Australian market. MTAA suggests that compliance with a nation's regulatory environment is a cost of doing business and is only a concern if non-compliance is a factor.

- MTAA suggests there is still an opportunity to include penalties for additional areas of breach of further provisions in the Franchising Code and importantly, the Schedule of Amendments for car dealers. MTAA points to the broad range of penalties provided in the Dairy Code as an example.

- As mentioned in this submission, a unilateral variation that forces change to a franchise business model, among potential others should be prohibited and carry a penalty for breach

- MTAA also welcomes the intent to amend the Franchising Code to include dispute resolution provisions found in the Dairy Code.

- MTAA understands the difficulty, if not impossibility, of mandating binding arbitration due to constitutional constraints, but believes there is a practical compromise to this desired end state if elements of the Dairy Code are incorporated in the Franchising Code and specifically to Dealer Agreements.

- MTAA suggests any Dealer Agreement must provide complaint handling procedure, the appointment of an independent mediator and arbitration adviser as prescribed in the Dairy Code. As previously mentioned in this submission, an automotive ombudsman in the ASBFEO office would coordinate and streamline this outcome.

**Recommendations**

- MTAA supports the incorporation of dispute resolution mechanisms found in the Dairy to be harmonised with the Franchising Code.

- MTAA recommends the creation of an Automotive Ombudsman role in the office of the Australian Small Business and Family Enterprises Ombudsman to coordinate and facilitate dispute resolution investigations, and determination/arbitration.

- Dispute notification and resolution processes be defined and included in disclosure materials and in dealer agreements including timeframes.

- Unilateral variations are prohibited unless agreed to by a majority of dealers.

## Terms of Reference E - Current and proposed business models in selling vehicles.

- It is fanciful to suggest there will not be changes to business models and arrangements deployed for the selling of motor vehicles in the future. Of importance is how the introduction and impact of changes differences on existing business partners, service providers and consumers.

- Some changes have already occurred. Direct selling of vehicles by manufacturers online. Specific outlets for low volume specialist vehicles such as branded electric vehicles and even some brand models being available initially via online or permanently.

- Some manufacturers have already adopted or plan to adopt a move to 'Agent' business models where the manufacturer or their distributor owns and markets the vehicle. The dealers in most cases are paid a commission. Importantly, requirements for the provision of service, warranty, parts and other services will be mostly unchanged. The move to such business models will undoubtedly raise questions of the governance of such arrangements.

- Critical to such models are the structure and provisions of agent agreements, what impacts they may have and whether the Franchising Code will still govern such agreements. Some manufacturers, considering the introduction of an 'agent' model, have indicated they intend that the agent model for their brand will continue to be governed by the Franchising Code. Others have not declared their intent.

- Some dealers think that an 'agent' model may provide benefits and remove some of the areas of contention and streamline the relations. Others believe that the use of 'Agent' or other models will perpetuate existing power imbalances under a different guise and 'Agent' or other business models are merely a means to bypass introduced and planned changes to agreements governed by the Franchising Code.

- MTAA suggests a fundamental issue is whether the adoption of an alternative business model is a hybrid of existing agreements and still governed by the Franchise Code of Conduct. Or whether an 'agent' agreement will be complex contracts with elements that lend to being regulated under the Franchise Code, but specify they are not.

- For example, MTAA notes that General Motors Holden' Service' agreement for the future servicing of Holden vehicles contains clauses that appear identical to previous franchise agreement clauses. However, the contract - the signing of which formed part of the acceptance of GMH's compensation offer - has also introduced clauses specifically indicating the service agreement is not a franchise agreement and therefore not governed by the Franchising Code.

- MTAA notes that one manufacturer pursuing an 'Agent' model in the Australian market maintains 'agent' agreements will continue to be governed by the Franchising Code. Interestingly, it has also stated it will not pursue such a model in the United States because of legislation that prohibits such conduct in most state jurisdictions.

- MTAA suggests there are policy and regulatory options to be considered to ensure a better balance in manufacture/dealer relationships and the treatment and role of future business models.

- The purpose of such options is not to maintain the status quo or provide protections from potential future changes, but to ensure such business model changes are not undertaken unilaterally to the detriment of dealers or to avoid regulatory requirements.

- For example, MTAA suggests an 'Agent' agreement may meet the definition of a Managed Investment Scheme governed under the Corporations Act (Cth) 2001 except for an exemption contained in that Act. If this is the case, then it may be open to the Government to explore an amendment of the Corporations Act to remove the exemption and have such 'Agent' agreements governed under the Corporations Act.

