Submissions by the Motor Traders' Association of New South Wales to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Franchising Code of Conduct and Other Matters

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APPLICATION TO APPEAR BEFORE THE COMMITTEE

The Motor Traders' Association of New South Wales has invested considerable time, effort and resources to prepare this submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Franchising Code of Conduct and other Matters.

The Association has adopted this course of action because it believes this committee's inquiry has the opportunity to lay the groundwork, at a federal level, for critical changes to the Franchising Code of Conduct, and in particular how it affects the motor vehicle industry.

The Motor Traders Association NSW is the peak industry body for the motor industry in NSW and is the most representative body for franchise motor dealers in the state. In 2007, 320,058 new motor vehicles were sold by dealers in NSW representing more than $20 billion in turnover a year.

The industry is also an important employer, especially in regional and rural NSW, with about 35,000 employees. It also trains more than 4000 apprentices and trainees a year.

As such the Motor Traders Association of New South Wales requests the opportunity to make a verbal submission to the committee to amplify the points made in its written submission.

*In this submission the words manufacturer, factory, distributor and franchisor are interchangeable

THE INQUIRY: WHY IT'S CRITICALLY IMPORTANT

The decision by the Federal Government to have an inquiry by the Parliamentary Joint Committee on Corporations and Financial Services into the Franchising Code of Conduct and other Matters could not be timelier. State parliamentary reports, a Motion in the Federal Parliament, and arguments advanced in a recent High Court case, all point to the importance of this inquiry.

In April 2008, a report was handed down to the Western Australian Minister for Small Business titled: "Inquiry into the Operation of Franchise Businesses in Western Australia". The comprehensive report, which received more than 100 submissions, said: "The Inquiry is firmly of the view that most franchise systems operate within the spirit and intent of the Franchising Code of Conduct. The Code serves the industry well; *however, issues raised in submissions made to this Inquiry reveal that further improvements to the Australian franchising operating environment are not only desirable but also necessary*." (MTA's emphasis)

A month later, on May 6, the Economic and Finance Committee of the South Australian Parliament tabled its report titled: "Franchises". It took an in-depth look at issues such as "Disclosure", "Unconscionable Conduct", "Dispute Resolution" and "Good Faith and Fair Dealing". [Both inquiries were initiated in the wake of the 2006 Review of the Disclosure Provisions of the Franchising Code of Conduct undertaken by the then Federal Government. Chaired by KPMG partner Graeme Matthews, it made 34 recommendations of which some were incorporated into the Code and took effect on March 1 2008.]

The fact two State parliaments set up their own inquiries after the Matthews Review strongly suggests there are ongoing concerns among legislators about the franchising business model.

This was highlighted by a debate in the Main Committee of the House of Representatives on September 1, 2008 when Mr Don Randall (Liberal member for the Western Australian seat of Canning) put forward a Motion that requested that the House recognise, and take measures to rectify, the difficulties facing franchisees.

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Randall stated that the House:

- "Recognises the severe financial distress and hardship faced by a number of current and former franchisees as a direct result of franchisor conduct;
- "Acknowledges that franchisors must be held accountable for their unconscionable conduct, including non-disclosure, through a more stringent and determined application of existing Trade Practices legislation;
- "Notes that there are many franchisees that have no adequate or available means to redress their grievances without recourse or expensive and often unaffordable litigation; and
- "Considers the introduction of provisions, similar to those available in industrial relations legislation for mediation, conciliation and arbitration, at no cost to the franchisee."

Randall received statements of support from Shayne Neumann (Labor), Steve Irons (Liberal), Julie Owens (Labor), Joanna Gash (Liberal), Sharryn Jackson (Labor), Judi Moylan (Liberal) and Jill Hall (Labor).

The MTA (NSW) concurs with the sentiments expressed in Randall's Motion.

Finally, in the High Court case, Master Education Services Pty Limited (Appellant) and Jean Florence Ketchell (Respondent), in which the court allowed the appeal, it said as part of its Order on August 27, 2008: "In the Second Reading Speech of the Trade Practices Amendment (Fair Trading) Bill 1997, it was stated that it was proposed to strengthen legal rights available with respect to unfair business conduct, the enforcement of rights and access to remedies. The Bill was said to achieve these objectives by implementing industry codes of practice and by providing access to protection against unconscionable conduct ...

"In the Explanatory Statement with respect to the regulations which prescribe the Code, it was said that the operation of the franchising sector had been of concern to the Government for many years. The sector was characterised by high levels of dispute, generally arising out of the imbalance of power between franchisors and

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franchisees. Major problems in the sector included inadequate disclosures by franchisors prior to franchise agreements being entered into."

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KEY POINTS

What follows is the executive summary by the MTA (NSW) in which the organisation summarises its case. But we think it important to first state the key points that underline this submission.

1. What is happening in the motor vehicle industry vis-a-vis the relationship between the factories and franchisees is increasingly anti-competitive and ultimately against the interests of consumers.

2. In the motor vehicle industry, there is no such thing as a level playing field; the economic disparity between franchisor and franchisee is simply too vast. And in an industry becoming increasingly competitive and experiencing slimmer margins, it means that economic imperatives often overtake issues of integrity and fairness. [Economic studies show that in areas where there are only Coles and Woolworths, grocery prices are materially higher than where there is also an IGA or Aldi.]

3. In a very real sense motor vehicle dealers are "consumers" and require protection from the economic muscle of the factories. By not providing this protection there inevitably will be a continuation of the trend towards a reduction of intra-brand competition in which the consumer is the ultimate loser.

4. As the case studies will demonstrate, franchisees invest significantly in their businesses, leaving them financially vulnerable when franchisors abruptly change the rules of the game.

5. The size, complexity, and economic importance of motor vehicle traders (particularly in rural and regional Australia) require that this franchise industry has its own specific legislative model.

6. Giving franchisees more rights is not an end in itself; the dispute resolution process must be simplified and the cost minimised. Today many franchisees are simply unable to meet the cost of a lengthy dispute with a factory.

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7. The MTA (NSW) does not expect governments to legislate against stupidity. But the current state of play in the motor vehicle industry means that the factories can impose their will on a reasonable person acting prudently. This must be addressed.

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EXECUTIVE SUMMARY

1. The Motor Traders' Association of New South Wales

Founded in 1910, the Motor Traders' Association of New South Wales (MTA) represents owners and business principals across all sectors of the automotive industry in New South Wales.

The MTA is an employers' association specifically for businesses in the motor industry and has more than 6000 members in New South Wales. The Association aims to help the motor industry by the daily running of members' businesses through advice and services, as well as lobbying governments to ensure the long-term viability of the industry.

The MTA is the principal party and a leader in industrial relations issues affecting the retail motor industry.

The MTA is also a founding member of the Motor Trades Association of Australia (MTAA) – the federal body that draws together MTA's sister organisations in other states and territories to represent the industry at Federal Government level.

2. Undesirable Developments in the Franchise Industry

In recent times the MTA has noticed the following disturbing developments/features of the automobile market in Australia:

(a) The move by manufacturers* to transfer profit from dealers to manufacturers by reducing margins on goods and services and shifting costs to dealers;

(b) The tendency of some manufacturers to alter dealer return away from objective gross profit margins to subjective "incentive", "performance", "quality" and "excellence" bonuses. The use of these devices results in;

(i) The reduction of intra-brand competition; and

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(ii) Compliance with practices aimed at resale price maintenance and third line forcing that are of questionable legality;

(c) Continual movement of the "ownership deck chairs" in the global market with further amalgamation, rationalisations, mergers and acquisitions concentrating market power and reducing inter-brand competition at the manufacturer level;

(d) Experimentation by manufacturers with devices to retake both wholesale and retail margins, for example by:

(i) Increased presence of manufacturers in the retail market by setting up or taking over additional retail outlets;

(ii) Ford's failed Retail Joint Venture (RJV). Ford sold its RJV to the Imperial Holdings Group of South Africa in 2005;

(iii) The sacking of all Melbourne independent dealers by Subaru and the substitution by one "mega dealer" owned by the manufacturer. This subject matter forms one of the case studies reviewed later;

(iv) The non-renewal, apparently without, or without any reasonable cause, of multi-decade independent dealers and their replacement with manufacturer-owned dealerships;

(v) The opening of additional manufacturer-owned dealerships that decrease the business funnel for existing dealers and puts them in competition with a dealer that has the benefit of both wholesale and retail gross margins as well as access to the financial substance of the manufacturer;

(vi) The opening of "cosmetic" or "PR" dealerships by manufacturers, the cost for which can be expensed to brand development. For example, restaurant and airport dealerships that are of questionable stand-alone viability;

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(e) An increased pressure on dealers to meet unrealistic performance targets and/or capital expenditure on facilities as a condition of continuation and/or renewal of dealer agreements. Those who agree are financially weakened and are less able to compete effectively in the market. Those who disagree face the sacrifice of their business and goodwill by closure or sale in a captive and limited market where the manufacturer controls who any dealership can be sold to;

(f) Further financial pressure on dealers to create and maintain increasingly sophisticated and expensive service equipment and tools, many of which become redundant over time as vehicle models are upgraded

(g) Increased direct and indirect pressure on dealers not to horizontally diversify and seek economies of scale by taking on other brands. In some instances additional brands that are unacceptable to manufacturers are forbidden. In other cases dealers are forced to the cost of independent and separate facilities and management that strips away most of the benefit of any economies of scale;

(h) An increased refusal to negotiate terms of dealer agreements or unilaterally imposed variations. Most manufacturers now adopt a "take it or leave it" attitude to documentation; and

(i) Pressure on dealers to help distributors of manufacturers reach sales targets that can be at variation with reality. Dealers are urged to order vehicles that they do not really want or in numbers exceeding prudent stock requirements. Incentives to make decisions to buy extra vehicles vary but include:

    (i) Financial incentives such as an additional bonus on the vehicles or reduced floor-plan finance for a period of time;

    (ii) Packaging of "hot" (fast-moving/high-margin vehicles) and "dog" (slow-moving/low-margin vehicles) together. If the dealer wants to be able to offer imminent delivery of "hot"

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vehicles he is persuaded to take some of the problem cars from the distributor. If he refuses, a competitor will be able to promise delivery of "hot" models months before the refusing dealer can.

3. The Cost to the Consumer

The MTA believes that these developments illustrate an insidious, deliberate and creeping reduction in both inter-brand and intra-brand competition in the Australian market for automobiles – with the Australian consumer ultimately paying the price.