- Alternatively, introducing 'agent' or other business models may be a unilateral change under franchising law. If so, dealers may face significant detriment because they have invested many millions of dollars in a franchise business model and not an 'agent' model.

- MTAA suggests if these interpretations are correct, then there may be two options the Committee could consider.

**Option 1 – Amend the Corporations Act (Cth) 2001**

- The first option to consider is amending the Corporations Act (Cth) 2001 to remove the exemption of franchise arrangements the application of the Act so that 'Agent' agreements are regulated as Managed Investment Schemes under the Corporations Act rather than as franchises under the Franchising Code of Conduct.

- The current exemption contained in the Corporations Act could be removed by amending the definition of franchise agreement contained in s9, which presently states:

> *"franchise means an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trademark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf."*

- While the above definition of a franchise is different from that contained in the Franchising Code of Conduct, it could be amended for the avoidance of doubt to state:

> 'An agency arrangement or some such similar arrangement is not a franchise as defined in the Corporations Act despite being a franchise agreement as defined in the Franchising Code.'

- The Corporations Act requires a Managed Investment Scheme to have all the following elements:
  - it must be a "scheme";
  - it must involve a contribution of money or money's worth to acquire rights to benefits;
  - the contributions are to be pooled or used in a common enterprise to produce benefits for the scheme members; and
  - the members do not have day to day control over the scheme.

- MTAA suggests the agent model proposed by one manufacturer has all the elements of a Managed Investment Scheme. Therefore it is reasonably arguable in public policy terms that such an agency arrangement be regulated by the Corporations Act rather than the Franchising Code of Conduct.

- MTAA understands the agency arrangement proposed by this manufacturer does not have the following usual features associated with a franchise arrangement as reflected in the current dealer agreement:
  - where the franchisee makes a payment for the purchase of vehicles;
  - where the franchisee is primarily responsible for the marketing and promotion of the cars in its designated Prime Market Area; and
  - where the franchisee owns the customer data.

- MTAA understands this option may not necessarily resolve all concerns and issues associated with an Agent Agreement. It may also be met with resistance by market stakeholders and within Government and may pose difficulties with multiple changes. However, MTAA provides this option to demonstrate a range of thinking on the issue of preserving the intent of addressing power imbalances in existing and future relationships.

**Option Two - Amend the Franchising Code of Conduct**

- The second and preferred MTAA option is to consider having agency agreements regulated by the Franchising Code of Conduct by a further amendment to the Schedule of Amendments for car dealers.

- MTAA recommends a prohibition on motor vehicle distributors making unilateral variations to the existing business format franchising model, which formed the basis for dealers decisions to invest in the franchise.

- If a car manufacturer/distributor elects to move an entire dealer network to an alternative business model such as an agent model and intends to retain participants from the dealer network, then such a change would require a 75% acceptance of the proposal by those dealers.

- Under this option, MTAA suggests amending the Franchising Code to adopt a specific provision that prevents motor vehicle distributors making unilateral decisions either to vary the franchise agreement or to change the business model to the financial disadvantage of dealers. This approach has similarities to those adopted in overseas jurisdictions such as Michigan in the United States of America.

- MTAA suggests a provision to the Franchising Code Schedule of Amendments specific to car dealers may include:

> *"A motor vehicle manufacturer or distributor shall not change or alter the franchise business model for the distribution of new motor vehicles, unless a 75% majority of dealers supports any change and that dealers, in general, will not be financially disadvantaged by such a change."*

- MTAA suggests another way of amending the Franchising Code to deal with unilateral changes made by distributors to the business model would be to include a new provision in the Franchising Code or Schedule of Amendments. Such a condition should aim to provide compensation to dealers in a wide range of circumstances where the existing dealer agreement is terminated, not renewed, or where a dealer decides not to enter into a new agreement because the franchisor has substantially changed the business model.

- For example, Section 20 of the *Michigan, Motor Vehicle Manufacturers, Distributors, Wholesalers and Dealers Act 1981* provides a new motor vehicle dealer with an action to recover actual damages reasonably incurred as a result of the termination, cancellation, failure or discontinuance of a dealer agreement. If such a provision is adopted in Australia MTAA respectfully suggests it would appear to be wide enough to encompass manufacturers moving to an agency model and to the conduct of GMH in ceasing its operations in Australia. Section 20 provides:

> *'If a manufacturer or distributor terminates, cancels, fails to renew, or discontinues a dealer agreement for other than good cause as defined in this act , the new motor vehicle dealer may bring an action against the manufacturer or distributor to recover actual damages reasonably incurred as a result of the termination, cancellation, failure or discontinuance.*
> *'A manufacturer or distributor who violates the Michigan Motor Vehicle Manufacturers, Distributors, Wholesalers and Dealers Act is liable for all damages sustained by the new motor vehicle dealer because of this violation.*
> *'A manufacturer or distributor or new motor vehicle dealer may bring an action for declaratory judgement for determination of any controversy arising pursuant to this Act.*
> *'A manufacturer or distributor who violates this act shall be liable for all court costs and reasonable attorney's fees incurred by the dealer."*

MOTOR TRADES ASSOCIATION OF AUSTRALIA

## Recommendation

- Investigate policy and regulatory options to ensure alternative business models, including agent agreements, meet minimum requirements of competition and consumer law, including franchising, and are not detrimental to dealers in their construct and application.
- Clarity is provided that franchising regulations cover agent type agreements.
- MTAA recommends consideration be given to the drafting and inclusion of a provision in the Franchise Code Schedule of Amendments for car dealers which prohibit motor vehicle distributors making unilateral variations to the existing business format franchising model by either a direct provision such as:

  *"A motor vehicle manufacturer or distributor shall not change or alter the business model for the distribution of new motor vehicles by way of a franchise agreement or other distribution system including an agency agreement to new motor vehicle dealers unless any change is supported by a majority of 75% dealers and that dealers in general will not be financially disadvantaged by such a change."*

- Or alternatively, amending the Franchising Code to incorporate a prohibition on unilateral variation to existing business format franchising model as a part of a provision that deals with the payment of compensation where the existing dealer agreement is terminated, not renewed, or where a dealer decides not to enter into a new agreement or where the distributor has substantially changed the business model.
- Consider an additional provision that would allow a dealer to initiate legal action to recover reasonable damages incurred in the event of cancellation, termination or nonrenewal.

MOTOR TRADES ASSOCIATION OF AUSTRALIA

## Terms of Reference F - Legislative, regulatory and self-regulatory arrangements found in international markets.

- Many international jurisdictions have franchising laws and regulations governing relationships between car manufactures/distributors and dealers.

- However, many do not or have laws and regulations of comparison to Australian competition law and franchising regulations. For this submission, MTAA has concentrated on the United States because:

    - United States automobile dealer franchising has been the dominant business format of car manufacturers/distributors and dealer relationships since the 1930s.
    - There have been numerous challenges and defences of these laws as market changes occur, providing substantial arguments for and against conduct that is similar if not identical to those experienced in the Australian and other worldwide automotive retail markets.
    - Dealer franchising in the US provides superior context, investigations, studies, academic, industry and legal review, than any other jurisdiction.
    - The European environment demonstrates significant fragmentation, less holistic legislative and regulatory approaches and a level of law and regulation of arguably lesser influence and standing than those of the United States or Australia.
    - European franchising laws and regulations are inconsistent, and generally lacking across the European Union.

- For these reasons, US laws and regulations are often referred to by MTAA and other associations and market participants as a reference point to the behaviours, conduct and actions, necessitating intervention in the Australian context and to potential legal, legislative and regulatory interventions.

### Australia in context

- According to Griffith University Franchising Australia 2016 report2:
    - One thousand one hundred twenty businesses operate as a franchisor, engaging almost 80,000 franchisees who in turn employ 470,000 Australians
    - The franchising industry turns over A$146 billion with motor vehicle sales contributing $43.4 billion of that total.
    - Around four per cent of small businesses in Australia are franchise operations.
    - The ACL, CCA and Franchising Code have specific governance for automotive franchising as well as common law and other Commonwealth and jurisdictions legislation and regulations.

[2] Franchising Australia, https://assets.cdn.thewebconsole.com/S3WEB1401/images/Franchising-report-2016.pdf

- According to the United States Department of Commerce, 'Australia has more franchising outlets per capita than any other country and three times more than the United States, but over 92 per cent of franchises are Australian-developed.'3

**United States**

- It is somewhat ironic that the decision to close Australiasian Holden dealer networks in 2020 is by the same company that pioneered franchising in automotive retail as far back as 1898. General Motors was one of, if not the first company in the world to use a franchising method to sell steam automobiles.4

- Laws and regulations governing the dealer-franchise system in the United States is the result of exhaustive lobbying efforts by car dealers from the 1930s to 1950s who called for Government regulatory intervention to counter alleged abuses of the franchise system by car manufacturers.5

- Today all 50 jurisdictions in the United States have laws in response to this intense lobbying. There are regular enthusiastic defences of these laws. The most recent involves applications by TELSA to permit direct selling of motor vehicles. Other reasons for vigorous defence campaigns from time to time is because of the ongoing conduct by manufacturers detrimental to dealers.