The European and US experience shows that legislators in these areas recognised that the risk to the end consumer of reduction in service, lessening in competition, elimination of choice in product and provider was so great that specific legislation was warranted.

In the European context, the need was seen to be so great as to merit an exemption to the largely sacrosanct competition policies.

Three case studies appearing later show that:

(a) A factory was able to remove all inter-brand competition in Melbourne, generating a mega store which is the only outlet for vehicles of that brand in that city. While some satellite servicing exists, the exercise has:

  (i) Increased margin to the factory/distributor (ie, increased cost to the consumer);

  (ii) Removed intra-brand competition;

  (iii) Had a deleterious impact on employment in the industry;

  (iii) decreased consumer service;

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(b) A factory/distributor was able to reduce the number of retail outlets in Sydney from six to five and assume control of more than 50% of the available market for one brand of luxury car.

4. Current Legislative Framework

Currently franchise relationships are governed by the following areas of law:

(a) General contract law;

(b) Common law;

(c) Federal Trade Practices legislation, especially sections 51AC and the Franchising Code of Conduct (now an Industry Regulation pursuant to the Trade Practices Act); and

(d) State Fair Trading legislation.

The MTA views the current legal framework as inadequate for the following reasons:

(1) Because of a lack of comparative bargaining strength, dealers are unable to negotiate fair amendments to agreements and the interpretation by courts of contracts always starts with the wording of the contract.

(2) Court proceedings have become prohibitively expensive and time consuming. Once court proceedings are invoked, relationships between dealers and manufacturers are usually impossible to maintain and/or repair.

(3) The TPA concepts, such as "market power" and "unconscionability", have eluded objective interpretation and often require controversial reports from expensive economists and/or other expert witnesses.

(4) While many other international jurisdictions have introduced concepts of "fair dealing" and "good faith", it has so far eluded general application to franchise legislation in Australia other than with a

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peripheral mention in S51AC(4)(k) as one matter potentially relevant to a finding of oppression.

(5) The onus of proof will almost always fall on the franchisee who has to prove that manufacturer conduct is unreasonable or oppressive in circumstances where there is usually little paperwork or other objective evidence available. The dealer has to prove lack of proper purpose in manufacturer decisions which is onerous if there are various possible motives.

This submission includes three case studies that highlight some of the local deficiencies.

5. The need for Industry Specific Regulation

Petroleum franchise legislation in Australia has set the precedent for a vital industry that deserved special treatment. Aside from the importance to the economy of the motor vehicle industry and the fact that a car is usually the most expensive consumer article and the second-most expensive article ever bought by most Australians, the following features of the motor vehicle industry make it appropriate for special legislative treatment.

(1) The sale and servicing of motor vehicles is both a capital and labour intensive exercise that is subject to high cost, high volume and low margin. As against pre-tax revenue of 4-9% in most retail sectors, motor vehicle dealerships are fortunate to exceed 1%.

(2) The tenure of dealership agreements imposed by manufacturers is relatively short – in most cases no more than 3 or 4 years. Almost none provides for options or automatic renewal. Dealers are not afforded enough secure tenure to anticipate a reasonable return on their extensive investment.

(3) In many areas of the law, a large difference in economic substance is recognised as an impediment to fairness in negotiation and dealings. This is the rationale for much of the "business to consumer" protection

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legislation. The MTA believes that the vast difference between manufacturer and dealer is not appreciated. For example, the most recent published annual reports of the following entities show:

(a) Toyota sells 8.9 million vehicles per year generating A$232 billion in revenue, and using A$316 billion in assets (at A$1 = ¥103);

(b) BMW sells about 1.5 million vehicles per year generating $91 billion in revenue and using A$145 billion in assets (at A$1 = €0.61).

Compare this with two of Australia's largest publicly listed "mega dealers":

(i) AP Eagers sells 28 different brands from 66 locations generating revenue of $1.675 billion, less than 0.7% of the turnover of Toyota, just one of its 28 brands;

(ii) Automotive Holdings Group represents 28 different brands in 77 dealerships in Australia and New Zealand generating revenue of $2.3 billion, 1% of Toyota's turnover.

Small dealerships, while they do not publish their trading figures, can generate revenues of between $20 million and $50 million per annum. There is no possibility of any "level playing field" when a small dealer negotiates with a manufacturer or its wholly owned distributor.

However, even small dealerships are required to hold stock levels (often financed by a corporate sibling of the manufacturer) of more than $10 million as well as significant obligations for their premises (by way of mortgage payment or rent). Dealers are financially vulnerable and beholden to the manufacturers, and as such are reluctant to lose favour with them.

In this context, the MTA believes that it is only fair and reasonable that dealers deserve better protection from coercive and oppressive conduct, in due recognition of their significant investment in, and commitment to, a motor

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vehicle franchise. Manufacturers should not be able to reap the financial rewards while, at the same time, minimising their financial exposure and risk at the expense of dealers who have no countervailing power.

It is necessary to understand the economics of the dealer/distributor relationship in order to fully appreciate the nature of the problems that motor vehicle dealer's confront. Unlike ordinary business ventures, franchising has a distinctive separation between the ownership of the franchise assets by the dealer/franchisee and control over those assets by the manufacturer. This structure creates a friction between a motor vehicle manufacturer wanting to exercise control over the franchise system and a motor vehicle dealer who wishes to ensure that the distributor's exercise of control is not opportunistic.

It is the unique nature and particular characteristics of the business relationship between manufacturer and dealer that has resulted in many overseas jurisdictions choosing to regulate the relationship by recognising the power imbalance between the dealer/franchisee and the manufacturer.

Given the importance of this sector to the economy in terms of turnover, taxation revenue, community involvement and employment (especially in regional and rural areas), and the fact that a motor vehicle is likely to be the second-most expensive good that consumers will purchase, the MTA believes that the retail motor industry warrants separate and special attention in the same way it has been done in most states of the US and in Europe for many decades.

It needs to be acknowledged that motor vehicle manufacturers have tended to use their overwhelming bargaining position without high regard for fair dealing standards. The following conduct of distributors and their representative body (FCAI – Federal Chamber of Automotive Industries) is illustrative of such behaviour:

- Motor vehicle distributors steadfastly refused to register with the voluntary Franchising Code that operated before the enactment of the mandatory Code;

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- FCAI and motor vehicle distributors argued before the introduction of the mandatory Franchising Code that their agreements were not franchises. In response the Federal Government was forced to insert a definition of franchise agreement that specifically included motor vehicle sales;

- Motor vehicle distributors have steadily undermined the Trade Practices Tribunal decision in the Ford Solus matter that prohibited exclusive franchise agreements with one distributor; and

- Motor vehicle distributors have taken steps such as the amendment of franchise agreements to avoid risk of being sued under the Trade Practices Act or Industrial Relations Act. In some cases, choice of law clauses operate to avoid jurisdictions that have the benefit of any protective legislation.

In summary, many motor vehicle distributors have shown their willingness to use their superior bargaining position to the significant detriment of their dealers and in so doing have:

- Rejected appropriate and accept acceptable minimum standards of conduct;

- Argued against the need for the adoption of a standard of good faith;

- Rejected compliance with the former voluntary self-regulatory mechanism in franchising; and

- Avoided general regulatory controls.

6. Overseas Experience

In the US and Europe, for more than 50 years, legislation has been in place to protect against anti-competitive and oligopolistic behaviour by motor vehicle manufacturers.

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The MTA is extremely concerned that Australia badly lags our trading partners in recognising the need for reasonable dealer protection specific to the motor vehicle industry.

Indeed, many overseas jurisdictions with extensive dealer protection legislation are now considering even more protection for franchisees.

7. Conclusion

If the tendency to remove independent and smaller dealerships in favour of either manufacturer controlled entities or very large (and often public) dealerships continues, the position will be reached where:

(a) Consumers will face a market with less competition, less service and higher prices;

(b) More profit margin will disappear overseas; and

(c) Job losses

8. Recommendations

The MTA believes that it is now an appropriate time for Australia to catch up with its international trading partners by adopting a motor vehicle industry specific code similar to those that have existed overseas for more than 50 years. The Texas Code (appearing as annex 1) is presented by the MTA as an appropriate model on which an Australian version could be based.

If necessary amendments have to take place within the framework of the existing legislation then the MTA believes that at least the following amendments should be implemented:

(a) A clear imposition of an obligation for parties to franchise agreements to act fairly and in good faith towards each other;

(b) The mediation provisions of the Code provide a requirement that parties mediate in "Good Faith"

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(c) A prohibition, in the case of the motor vehicle industry, of manufacturers owning dealerships or having any equity in, or management of, dealerships;

(d) The reconstruction of the dispute resolution provisions of the Franchising Code of Conduct to ensure binding, effective, fast and economic resolution of disputes between franchisors and franchisees. Ideally this would take place in the jurisdiction of a board or tribunal with specialist knowledge and coercive powers to call for oral and documentary evidence. The court system is too ineffective, time consuming and costly (especially for franchisees) to fairly resolve motor disputes;

(e) The insertion of provisions in the Franchising Code of Conduct requiring franchisors to provide a minimum term of five years (as has been adopted in Retail Lease legislation in most states) combined with the ability of franchisees to obtain extensions where factors such as material capital expenditure during the period of the lease required by the franchisor, etc, would make reliance on the expiry of the term unfair;

(f) To allow franchisees easier access to collective bargaining.

(g) An obligation to make the manufacturer's conduct objective transparent and fair in areas of:

(i) Setting and policing targets, performance standards and product allocation;

(ii) Designing and assessing Customer Satisfaction Indices;

(iii) Altering Prime Market Areas and/or appointing additional dealers in existing Prime Market Areas;

(iv) Terminating dealership agreements either with or without cause and paying just compensation for the appropriation of goodwill;

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(v) And the ability to challenge such conduct as unfair or in bad faith by referral to a board or tribunal;

(h) An acknowledgment of the existence and development of franchisee/dealer goodwill as an assignable asset.

9. Final Observation

The MTA wants to stress that it understands that the concept of fairness and good faith is a "two-way street". Franchisors have a legitimate interest in protecting the goodwill, reputation and intellectual property of the products and services that they market through franchisee networks. Concepts such as fixed terms and reasonable notice should apply equally to franchisees to ensure that the legitimate business plans of the franchisors are implemented.

Amendments to the status quo need to address the current imbalance of power – not reverse it.

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PART A – INTRODUCTION

1. Franchise industry in Australia generally*

Franchising is big business in Australia. This sector of the economy turns over about $140 billion a year – about 15% of GDP. At the same time the industry encompasses more than 600,000 Australians, either as franchisors and franchisees. It has also become a significant export earner (of which more later).

The industry's peak body is the Franchise Council of Australia. It was established in 1983 and represents more than 600 franchise companies. Directors on the council represent every state.

There are now about 1000 business franchise operations in Australia of which more than 90% are locally based. They range from the instantly recognised brands such as KFC and McDonald's to one-man/woman operations in property and business-related services.

2. Importance of general franchising in Australia

The industry's growth over the past decade in terms of franchisors has been nothing short of phenomenal; from 693 franchisors in 1998 to about 1000 today. The introduction of the Franchising Code of Conduct (The Code) in 1998 slowed the growth in the number of franchisors coming on to the market, but once the Code became more widely accepted in the industry, growth quickly picked up; between 2002 and 2008 it has been 30%.

This growth reflects five factors:

- The market's acceptance of franchising; Australian consumers are comfortable with and like dealing with franchise operations.
- The appeal of the franchising model to entrepreneurs who want to run their own business.

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- The proven success of the franchise model as a means of achieving market penetration.
- Industry and consumer acceptance of the industry's regulatory framework.
- A strongly growing economy.

Today, there are about 60,000 independent franchise operations. When coupled with about 6000 company owned operations, it underlines how widespread the franchise business model has become.

These numbers do not include petrol stations or motor vehicle outlets. Of the former, there are about 5700 fuel outlets and there are about 2600 motor vehicle retail outlets.

In terms of the small business sector, franchise operations comprise about 5% of all small businesses in Australia. This would suggest there is room for further growth given an appropriate environment.

Turnover

Industry estimates total sales by franchise operations at about $140 billion of which motor vehicle sales make up about 25% or more than $30 billion.

Employment

Employment in the industry totals about 600,000, including franchisors.

Among employees, it is spread across full-time, part-time, and casual, reflecting the nature of the industry – particularly in food retail. The first work experience of many young Australians is in a franchise operation, typically while still studying at school or university.

Part-time and casual employees make up more than 50% of employee numbers, making employment practices dissimilar to the Australian norm. This is a positive for the industry, giving employees more flexibility about when and how often they work.

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At the same time, a large proportion of franchise operations, particularly in property and business service and personal service industries, are owned/managed by operators who employ no staff.

Industry profile

The majority of franchising takes place in the retail non-food industry; about 30% of franchisors and about 35% of franchise operations.

Next on the list comes the property and operation business services sector; about 21% of franchisors and about 8% of franchise operations.

In terms of age, franchisors have been operating their businesses for an average of 16 years and franchising for 10 years, demonstrating the level of maturity in the sector. In the motor vehicle retail industry, these age numbers are even higher.

On average, franchisors operate their businesses for four years before adopting a franchising strategy. However, many franchisors still enter franchising at a very early stage of their business development, with nearly 20% of businesses franchising immediately and another 13% doing so within the first 12 months of operation.

Although the sector is showing signs of maturity in terms of franchising experience, the average size of a franchise chain system remains relatively low at 22, as well as an average of one company operation. Nearly 50% of franchises have less than 20 operations.

Geographical spread

New South Wales has the biggest slice of the franchising cake with 34% of total operations. Victoria is second at 24% and Queensland third at 20%. These percentages largely reflect the relative populations in each state. This pattern of franchising activity has remained constant over the past decade.

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Industry structure

Two thirds of franchisors have now adopted master franchising arrangements in their domestic operations. Franchisees operate from a mixture of locations, including mobile or home-based arrangements. Slightly more than one quarter of franchise systems have franchisees operating from home and 22% have mobile franchisee operators, compared with 45% operating from a retail site.

International expansion

About 25% of Australian franchisors have overseas operations, with the main markets being New Zealand, Singapore, Malaysia, China/Hong Kong, the US and Britain.

But it's a relatively new phenomenon for the industry; most franchisors have only gone offshore in the past five years. Of those franchisors that have made the move offshore, on average they had 29 franchise operations.

Master franchising and 100% ownership are used by most franchisors when structuring their overseas operations.

New Zealand remains the most popular destination (76%) because of its geographical, political and cultural alignment to Australia. Southeast Asian destinations are popular, particularly Singapore (27%), China/Hong Kong (26%), Malaysia (22%), India (16%) and Indonesia (15%).

Large English-speaking nations are well-favoured: Britain (18%), US (16%) and Canada (16%). Of the 1984 operating franchises overseas, 59% are in Britain, the US, New Zealand, and Canada. A further 15% are in Southeast Asia and 10% in Europe.

Just under two thirds of franchisors (63%) began overseas operations from 2000 onwards, suggesting that international expansion is relatively new game for most of them. The evidence suggests many are entering international markets before reaching domestic saturation. Almost three quarters (73%) are involved in retailing (food and non food), property and business services or personal services.

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* Data on the Franchise Industry was drawn from the "Franchising Australia Survey 2006" that was prepared by the Service Industry Research Centre at Griffith University.

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PART B – THE MOTOR VEHICLE INDUSTRY**

This inquiry into the Franchising Code of Conduct and Other Matters by the Parliamentary Joint Committee on Corporations and Financial Services comes at an auspicious time for the MTA and the owners and business principals it represents.

The Federal Government is currently considering a review of the motor vehicle industry (the Bracks Review) to assess the challenges the industry faces, overcome barriers to success and to identify and maximise new opportunities. The final findings of this review and, more importantly, how the Federal Government responds to those findings, will have a significant impact on all motor vehicle dealers.

The review has highlighted the obvious: it is a significant and strategically important industry for Australia, of which the dealers are the most visible face. In manufacturing alone it employs more than 60,000 people.

It is a major exporter responsible for generating $4.7 billion annually. It is also the leading source of manufacturing R&D and innovation in Australia. There is a major regional element with many component manufacturers located outside the capital cities.

The industry also is characterised by important and deep linkages to other industries, such as tooling, chemicals and plastics.

In the past 20 years, in particular, since the Button Car Plan (named after the then Industry Minister, Senator John Button), the focus of the local industry has shifted towards the development of new export markets, requiring significant investments in plant and equipment, innovation, technology, and new product design.

Domestic market

The automotive industry is one of the oldest and most strategically important industries in Australia. Apart from the three passenger motor vehicle producers operating in Australia - Ford, Holden and Toyota – there are more than 200 automotive component manufacturers nationally, 70% of which are located in Victoria.

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With a cluster of key vehicle producers, component companies, design houses, toolmakers and other service providers (particularly in Victoria), the industry maintains direct links with numerous other sectors of the economy and provides a highly skilled workforce and quality automotive R&D facilities with specialist capabilities in design, engineering, materials applications and manufacturing of innovative metals, plastics, electronic and mechanical products.

The domestic market is best defined as a small, open and highly competitive market that accounts for about one million vehicles a year. Domestic sales, particularly through fleet purchasing, account for a significant but falling proportion of the local industry's output.

Industry Linkages

The automotive industry is characterised by linkages within the manufacturing supply chain, and across related industries. These linkages facilitate important spillovers in skills development, connections to global networks, expenditure on and performance of R&D, dissemination of world's best practice manufacturing methods and technologies, and closer linkages to the services sector.

The tooling segment of the precision engineering industry has important linkages with the automotive industry to manufacture and supply a range of vehicle components. The segment directs about 65% of its output to automotive assemblers.

The manufacturing industry is increasingly concentrated in Victoria, employing 7000 people. Victoria's share of national output for the industry is 45% and increasing. Its share of precision engineering exports is 60%.

The automotive market is also the second most important market for Victoria's metal fabrication industry with 14% of output directed to vehicle producers and their direct suppliers. It is estimated that the metal fabrication industry employs 4200 people directly servicing the automotive industry.

These strong industry linkages create export opportunities for supplier industries and broaden the skills and innovation capabilities base of the economy.

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The sheer scale of the automotive industry makes it an important industry for Australia generally – and Victoria in particular. Victoria is the "engine room" of the automotive industry making up 55% of national automotive output.

The industry, including the design, manufacture and assembly of motor vehicles and components, is Victoria's largest manufacturing industry, contributing about 1.5% per cent or about $3 billion of Victoria's Gross State Product.

Employment

The ongoing rationalisation and efficiency gains in the automotive manufacturing industry are reflected in the industry's employment numbers. Since February 2003, employment in the industry has declined 18.4% nationally.

Despite this trend, the automotive manufacturing industry continues to be a major employer, directly employing about 60,000 people (38,000 in Victoria alone), the largest for the manufacturing sector.

Research and Development

The automotive industry is extremely knowledge intensive and a major source of innovation and technological development. The Australian automotive industry invested $654 million in R&D investment in 2005-06.

The industry's R&D expertise is underpinned by Australia's strong capabilities in design, engineering, tool making, electronics and plastic injection moulding.

Vehicle and component manufacturers also actively seek out technology applications from the research undertaken within Australia's highly developed network of university and government research facilities. Monash University, for example, is home to one of the world's leading centres of research in mechatronics.

Australia can provide R&D services more cost-effectively than Europe or North America due to excellent infrastructure (such as testing grounds and training facilities) and strong intellectual property protection laws.

*In this submission the words manufacturer, factory, distributor and franchisor are interchangeable

Exports

Automotive exports have been a major success story. In 2006-07 Australia exported 144,000 vehicles, of which 96,000 were from Victoria. These exports were valued at $2.7 billion and $1.77 billion respectively.

The major markets for PMVs are predominately in the Middle East, with Saudi Arabia ($804 million), the United Arab Emirates ($213 million), Oman ($189 million) and Kuwait ($182 million).

The substantial decline in the export of automotive parts over the past five years mirrors the national trend and reflects the move of local component suppliers offshore (ie, Pacifica) and the decline in the components industry due to the change in global sourcing from Ford, Holden and Toyota. This trend is likely to continue and even accelerate towards 2015.

These export statistics, however, understate the significance of the automotive industry, as they relate only to goods and do not capture the significant export of services and intellectual property, such as design and engineering services. The automotive industry is an international leader in building multiple models and variants based on a single base power train, and exporting to various markets with different requirements.

For this reason, R&D, design and engineering services are important parts of the production process and significant export items.