- The provisions in these laws vary from jurisdiction to jurisdiction. Still, they commonly include prohibitions on forcing dealers to accept unwanted cars, protections against termination of franchise agreements, and restrictions on granting additional franchises in a franchised dealers geographic market area as well as direct selling by manufacturers.6

- The United States Federal Trade Commission (FTC) is at odds with most jurisdictional legislation as it has alternative views and recommends allowing direct manufacturer sales.

- The conduct which led to the drafting of laws and regulations in the United States has remained consistent for decades, albeit with variations as new participants have entered the market and circumstances and influences have changed along with the market.

---

[3] FRANCHISING INDUSTRY A Reference for US Exporters, https://www.franchise.org/sites/default/files/2019-05/USCS_Franchising_Resource_Guide_2018.pdf

[4] Francine Lafontaine & Fiona Scott Morton, Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis, 24J. ECON. PERSP. 233, 234 (2010).

[5] Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism Daniel A. Crane University of Michigan Law School, 2016 https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://en.wikipedia.org/&httpsredir=1&article=2720&context=articles

[6] Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism Daniel A. Crane University of Michigan Law School, 2016 https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://en.wikipedia.org/&httpsredir=1&article=2720&context=articles pg 573/574

- MTAA does not suggest importing United States laws and regulations to address identified power imbalances in the Australian market as the solution.

- However, MTAA respectfully suggests, some provisions in these US jurisdictional laws are essential references to guide potential solutions in the Australian context as they deal with similar if not identical conduct which is the cause of amplified concerns.

- MTAA is of the view that Australia's overall legislative and regulatory regime for competition, consumer protection, and general franchising is mostly leading, modern and reasonably balanced in its approach to public policy and government intervention when compared to international jurisdictions.

- The arguments have long been that automotive franchising is a vastly different franchising and competition consideration due to the nature of relationships, the products involved, and the incomparable level of investments and after-sale interactions required.

- Therefore there is an ongoing requirement for continuous improvement. The US laws and provisions are useful in this context.

- An example of a reference point for potential solutions to power imbalances in Australian manufacturer/distributor and dealer relationships is the Michigan, Motor ***Vehicle Manufacturers, Distributors, Wholesalers, and Dealers Act of 1981*** ( http://www.legislature.mi.gov/(S(ayh1gmcj5xbgjtv4f0zaw4vf))/mileg.aspx?page=getObject&objectName=mcl-Act-118-of-1981 ) and amendments contained in **Senate Bill no. 1308** ( http://www.legislature.mi.gov/documents/2009-2010/publicact/pdf/2010-PA-0138.pdf ).

- MTAA provides the following examination of this particular Act and context to outstanding matters impacting Australian Dealers along with potential solutions.

**Key issue - Injunctive Relief**

- Injunctive relief may be a technical legal issue, but it is an issue that causes problems for Australian dealers. In Australia, where a dealer needs to take immediate legal action to protect its rights, there are requirements to provide to the Court an undertaking for damages caused to the manufacturer/distributor.

  **Michigan Act:** A provision provides discretionary power to the Court to grant an injunction without a bond (Section 21 Para 445.1581).

  **Australian context and potential solution:** A similar provision in Australian law would enable the granting of an injunction without an undertaking on the payment of damages by a dealer, streamlining the legal process to protect their rights.

MOTOR TRADES ASSOCIATION OF AUSTRALIA

## Consumer Claims and Product Defects

- While MTAA understands and respects the protections afforded Australian consumers, MTAA has ongoing concerns regarding the intersect between the ACL, consumer guarantees and warranties and the accountabilities of manufacturers/distributors and dealers.

  MTAA suggests the Michigan Act provides increased clarity on the role of manufacturers/distributors and dealers in the area of product defects and consumer claims.

  For example,

  **Michigan Act:** Provisions in the Michigan Act (Section 19 Para 445.1579) provides broad indemnification for dealers against manufacturers/distributors regarding product defects of vehicles, parts or accessories.