Investment

Finally, the automotive industry has been a major source of business investment income. Since October 1999, major automotive investments have included:

- Toyota's $45 million Technical Centre Asia Pacific and $400 million to upgrade its Altona plant for the new Camry and Aurion models in 2006.
- GM Holden invested $386 million in its HFV6 engine plant and $200 million in a new head office building.

*In this submission the words manufacturer, factory, distributor and franchisor are interchangeable

- Ford's $1.8 billion investment included the upgrade of the Geelong R&D Centre.

The future

It is evident that the industry's future success is contingent on it being internationally focused and integrated.

This requires further development of the industry's export focus, which has developed substantially over the past two decades and is now worth some $4.7 billion in automotive merchandise exports alone. And there is a substantial additional amount of export earnings through services exports that is not included in this data.

The Australian industry will never be a large-scale global producer. Its future lies in being globally integrated through specialist capabilities in design and niche production. While the industry will continue to have an advantage in the production of large-bodied vehicles, it will also need to develop its advanced and manufacturing capabilities.

It is also important that the industry remains flexible in order to respond to changing consumer needs and be capable of quick, easy and seamless production - from "sketch to suburb".

The challenge

But that future outlined is far from guaranteed. Over the past decade the global automotive industry has, through merger and acquisition activity, contracted to six major, multi-national brand-owning vehicle manufacturers that compete in most markets and most market segments.

There is also a number of mid-range and relatively small, niche vehicle manufacturers, most with some common ownership or strategic alliance with the "Big Six". The "Big Six" now effectively control more than 82% of global light vehicle production - the top nine producers more than 95%.

The major driver of this consolidation has been the pursuit of low cost competitive advantage through economies of scale, scope and experience.

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**Data on the car industry was drawn from the Victorian Government's submission to the Federal Government Inquiry into the Car Industry (2008)

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PART C – INADEQUACY OF CURRENT LEGAL FRAMEWORK

1. General Contract and Common Law

Franchise agreements usually take the form of written contracts, so first and foremost they are interpreted in accordance with our general contract law. The first "port of call" of a court is to look at the words of the agreement on the premise that, without good reason, those words should prevail.

This position is tempered by both court precedent (our common law) and legislation (our statute law) that deal with topics such as consideration, offer and acceptance, misrepresentation and so on. The fundamental problem is that the law assumes, unless the contrary is shown, that all contracts are negotiated fairly between two parties neither of which is subject to any vitiating influence. **In motor vehicle franchising this is clearly not the case**.

It is the MTA's submission that General Contract and Common Law are ineffectual in addressing the effect of the massive imbalance in bargaining strength between the multinational manufacturers and local motor vehicle dealers. The vast majority of dealer agreements are now tendered by factories on an "as is and without amendment" basis. A clear example is the attached letter [redacted] from [redacted] dated 26 June 2008 which followed a dispute about [redacted] seeking an indemnity from dealers for any GST on holdback claimed by the ATO. Having conceded on this unsustainable argument the manufacturer advised dealers that "*No other changes will be considered*".

2. Trade Practices Act

(a) Franchising Code of Conduct

The mandatory Franchising Code of Conduct that began in 1998 does not provide redress or remedy for the problems being experienced by motor vehicle dealers. The Franchising Code is a general code applying to all industries that are subject to the licensing of business formats and it does not have regard to the particular problems faced by

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motor vehicle dealers. This is out of step with overseas experience, where regulators in North America and Europe have enacted specific regulations to deal with the regulation of franchising in the motor vehicle industry. In particular, the Franchising Code does not address the following problem areas experienced by motor vehicle dealers.

- Motor vehicle distributors are not precluded from terminating a franchise agreement at will without being required to demonstrate that the dealer has breached a term of the franchise agreement. Distributors also avoid the necessity for giving reasons for terminating a dealership as required by the Franchising Code of Conduct by offering a short-term agreement on a "take it or leave it" basis. Once the agreement expires the distributor avoids the need to terminate the franchise agreement for cause, and therefore the requirement to give reasons under the Code is obviated. The position is perpetuated by many manufacturers providing successive short-term agreements, or the so-called "evergreen" agreements, which avoid disclosure obligations and provide the ability to terminate with a fixed period of notice or alternatively "reasonable" notice.

- There are no constraints on a motor vehicle manufacturer substantially varying a dealer agreement during its term. Such variations, for example, may substantially and unfairly increase the capital contribution by the motor vehicle dealer;

- There is no minimum term specified for a motor vehicle dealer agreement;

- Steps taken by motor vehicle distributors to impede multi-site franchising are not effectively constrained;

- In the absence of any effective legal sanctions the Code does not provide any incentive for motor vehicle distributors to resolve

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franchise disputes quickly and economically. Cost and time favours the manufacturer.

(b) S. 51AC

In 1998, the Trade Practices Act 1974 ("**TPA**") was amended to introduce a new provision dealing with unconscionable conduct in business transactions. Notwithstanding the intent of the section, experience suggests that only the most oppressive corporate conduct is subject to legal action and remedy. It should be noted that Section 51AC is a general provision and it does not deal with the specific problems being faced by motor vehicle dealers. In any event, the cost of running legal proceedings in the Federal Court is too expensive for all but a handful of the largest of motor vehicle dealers. In addition, Section 51AC as a general statute is also uncertain in its application, and therefore the risk for a motor vehicle dealer in taking action runs the serious risk of not only losing the proceedings, but also being liable for the costs of the defendant.

It should also be noted that since the introduction of Section 51AC, motor vehicle distributors have taken steps to limit the use and effectiveness of the section. Such steps have included insertion of provisions into dealer agreements such as acknowledgments that:

- The dealer accepts that there is no right to renewal of an agreement on its expiration. This is contrary to long accepted industry practice where dealer agreements are automatically renewed on their expiration, providing the dealer is performing satisfactorily and there is no breach of the existing dealer agreement;

- Dealers have received legal advice and the opportunity to freely negotiate the terms of the agreement before execution which in almost all cases is simply untrue;

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- Dealers have executed agreements freely and with no pressure or promise from the manufacturers.

(c) Industrial Relations Act (NSW only)

Industrial Relations Act (NSW) – Section 106 (Unfair Contracts)

Section 106 of the NSW Industrial Relations Act provides redress against unfair contracts that deal with the provision of labour and was considered effective in redressing unfairness in dealer agreements.

However, for the past few years, the previous accepted interpretation of this section has been abandoned in cases such as *Fish v Solution 6*, *McDonalds v IRC* and in the motor vehicle industry by *Alto Artarmon v BMW Australia*. As a result of these cases it appears now to be the law that s106 is only available to small franchises where the franchisees are individuals and perform the franchise services on their own. It now appears to have little ongoing relevance to corporate franchisees.

(d) Fair Trading Legislation (States only)

State-based fair trading legislation has not proved to be an effective weapon against oppression for the following reasons:

(i) Jurisdictionally it has been set up as business to consumer legislation;

(ii) Jurisdiction limits often apply which preclude relevance to dealership agreements; and

(iii) The laws vary from state to state and exhibit the same shortcomings as the federal legislation.

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3. General dispute resolution issues

The costs of running litigation are prohibitive to all but a few motor vehicle dealers. In terms of seeking redress during the course of a franchise agreement, it is unrealistic to expect motor vehicle dealers to either threaten or take legal action to protect legal rights as such action is almost certainly likely to jeopardise the all important commercial relationship between the parties. Franchise experience suggests that the business relationship is just as important as the legal relationship and when the business relationship breaks down, it is often only a matter of time before the legal relationship comes to an end.

Currently, mediation under the Franchising Code of Conduct is failing to meet the interests of all parties. As it stands, it involves complainants telling the respondent in writing:

- The nature of the dispute
- What outcome the complainant wants
- What action the complainant thinks will settle the dispute.

The parties then try to agree about how to resolve the dispute.

For mediation under a franchise agreement:

- If the parties cannot agree within 3 weeks, either party may refer the matter to a mediator
- If the parties cannot agree about who should be the mediator, either party may ask the mediation adviser to appoint a mediator who may decide the time and place for it to occur. It is compulsory for all to attend and try to resolve the dispute, but there is no objective measure by which this obligation can be tested.

The mediation adviser must, within 14 days, appoint a mediator for the dispute.

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Mediation is terminated if:

- At least 30 days have elapsed after the start of mediation and the dispute has not been resolved
- If either party asks the mediator to terminate the mediation, the mediator must do so.
- The mediator may terminate the mediation at any time unless satisfied that a resolution of the dispute is imminent.

If the mediator terminates the mediation of a dispute, a certificate must be issued stating:

- The names of the parties.
- The nature of the dispute.
- The mediation has finished
- The dispute has not been resolved.
- Copies must be given to the mediation adviser and the parties to the dispute.

Mediation does not prevent a party to a franchise from taking legal action and the certificate does not have to record any reason for mediation failure.

Parties to mediation are liable for their own costs.

Clearly, an alternate fast, fair and economic method to resolve disputes has to be found.

The MTA believes that motor dealerships disputes would be more effectively resolved by referral to a body with specialised experience (both manufacturer and dealer representation) and with powers to compel evidence and make binding decisions. The Board set up under the Texas legislation is believed to be an appropriate model.

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Unfortunately, disputes with manufacturers are too often coupled with (if not the cause of) financial stress of the dealers. Many are unable to sustain the delay and cost of major litigation.

The MTA believes that government acceptance of the need to remove cost, delay and formality has been well recognised in areas such as:

(a) Tenancy law with fast acting tribunals that discourages legal representation; and

(b) Takeovers law where a takeovers panel is empowered to make a fast finding of acceptable or unacceptable conduct obviating the need and uncertainty of court proceedings.

What follows is an outline of how the Texas Motor Vehicle Board overseeing the industry operates, with a particular focus on disputes between manufacturers and dealers. It's the MTA's strong contention that this approach should provide the framework of any system, particularly as it pertains to dispute resolution.

I. Key duties of the Texas Motor Vehicle Board are to:

- Establish the qualifications of licence holders
- Ensure that the distribution, sale, and lease of motor vehicles is conducted as required by this chapter and board rules
- Provide for compliance with warranties
- Prevent fraud, unfair practices, discrimination, impositions, and other abuses in connection with the distribution and sale of motor vehicles

II. Key powers of the board:

- Initiate and conduct proceedings, investigations, or hearings
- Receive evidence and pleadings

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- Issue subpoenas to compel the attendance of any person
- Order the production of any tangible property, including papers, records, or other documents
- Make findings of fact on all factual issues arising out of a proceeding initiated under this chapter
- Use the services of the attorney general and institute and direct the conduct of legal proceedings in any forum
- Issue, suspend, or revoke licences
- Impose civil penalties

The MTA believes that a board or tribunal set up and operating in the same manner as the Texas Board would lead to a faster, cheaper and more accessible form of dispute resolution than court proceedings.

The ultimate power of a board such as this can be seen by the case brought by the Texas Board against the Ford Motor Company. As a result Ford could not market vehicles in Texas over the Internet. A note about this case appears as annex 3.

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PART D – CASE STUDIES

Case Study #1 – [redacted]

This summary is taken from the report of the Sirius Consulting Group prepared on 5 July 2002 for the Australia Automobile Dealers Association a copy of which is annex 4.

[redacted] is 90% owned by [redacted], a specialist UK-based, multi-national automotive distribution, logistics and, latterly, retail company, and 10% [redacted], the Japanese 80% brand owner o[redacted]). It is the authorised Australian distributor of [redacted] vehicles.

On 23 September 1997 [redacted] wrote to their franchised network advising them of an extension of Dealer Agreements expiring on or around 1 October 1997 until 31 December 1997. In December 1997 [redacted] instituted a dealership enhancement and identification program requiring each member of their franchised network to invest between $250,000 and $800,000 on upgrading dealership facilities and [redacted] corporate identification to be completed by March 1999. At the end of this program each dealership was to be accorded a four or six star accreditation. Non-compliance with the program would lead to non-renewal of the franchise agreement. In many cases the franchisees were spending the investment on rented premises.

On 1 June 1998 [redacted] wrote to 'All Dealers with Expired or Near Expired Dealer Agreements' (sic) advising them of "*a great deal of uncertainty surrounding the introduction and application of the Franchising Code of Conduct (scheduled to apply from 1/7/98)*". The letter offered to extend expired or nearly expired agreements under the same terms and conditions as had previously existed with the inclusion of a dispute resolution mechanism referred to as "new clause 16". The letter stated that this would "*allow greater stability for the introduction and management of the* [redacted] *6 Star Revitalisation Program*". Franchisees were advised that the extension offer would lapse by 19 June 1998 after which renegotiating a dealer agreement "*may prove challenging*". The letter concluded with: "*Should all reasonable attempts to*

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negotiate an immediate post-Code Dealer Agreement (sic) fail, we have been instructed by [redacted] *Ltd to formalise the conclusion of our relationship.*"

On 18 June 1998 [redacted] wrote to all dealers with expired or near expired dealer agreements "clarifying" their letter of 1 June 1998. They claimed that "due to the onerous requirements" of the franchising code that they, [redacted], were still several months away from the finalisation of their new dealer (franchise) agreements. They again recommended the acceptance of the existing dealer agreement extension to 1 October 1999 to "*give* [redacted] *(sic) some breathing space to digest the requirements of the code and finalise the redesign of our dealer agreement.*" They further stated: "*The renewal of the agreement will provide you with some certainty that many of you have requested* ***especially while undertaking improvements to your facilities.***" (MTA's emphasis) It is unlikely that other major franchisors or their franchisees experienced this degree of uncertainty.

On 26 June 1998 [redacted] wrote to franchisees that had not formally agreed to the non-negotiable, non-compliant, proposed extension of their Dealer Agreements (to 1 October 1999) extending the terms and conditions of the lapsed Dealer Agreements until a new dealer agreement "is agreed". This was the first of their communications to acknowledge copies to "[redacted] and Minter Ellison, a firm of solicitors. In September 1999 [redacted] submitted their new draft dealer agreement to the [redacted] development board for approval/negotiation and on 24 March 2000 wrote to their Melbourne franchisees with a new "final" take it or leave it, non-renewable franchise agreement expiring on 1 January 2002 and informing them that [redacted] (sic) would be taking over retail operations commencing mid 2001. Together with the new agreement was the offer of a "consideration" to offset business exit costs. This varied between $50,000 and $450,000 with the most common offer being $150,000 and was conditional upon the franchisee granting a release to all [redacted] associated entities and their employees from any legal action. These amounts were, in some cases, subsequently negotiated upwards by $50,000 to an average payment of $165,000. [redacted] had therefore taken monopoly control of the Melbourne market for [redacted] sales, services and parts for a little over $1.1 million.

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In a "Dealer Bulletin to all [redacted] Dealers & Staff" of 27 March 2000 [redacted] advised the franchise network of the terminations and their intention of "*moving into the retail car market in the Melbourne Metropolitan area*". The Bulletin went on to assuage "discomfort to dealerships elsewhere" as the initiative "relates only to the Melbourne metropolitan market." It was at about this time that the corporate entity known as [redacted] Pty Ltd was re-defined, which according to the [redacted] annual report (2000) differs from [redacted] in two important respects:

- It is 100% owned by [redacted]
- It is concerned with **retail operations** as well as import and distribution

It is clear from [redacted] 1999 Annual Report that although the Australian [redacted] franchised network was vastly outperforming the market, [redacted] was intent on pursuing a global strategy of automotive concentration and forward integration into retail. They clearly prioritise regional clustering and regional market monopoly (their preferred and belaboured euphemism is "exclusivity"). Their expenditure of $A25 million on two Sydney retail groups delivered them (among other franchises) the monopoly retail position for [redacted] products in Sydney.

By 2003 Melbourne consumers had their Melbourne metropolitan choice of dealers reduced from eight vigorously competing independent businesses to one: [redacted] P.L. – 100% owned by [redacted]. A distributor owned, regional monopoly consisting of a centralised "experience" centre, four sales and service satellite outlets and two satellite service only outlets. The effect on Melbourne consumers of [redacted] is obvious – no competition, higher prices and less service.

The dealers were forced to sacrifice this goodwill and business assets for unfair compensation.

The winner was the foreign-based distributor which in its current website (www.[redacted].com.au see annex 5) notes that:

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> **"Using vertical integration (MTA emphasis) [redacted] works closely with [redacted] retail in 10 retail centres along the eastern seaboard of Australia"**

It would appear that more "vertical integration" or what others might call "disintermediation" or "cutting out the middle man" may follow if this policy is followed.

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Case Study #2 – [redacted]

The [redacted] is a text book case of how the son of a migrant market gardener, through dint of hard work and clever investment decisions, has built a hugely successful business. It's not exaggeration to say [redacted] is one of the most respected identities in the motor vehicle industry, and it is the MTA's contention that how he has been treated by [redacted] is evidence enough alone as to why changes to the current laws are urgently needed.

What follows is drawn, in part, from the affidavit presented by [redacted] to the Industrial Relations Commission of New South Wales in April 2001. It does not draw on the final settlement between him and [redacted] – an agreement to which both parties have signed confidentiality clauses.

[redacted]'s background

[redacted] became an apprentice automotive engineer in 1956. After completing his apprenticeship, he opened a motor repair shop in Chatswood, and in 1957 he opened a second motor repair shop at Gordon.

In the late 1950s and early 1960s, as his business prospered, he took on franchises from European manufacturers Fiat, Renault and Peugeot and later a Toyota franchise at Chatswood. In June 1968, George opened a new Ford dealership located on Sydney's north shore at Gordon, and in 1971 he opened a second Ford dealership at Artarmon.

In 1984, [redacted] franchises were added to the Artarmon and Gordon dealerships. Towards the end of 1985 the [redacted] opened a new Toyota dealership at Pennant Hills and, during 1989, the Volvo marque was included in the Pennant Hills complex.

Suzuki became the next corporate identity to open at Chatswood in 1992 under the Alto name and this was further supplemented by a Hyundai franchise in 1993, with service facilities for Hyundai and Suzuki on site.

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Alto then opened a Land Rover dealership at Artarmon selling both new and used Land Rovers. This was followed by Land Rover Brookvale that opened in 1997. In November 2000, the Alto Group was appointed as the Volvo dealer for the North Shore PMA.

This snapshot of the Alto Group's growth is clear evidence of [redacted]'s industry knowledge, commercial acumen, and commitment to the consumer. Over the past 40 years, too, he has held numerous positions on dealer councils and motor vehicle associations, as well as directorships for companies such as the Pittsburgh National Bank and McConnell Dowell Corp.

How the relationship with [redacted] began

The difference in how the relationship between [redacted] and [redacted] began and ended could not be starker.

In 1983, [redacted] (then Managing Director of [redacted]) approached Altomonte to open [redacted] franchises at Artarmon and Gordon adjacent to the sites where he was operating Alto Ford franchises. Altomonte had a high standing in the industry and was then President of the Motor Traders Association of NSW.

Remember, too, the [redacted] brand in Australia was not what it is today; it was not a sought-after make. To quote Altomonte: "*I eventually agreed with Meatchem that I would take on the [redacted] franchise, not because it was a sought-after franchise, but because of the high personal regard I had for Meatchem as a man of integrity.* ***No written dealer agreements were sought or entered into at this time.*** [MTA's emphasis]

"*I then proceeded to spend about $100,000 at Artarmon and about $80,000 subsequently at Gordon building [redacted] showrooms at these locations. Sometime in late 1989 [redacted] approached us to enter into written dealer agreements for the Artarmon and Gordon dealer franchises. As I had been successfully operating the dealerships for more than five years and in view of my high regard for Meatchem I saw no difficulty in signing and returning the agreements to [redacted]*" ***Neither party took legal or other advice on the terms of the written agreements. No negotiations of the terms occurred.*** [MTA's emphasis]

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How the relationship failed

In August 2000, George Altomonte and his son Anthony met with three representatives of [redacted] Australia (including then general manager [redacted] at which they were told [redacted] Australia wanted to terminate their Gordon franchise. [redacted] cited "management problems". Altomonte's response was: "*I am very disappointed with the way this review has been done and the way [redacted] has treated Alto. On the eve of opening a brand new Artarmon dealership at the cost of $8 million you put Gordon on review and your agenda was to terminate Gordon and appoint another dealer after we had made this huge financial commitment. This is harsh and unconscionable and also in bad taste and unethical.*"

Just four weeks later Altomonte met with Hartmann again at which time he was informed of [redacted] decision to terminate the Gordon franchise. Altomonte's response again goes to the heart of the matter: "*We spent $8 million to develop Artarmon on the clear understanding that no other dealer would be appointed to Artarmon and Gordon for five years from completion of Artarmon and you must honor that commitment.*

"The first time you mentioned to me you had concerns about the management of Gordon was at our earlier meeting this month.