  Also, 2010 amendments provided additional clarity, including:

  > *'Sec. 17. (1) Each new motor vehicle manufacturer shall specify in writing to each of its new motor vehicle dealers licensed in this state the dealer's obligations for preparation, delivery, and warranty service on its products. A manufacturer shall compensate a new motor vehicle dealer for warranty service required of the dealer by the manufacturer. A manufacturer shall provide a new motor vehicle dealer with the Schedule of compensation to be paid to the dealer for parts, work, and service, and the time allowance for the performance of the work and service.*
  > *(2) A schedule of compensation described in subsection (1) shall include reasonable compensation for diagnostic work and repair service and labor. Time allowances for the diagnosis and performance of warranty work and service shall be reasonable and adequate for the work to be performed. In determining what constitutes reasonable compensation under this section, the principal factor to be given consideration is the prevailing wage rates being paid by dealers in the community in which the dealer is doing business, and the compensation of a dealer for warranty labor shall not be less than the rates charged by the dealer for like service to retail customers for nonwarranty service and repairs, if those rates are reasonable. (3) A manufacturer shall not do any of the following: (a) Fail to perform any warranty obligation. (b) Fail to include in written notices of factory recalls to new motor vehicle owners and dealers the expected date by which necessary parts and equipment will be available to dealers for the correction of the defects. 3 ESB 1308 (c) Fail to compensate a new motor vehicle dealer licensed in this state for repairs made in connection with the recall.'*

  **Australian context and potential solution:** The provision in and 2010 amendments to the Michigan Act may provide a reference source for improved protection for dealers and strengthen accountability for manufacturers/distributors. MTAA would be of a view the existing indemnification provision contained in the ACL limits assistance to dealers if they were to assert a claim against the manufacturer/distributor for product defect.

MOTOR TRADES ASSOCIATION OF AUSTRALIA

MTAA is aware of cases where dealers are party to legal proceedings about major vehicle defects. The manufacturer/distributor was not a party to the legal proceedings or was otherwise unwilling to assist the consumer. While dealers have rights to indemnification, almost all dealers do not make any claim against manufacturers/distributor for fear of disturbing the relationship by eventual retribution.

To strengthen protections, MTAA suggests the drafting of a provision for inclusion in the Schedule of Amendments that better reflects accountabilities using the Michigan Act or similar as a reference.

MTAA also recommends the drafting of a specific provision that improves indemnification, making it clear such a condition would override existing ACL provision.

**Change to Business Model**

- MTAA has raised the potential impacts of moves by some manufacturers/distributors to an 'agent' model and that such a move might have the intended or unintended consequence of agent model agreements no longer governed by the Franchising Code.

  MTAA is also concerned that any moves from a franchising model to an agent model might be a unilateral variation. Depending on the timing and other factors of such a move, it will likely cause significant detriment as it will not appropriately consider the investments made as conditions of the previous franchise agreement.

  MTAA notes recent media commentary by Mercedes Benz that the Franchising Code will still govern 'agent' agreements reached as part of a flagged move to an 'agent' business model. The regulator has also provided some assurances to MTAA that if 'agent' agreements 'look, act and contain content' as a franchise agreement, then they will likely be monitored and enforced under franchising regulations.

  While MTAA welcomes the assurance of Mercedes Benz and the commitment of the regulator, there is no compliance requirement leaving a vacuum for interpretation and potential extrapolative conduct.

  MTAA notes that Mercedez Benz also stated it would not roll out the agency model in the United States. MTAA suggests that the presence of laws and regulations in most jurisdictions is the prohibitor for this decision.

Already MTAA has sighted agreements containing clauses that explicitly state the supplied documentation to the dealer is not a franchise agreement. Yet, it contains many identical provisions from previous franchise agreements. The only change is the inclusion of a condition that says it is not a franchise agreement.

**Michigan Act:** *Section 14 Para 445.1574* of the Michigan Act states:

> *(a) Adopt, change, establish, or implement a plan or system for the allocation and distribution of new motor vehicles to new motor vehicle dealers that is arbitrary or capricious, or modify an existing plan or system that causes the plan or system to be arbitrary or capricious.*

**Australian context and potential solution:** MTAA suggests there remains an opportunity to clarify further the governance of 'agent' and other business model agreements.

MTAA suggests the Michigan Act provides a guide to the development of a further amendment to the Franchising Code car dealer specific amendments to address the potential consequences of unilateral variation of moving to an agency agreement.

**End of Dealer Agreements**

- Responses in this submission to other areas of inquiry reflect views and recommendations on this matter.

**Terms of Reference G - the imposition of restraints of trade on car dealers from car manufacturers.**

- Responses in this submission to other areas of inquiry reflect views and recommendations on this matter.

End of Submission