"I want you to reconsider my offer to develop a new facility as outlined in my letter of August 2. Also you have raised a problem with management (at Gordon). I will make changes if that will make you happy.

"It seems that unless we agree with everything you say then we are uncooperative and if we disagree with your direction then that is taken to be an unacceptable relationship."

In the following April 2001, [redacted] confirmed its intention to terminate the Gordon franchise agreement. An agreement was reached to move the dealership to Pennant Hills, considered by [redacted] to be an "open PMA". A new dealership facility was constructed, opening in early 2003.

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In 2006, the Pennant Hills [redacted] franchise was an embryonic business still in its start up phase and Artarmon's sales were impacted by the Lane Cove tunnel works (its revenue fell by about one-third). Pennant Hills, meanwhile, started to break even in the 2005-06 financial year.

Then in April 2006, [redacted] Australia management told Altomonte they wanted him to consider selling the business. They again cited some management issues and other supposed problems. Altomonte said "no".

Seven months later (November 2006), [redacted] management saw Altomonte again. The message this time was: "*We have rethought the Sydney market. We want to reduce outlets from five to four and want to acquire Artarmon and Pennant Hills and incorporate the Sydney North PMA with our City South PMA.*"

"*By the way, here are notices of termination so we can get this going.*" The agreement was evergreen, subject to "reasonable notice" of termination.

Altomonte did not accept the legality of what [redacted] was doing. But out of interest he inquired about an offer price.

His comment: "*You are also well aware of our financial position as we are required to submit our financials to* [redacted] *and this, I believe, gives you an unfair advantage. You have chosen a time when we are at the bottom of the cycle with only an upside in front of us to make this offer. Clearly this timing has the potential to undermine the price we could expect to receive. We would never have chosen this time to sell our businesses if we were to do so on the open market.*

"For over 23 years we have served, very well, the [redacted] *franchise on the North Shore. We took on* [redacted] *when it was only a small franchise struggling to get dealers and any real market share. We persevered through those hard times and did not quit when others would have and in fact did. We have achieved some significant milestones in those years including being the first Australian dealer to deliver 10,000 new* [redacted]

"Franz, you advised your plan was to purchase our businesses at a fair price. We both know that this will give you, the factory, over 55% share of the Sydney market. I

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trust that your definition of fair is the same as mine. Fair for the 24 years my family has worked hard for [redacted] fair in consideration of the real value of our businesses and fair in regard the good reputation we have in the Sydney market.

"The figure subsequently offered by [redacted] Australia was, in Altomonte's opinion, a fraction of what the dealerships were worth."

Alto began S106 proceedings in the Industrial Relations Commission of New South Wales. They lost in the well publicised case which laid s.106 to rest as an effective control of unreasonable franchisor conduct. They also started the mediation process under the Franchising Code of Conduct. After the S.106 decision, [redacted] took a hard line.

From August 2007, [redacted] started taking steps consistent with the termination on 30 November such as not allocating cars to Alto and advertising for staff for a new [redacted] North Shore dealership. Alto went to the Victorian Supreme Court and obtained an injunction. The matter was set down for final hearing in late 2007. It never got to court; at the third mediation attempt the matter was settled – with terms not to be disclosed.

Case Study #3 – [redacted]

This case study presents the experiences of three franchisees in regional New South Wales with [redacted]; Dennis Trigg of Triggs Motors from Toronto (near Newcastle), Murray Rumbel of Modern Motors from Dungog and Evan Teasdale, who has just sold Teasdale Motors at Singleton in the Hunter Valley. In none of these instances did the severing of the relationship force any of the franchisees to close their businesses, although all experienced a degree of financial difficulty because of the arbitrary manner in which [redacted] then parent company – in one instance [redacted] and in the other two, [redacted] – ended longstanding franchise agreements.

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MTA (NSW) believes this case study is best illustrated through the words of the franchisees. But before presenting the edited versions of interviews with them, all three examples have common themes:

1. They were all small dealerships that had longstanding agreements with [redacted] and had built up a solid core of customers who were loyal to the brand – and, even more so, to these dealers. And these franchisees, over several generations, remained loyal to [redacted] – despite mechanical problems with some makes. But in the final analysis this loyalty proved a one-way street; none of the franchisees was even consulted on [redacted] decision to end their franchise agreement.

2. When [redacted] ended the franchise agreements, the company refused to entertain any argument that rural Australians were motivated by different factors when buying a vehicle compared with their city cousins. In particular, [redacted] totally discounted the notion that loyalty to individual dealers, and the brands they sell, plays a bigger role in any sale in the country compared with the city. In all examples the dealership spans at least two generations and in the case of Triggs it's in its fourth generation.

3. [redacted] was indifferent to the servicing needs of existing customers when ending the relationship.

4. All three examples graphically highlight the "power imbalance" between the factories and franchisees.

Dennis Trigg (Toronto)

"My dad began the business in 1945, and, in 1950, he started selling Morris cars. It was Morris first, then BMC (British Motor Corporation). Then we got into [redacted] in the early 1970s in Toronto. We were there for umpteen years – you can see the photos on the wall – but we ran out of room. At that time (the late 1980s), the [redacted]

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[redacted] dealer in Newcastle decided to give it away and they asked me would I like the Newcastle franchise.

"At that time the [redacted] brand was most things I could have wished it to be; they were fairly skimpy on the warranty, and some of the vehicles weren't as good as they could have been. But we'd grown up with that; it felt like the norm.

"I took the dealership on, moving to Newcastle and opened just a few weeks before the earthquake in 1989. We were right at its epicentre; it was months before we could even use the place.

"But after a while things settled down, and we started to do well. We were selling a lot of product; we won several awards and got a reputation as being a good service dealer. I had 'my way' of selling the vehicles, displaying them as off-road vehicles. I guess you could say I could talk the language.

"They weren't easy to sell. Toyota had a lot of the market share. But there were people who liked English vehicles. We had a nice business going.

"It all changed in the mid-1990s, if memory serves me correctly, when [redacted] took over. From my perspective [redacted] were hard to deal with. Up until then [redacted] had been English and management had been pretty straight to deal with.

[redacted] came to me and said, 'Everything has to change; it's got to be white dust coats, tiled service bays, glass and chrome, all upmarket'. I said - indeed, many dealers said - to [redacted]: 'It's not going to work because people that buy these vehicles want to know what they'll do. I had the vehicles up on their sides, on rock shelves, all that sort of stuff. I knew a fancy showroom wouldn't get customers in the door'.

"But [redacted] was adamant: 'No, you've got to have a new showroom in Newcastle'. I was renting premises, quite big premises, and had a staff of more than 20. They presented me with plans (they condescended to pay for them) and they wanted me to invest $300,000 out of my own pocket with no help from [redacted]. I was 57 at the time and I said: 'There's no way I'm going to get that back so what are my options?' and the representative at the time came around and quickly told me, 'You haven't got any options'. I asked, somewhat naively, 'Why not, I've been with you for years'. It

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counted for naught. I hung on for a little (he had another dealership) after we lost [redacted] and then just closed the doors.

"There was absolutely no attempt on [redacted]'s part to compromise. It was the [redacted] way of thinking or the highway. That's how I read it anyhow.

"Looking back I think they made several of the Sydney dealers change their marketing. They spent millions doing it the [redacted] way', and I think a year down the track the company changed its tune. They could see it wasn't going to work so they went back to my old idea but by then it was too late.

"It wasn't rocket science, as I said. I just created a country atmosphere; wood chips and cars up on ramps and things like that. But no, [redacted] wanted showrooms of glass and chrome that might be all right in Toorak, but not in Newcastle."

"From where I sit, [redacted] today is only interested in the big cities – Sydney, Melbourne, Brisbane on the east coast and Perth in the west. They don't care about the dealer; you're only a pawn, someone who's selling their product. If they don't like you, they'll get someone else. And that someone will take it on even if they go bust, as many dealers have over the years. There's no loyalty. Talk to anyone in the industry, they'll tell you the same story."

Murray Rumbel (Dungog):

"We were Australia's oldest [redacted] dealer, going back to the early 1960s. I'm pretty sure of that. I think it was 1961 or 1962 when Dad sold his first [redacted] and then, about four years ago, they came up and gave us notice.

"We didn't have a problem with [redacted] we got on well with them. In those days they had what was called an after-sales manager working for [redacted], and he used to bring the entire 'problem' [redacted] in this neck of the woods for us to fix, which we happily did.

"Believe me, back in the early 1990s there was a lot of problems with [redacted]. They even came up with their 'Project Well-being' where they'd give frontline staff training to smooth things over with the customer, and they'd give mechanics special

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training to fix all the known problems. But a lot of dealers didn't want to do that so they brought the vehicles to us.

"In those days dealers were pretty thick on the ground. Initially they were very much an off-road vehicle, but then they brought out the [redacted] model that took them into the luxury end of the market and it became a more metropolitan-based dealership.

"We were selling between 15 and 20 vehicles a year. Not a lot, but it wasn't costing them anything to run in my eyes. We had built up a loyal group of customers.

"Then four years ago someone came here from [redacted] – I wasn't here at the time – and told my father they were giving us two years' notice. They wanted to bring Volvo, Jaguar and [redacted] under the one umbrella and, basically, we didn't fit the bill for how they wanted to present their dealers. Today no one's selling [redacted] in Dungog, with the nearest dealer at Newcastle (about 75 kilometres away). We weren't given any options, to upgrade, a trial period, nothing. It was two years and out. We asked if we could stay on as a warranty agent and we got the same answer. I said at the time to [redacted] 'could we stay on until the last vehicle we've sold is out of warranty'. They just weren't interested. On that date, it finishes. And of course there was no talk of any compensation.

"A helluva lot of customers sent letters to [redacted] complaining, even went and spoke to them, but they didn't care.

"Looking back there was no loyalty, especially where [redacted] was concerned. Take warranty, for example. They had a three-year, 100,000 kilometre warranty. If we had a car that was three years old, but may have only done 50,000 kilometres, then we'd ask [redacted] to extend the warranty. They actually got abusive about it. 'The warranty's over. I wish you blokes would get over it and stop asking for assistance'.

"I mean the vehicles had problems. If it was a one-off thing you wouldn't bother asking for it, but when you've fixed the same thing on every car that you've ever sold and the poor bastard only gets to 50,000 kilometres even though the vehicle is three years old, then we were only asking for a fair shake for our customers, which just

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happened to be their customers. And all we copped was abuse. From my perspective we had a moral obligation, but there's no way they saw it that way.

"It took a huge personal toll on our family, especially my father. He had dementia – I was pretty much running the business when that it happened – and nearly every day he would re-live 'the sack' because he'd forget about it and someone would come in and say, 'Oh, bad news about you losing [redacted]. He had had all those years selling [redacted], of servicing customers, of keeping them on the road, and in the end it didn't count for a row of beans."

Evan Teasdale (Singleton):

"I was overseas when it happened, on holiday. The dealership was coming up for renewal and they weren't going to renew mine. They gave me two years to wind it down. It was four years, almost to the day, same as Murray Rumbel in Dungog.

"When I got back to Australia I rang them to try and find out what had happened and they basically told me that the vehicles had moved upmarket and they didn't think they'd sell any cars via their rural network of dealers. They were aiming at Sydney and the big provincial dealers, arguing that the cost of maintaining a rural dealer network was too expensive.

"I had had the franchise since 1974; I was one of the early [redacted] dealers. Over the years it was quite a good relationship, although it had its ups and downs. When my father was running the business, in the early 1980s, they took the dealership away from us. They made us a service outlet, not a sales outlet, but in 1991 we were reappointed a full dealer. They wanted to expand their marketing, expand the business. They went back to a lot of old country dealers like us, and we took them back on.

"So when they gave us two years' notice, I was disappointed. But I didn't complain; I could see their point of view. I mean, if they're going to an upmarket vehicle, well,

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let's face it, my premises (in Singleton) were fairly old. We probably didn't fit the mould of what they wanted to portray as their corporate image.

"What I didn't understand is why they turned their back on their country customers. They had been loyal. I could understand them getting rid of us, but they should have had someone to look after their loyal clientele. That's what I couldn't figure.

"I guess that reflects my philosophy about this business. I always figured people sold vehicles, not premises (MTA emphasis). In rural Australia, in particular, it's relationships that count. It might be different in the city, but in rural Australia that's what people value.

"I mean price was always important, although not as much in the past as it is now. But even now, in the country, people don't care what the place looks like. It's the quality of service they get. You know your customers; it's not as if they walk in here and you don't know them. So you have to get on with the locals.

"If I had any word of advice after all these years in the industry, I would say to the factories to be a little bit more understanding of how a dealership works, and don't try classify everybody the same. Things do work differently in smaller towns compared with the big cities."

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PART E – OVERSEAS EXPERIENCE

Section One – The USA

More than 50 years ago the US Congress introduced specific legislation to govern the relationship between automobile manufacturer and dealer. The following explanation heralded the introduction:

> *"Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer.*
>
> *The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute towards making the dealer an easy prey for domination by the factory.*
>
> *On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer."* *S. Rep. No. 2073, 84th Congress, 2nd Sess., 2 (1956).*

It was recognised half a century ago in the United States that there was a need for industry specific legislation governing the retail motor industry. The reasoning lies with the enormous power imbalance between the motor vehicle dealer and the manufacturer, the importance of the motor vehicle to the economy and the consumer, and the value of fair intra-brand (as well as inter-brand) competition to both the small businessman who has invested in it and the consumer.

Since then, all states of the US have introduced specific motor vehicle legislation or amendments to general franchising statutes. These legislative initiatives recognise the importance of the automobile industry and the desire to proscribe misuse of

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economic power in relation to which the motor vehicle industry is particularly vulnerable.

The introduction to the Alabama Code states that:

> *"The legislature finds that the distribution and sale of motor vehicles within this state vitally affect the general economy of the state and the public interest and the public welfare, and that in order to promote the public interest and the public welfare, and in the exercise of its police power, it is necessary to regulate motor vehicle manufacturers, distributors, dealers, and their representatives and to regulate the dealings between manufacturers and distributors or wholesalers and their dealers in order to prevent fraud and other abuses upon the citizens of this state and to protect and preserve the investments and properties of the citizens of this state."*

Most of the state franchise laws are based on drafts prepared by the National Automobile Dealers Association (NADA). As a consequence they are often similar in structure and wording and in the issues addressed. The following is a general summary of the provisions of a typical state dealer franchise law.

Board or Commissioner of Motor Vehicles

Most states with comprehensive dealer franchise laws have some form of appointed board made up of new and used dealer representatives and manufacturer and distributor representatives. Most of these also have representatives from the motorcycle and recreational vehicle sectors. Other states leave administration of the laws in the hands of the Department of Motor Vehicles (DMV) and its Commissioner. The relevant authority collects a fee from each dealer and may also be responsible for dealer and manufacturer licensing. The board or department holds hearings into complaints by dealers about violation of the legislation.

Competition of manufacturer with franchised dealers

Most states include a provision along the lines that: *"A manufacturer shall not directly or indirectly compete with or unfairly discriminate among its dealers."* This includes the manufacturer *"having an ownership interest in, or operating or acting in the*

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capacity of, a new motor vehicle dealer or a used motor vehicle dealer," except temporarily during the transition between franchised dealers or, in some states, when establishing a business in partnership with a dealer who will take over the dealership within a specified period. Also, manufacturers may be restricted from retailing vehicles, products or services except through their franchised dealers. Other provisions prevent the manufacturer from "*controlling any aspect of the final amount charged, the final sales price or the final lease price for any of the vehicles or products, trade-ins, services or financing offered, offered for sale or offered for lease to retail consumers in a dealer's area of responsibility without the written consent of the dealer*" with some exceptions (Arizona Statutes).

Discrimination by franchisor among franchised dealers

Manufacturers are forbidden to offer any vehicle or product to a dealer at a lower price than is available to any other dealer of the same line-make. In some states manufacturers are also directed to offer all leads to all dealers in the relevant market area.

Termination and non-renewal of franchises

Manufacturers are prevented from terminating, cancelling or refusing to renew franchises without good cause or without acting in good faith. They are also required to give notice, usually at least 60 days, except in circumstances involving criminality on the part of the dealer or failure by the dealer to conduct business over seven days. "Good cause" for termination is taken to exist:

- If the dealer has failed to comply with a provision of the franchise agreement "*which is both reasonable and of material significance to the franchise relationship*" and the dealer has been given ample time to remedy the breach; or
- If the dealer has failed to achieve satisfactory performance in sales or service, has been notified well in advance and has failed within a given period of at least six months to comply with the established standard.

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The burden of proof is on the manufacturer to prove that good cause exists for termination or non-renewal.

In some states, such as Texas, the nominated term of an agreement is not conclusive, recognising, for example, that if a dealer is forced to incur capital expenditure late in the term, or if contrary representations are made by a manufacturer, enforcement of the term may not be appropriate.

Succession of franchises

Generally, if a franchisee wishes to pass on the franchise to a designated relative on the franchisee's death or permanent incapacity, the manufacturer must assent unless proof can be offered that the designated successor is a convicted criminal or is not of good character.

Sale or transfer of franchises

The manufacturer may not unreasonably withhold consent for the sale or transfer of a franchise, although the manufacturer has the right of first refusal.

Compensation on termination or non-renewal of franchise

A dealer whose franchise has been terminated or not renewed must be compensated by the franchisor for unsold stock and rent on the property. There is usually a time limit for unsold stock (eg, compensation may not be mandatory for vehicle stock over two years old) and for the period of rent to be paid.

Coercion by manufacturer or distributor

In many motor vehicle franchising Acts, prohibited practices by the manufacturer centre on a general prohibition on coercing the dealer to carry out any action that may have an adverse effect on the dealer. Coercion by threatening to terminate or refuse to renew a franchise agreement is specifically condemned.

Manufacturer's delivery obligations

The manufacturer cannot refuse to deliver vehicles or other products ordered by the franchisee within a reasonable time and in reasonable condition ("acts of God"

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excepted). A manufacturer may not coerce a dealer into ordering or accepting any stock that has not been voluntarily ordered by the dealer.

Manufacturer's warranty obligations

While warranty issues are frequently addressed in other state laws, some franchising laws include specific admonitions to manufacturers to fulfil their responsibility to consumers and dealers and to amply compensate dealers for warranty work carried out. In return the franchisor may be given the right to periodically audit the dealership to confirm that warranty work invoiced by the dealer has been carried out as the dealer declared.

Disclosure of distribution details to franchised dealers

A manufacturer must disclose, if requested by a dealer, "*the basis upon which new motor vehicles of the same line make are allocated or distributed to new motor vehicle dealers in the state and the basis upon which the current allocation or distribution is being made or will be made to that new motor vehicle dealer.*" (Michigan Statutes)

Price increases without due notice

The manufacturer may not increase the price of a vehicle that has been ordered by a dealer before the dealer received written notification of the price increase.

Franchisor interference in financial structure of dealership

The manufacturer may not coerce a dealer to change the capital structure or financing of the dealership provided the dealer "*at all times meets any reasonable capital standards determined by the manufacturer in accordance with uniformly applied criteria.*" The dealer may not make any changes to the capital structure that "*cause a change in the principal management or have the effect of a sale of the franchise*" without the manufacturer's consent. (Idaho Statutes)

Franchisor interference in dealership premises

A manufacturer or distributor may not coerce a franchised dealer to:

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- *"Either establish or maintain exclusive facilities, personnel or display space"*; or
- Expand or make significant modifications to an existing dealership, or to construct a new dealership facility, *"without a written guarantee of a sufficient supply of new vehicles so as to justify an expansion, in light of the market and economic conditions"*.

(Idaho Statutes)

Additional franchises in the one dealership

A franchisor may not coerce a franchised dealer to *"refrain from participation in the management of, investment in, or the acquisitions of any other line of new vehicle or related products"* provided the dealer *"maintains a reasonable line of credit for each make or line of new vehicle, and the dealer remains in compliance with any reasonable facilities requirements of the manufacturer, and no change is made in the principal management of the dealership."* (Idaho Statutes)

Performance standards

Some states address this issue. In Mississippi it is unlawful for a franchisor *"to attempt to coerce, or coerce, a motor vehicle dealer to adhere to performance standards that are not applied uniformly to other similarly situated motor vehicle dealers. Any performance standards shall be fair, reasonable, equitable and based upon accurate information. If dealership standards are based on a survey, the manufacturer or distributor shall establish the objectivity of the survey process and provide this information to any motor vehicle dealer of the same line or make covered by the survey request. Upon request of a dealer, a manufacturer or distributor shall disclose in writing to the dealer a description of how a performance standard or program is designed and all relevant information pertaining to that dealer used in the application of the performance standard or program to that dealer."*

Relevant market areas

The size of a dealership's "relevant market area" varies between jurisdictions but is usually the area in a ten-to-twenty mile radius around the dealership. In most states

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a manufacturer wishing to establish an additional franchised dealership in the relevant market area of an existing dealership of the same line-make must notify all affected dealers and the relevant authority in writing. A period is then allowed for any dealer in the market area to lodge a protest. At the subsequent hearing the burden of proof is on the manufacturer to demonstrate that good cause exists for the establishment of an additional franchise.

Dealer right of association

A dealer has the right of free association with any other dealer for any lawful purpose.

Appeals process

In States with comprehensive franchise laws a dealer may appeal to the Board or Commissioner of Motor Vehicles within a set time if the dealer feels that he or she has been unfairly treated in a manner that breaches the legislation. A hearing is then held at which the franchisor has the burden of proof to demonstrate that it has acted fairly and reasonably in its dealings with its franchisee.

Violations, dispute resolution and penalties

Usually the Commissioner of Motor Vehicles has the power to issue fines for violation of the legislation although in some states (for example, Alabama) remedies must be pursued through the courts. Some states may also direct parties to a dispute to enter a mediation process if requested by one of the parties.

Section Two – Europe

In Europe, the European Commission, through the **Directorate General for Competition**, has recognised in 1985, 1995, 1999 and 2002 that the motor trades distribution industry is important enough to require specific regulation (distinguishing it from franchise arrangements, distribution agreements, exclusive purchasing agreements) and an essential aim of good competition policy in this area is to strengthen the dealer's independence from manufacturers.

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> *"A strong and independent dealer sector is more likely to engage in pro-competitive behaviour and to be more innovative, to the benefit of consumers"* (p 46 Distributing and Servicing of Motor Vehicles in the European Union: European Commission – Directorate General for Competition 2002)

In 2002 the EC decided that its regulation would be built around (among others) the following principles:

> - *Strengthening dealers' independence from manufacturers, both by stimulating multi-brand sales and by strengthening minimum standards of contractual protection (including retaining the existing minimum notice periods provided for in regulation 1475/95) and by allowing them to realise the value that they have built up by giving them the freedom to sell their businesses to other dealers to sell the same brand* **(p13 Distributing and Servicing of Motor Vehicles in the European Union: European Commission – Directorate General for Competition 2002)**

In (1985) 1995 and 2002 some reforms were introduced to strengthen the independence of the dealer vis a vis the manufacturer.

The following summarises the relevant European Commission reforms, noting that at a national level there may be other regulation (governing, for example, just compensation for termination):

1. **Tenure** – Dealers have a right of tenure to protect their investment – either for an indefinite period or for a minimum period of five years.

2. **Termination –**

   (a) For an indefinite term agreement – dealers can only be terminated on the giving of two years' notice.

   (b) For an indefinite term agreement where the manufacturer is obliged under law (ie, a national law) or agreement to pay compensation for the termination or where the manufacturer wishes to terminate where necessary to re-organise a whole or part of his network, he must give at least one year's notice.

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(c) For a fixed-term agreement, six months' notice must be given before the end of the agreement.

(d) Termination without notice is governed by national law.

(e) A manufacturer must give reasons for termination in writing that are detailed, objective, and transparent (except for fixed term contracts).

3. **Dispute Resolution** – The regulation gives rights to dealers to refer disputes for resolution to either an arbitrator or an expert third party.

4. **Sale of dealership** – a dealer has the right to sell to another dealer with the same brand.

5. **Right of a dealer to sell more than one make** – multi-brand selling is specifically allowed by European regulation.

6. **No price control** – dealers can autonomously determine prices and discounts to final consumers; car manufacturers are not allowed to directly or indirectly restrict this freedom.

In Europe, the 1995 regulation 1475/95 saw the exemption of exclusive and selective distribution agreements. This was:

> *... based on the assumption that effective competition exists, not only between the manufacturers of different brands through their respective distribution systems (inter brand competition) but also to a certain extent between different dealers of the same brand (intra-brand competition). An objective of Regulation 1475/95 is that European consumers should take an equitable share in the benefit from the operation of such competition.* **(see recital 30 of regulation 1475/95 at p64 EC Report)**

Tenure

Introduced in 1995 regulation 121475/95 provides that distribution agreements can be concluded for a fixed period of at least five years or without time limit. The period of notice for terminating the latter type of agreement (that is no fixed time period) is

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at least two years for both parties and can be reduced to one year in special cases (eg re-organisation of a dealer network).

The rationale: these provisions were introduced in 1995 to give legal certainty to dealers as to their contractual relations with car manufacturers and to better protect dealers' investments and give them a reasonable period to change their commercial activity. In Europe, almost all dealers' contracts used in Europe are for indefinite period. If agreements lasting five years are used, they are normally renewed or extended beyond this period. Agreements concluded for an indefinite period are normally ended with two years' notice.

In 2002 the European Commission noted that these rules had not really strengthened the position of dealers vis a vis the manufacturers (implying that more needed to be done) in any major way:

> *The relevant rules of the Regulation give dealers only limited protection, in that they allow them a certain period of time to earn a return on their particular brand-specific investments, part of which is lost if they become a dealer of another network or an independent reseller or repairer.*
>
> *Otherwise these rules do not really strengthen the dealer's independence. Since all other manufacturers use selective/exclusive distribution agreements with a limited number of dealers and since all manufacturers are about to reduce the number of dealers in the context of ongoing restructuring process, it is rather exceptional for a dealer whose contract has been ended to become a dealer of another well established make. It is difficult for a dealer to switch the make and to become a dealer of another manufacturer.* **p84 of the 2000 Commission of European Communities Report on Motor Vehicle Distribution and Servicing Agreements**

The European Commission was saying that while tenure provisions were attractive – by themselves they did not make a radical difference – because the fact remains that *in this industry* it is exceptional for a terminated retailer to be able to set up shop selling another brand/marquee. (Contrast, for example, a travel retail franchise.)

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Note that in NSW, multi-brand franchising is more widespread – but now under threat.

It logically follows from this analysis – and in Europe this was done in 2002 – that for the motor retail industry to be more independent – provision of tenure was not enough – dealers should also have the ability to sell a number of brands. (Note that this is more complex than it might sound – as manufacturers, as a consequence of global acquisitions – now own a number of different brands, many perceived by the public in all likelihood to have nothing to do with each other.)

Right of Dealers to Sell More than One Make

In Europe during 1995, a form of multi-make selling was allowed. However the dealer could only do it through a distinct legal entity, in separate sales premises, under separate management and in a manner that avoids confusion between makes. In 2002 these rules were found to impose a heavy financial burden on multi-make dealers and as a consequence multi-make dealers were rare and the advantages of multi-make marketing – improved inter-brand competition and improved dealer independence had not been attained.

As a consequence, in 2002, the EC has announced that dealers will be able to sell several brands and will not be restricted to a particular area and will be able to compete with each other. After sales service will be able to be outsourced, and dealers would not necessarily continue to provide this service themselves.

From October 2002 onwards all dealers must choose if they wish to be selective or exclusive. Selective dealers cannot sell to independent resellers, but can stock any marquee of car they want and sell to any end user they like. Dealers wishing to retain exclusive relationships with car makers will now be able to sell to resellers and to customers from outside their assigned territory. The introduction of the most controversial measures giving dealers the right to open showrooms anywhere in the 15 nation European Union, from Aberdeen to Athens, (creating a free market) was postponed.

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Dealers' Pricing Policy

In Europe, regulation 1475/95 ensures price competition at the retail level. Dealers have to therefore be free to autonomously determine prices and discounts to final consumers; car manufacturers are not allowed to directly or indirectly restrict this freedom. Consequently, car manufacturers only issue lists with recommended retail prices.

In Australia – the existence of independent competitive dealers is the only source of intra brand competition. However – as recently seen in the Subaru/Inchcape buy out of 8 Melbourne inner metropolitan motor dealers – forward integration destroys this source of competition – and the recommended retail lists may become a form of price fixing.

Dispute Resolution

In Europe in 1995, regulation 1475/95 establishes that the parties to a distribution agreement must, in the event of disagreement on issues regarding the annual setting of sales targets, stock requirements, demonstration vehicles and the termination of the dealer's agreement, accept a system for quick resolution of a dispute – such as recourse to an expert third party or an arbitrator.

Note that in Australia – dispute resolution tends to only be seen on termination in expensive litigation and dealers report a high degree of dissatisfaction with franchise laws which provide for mediation – namely that the manufacturers are not using mediation in good faith.

There is a lack of consensus as to the effectiveness of the expert third party/arbitrator rules for dispute resolution in Europe. In 2002 the EC reports that while there are very few cases of intervention by an arbitrator, the mere mention of this in the contracts have been sufficient to drive the parties towards finding agreement **(p91 of the 2002 EC Report)**.

The new 2002 regulation (1400/2002) stipulates that any vertical agreement has to provide for each of the parties to have the right to refer disputes concerning the

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fulfilment of their contractual obligations to an independent expert, such as a mediator, or to an arbitrator.

> *Such disputes may relate inter alia to supply obligations, the setting and attainment of stock requirements or agreed sales targets, the implementation of an obligation to provide or use demonstration vehicles, the conditions for the sale of different brands (multi branding), the issue as to whether a prohibition to operate out of an unauthorised place of establishment limits the ability of the distributor of motor vehicles other than passenger cars or light commercial vehicles to expand its business or where notice is given to terminate an agreement, in particular the issue whether the termination of an agreement is justified by the reasons given in the notice.* **(p56 Distributing and Servicing of Motor Vehicles in the European Union: European Commission – Directorate General for Competition 2002)**

Selling or acquiring a Dealership

The 2002 regulation provides that dealers are allowed to purchase other undertakings of the same type that sell or repair the same brand of motor vehicles. Similarly, a dealer has the right to transfer all of its rights and obligations to any undertaking of its choice of the same type that sells or repairs the same brand of motor vehicles.

Note that if a dealer is under a notice of termination he sells the business subject to the notice of termination.

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PART F – IMPORTANCE OF FAST AND INEXPENSIVE ALTERNATIVE DISPUTE RESOLUTION

The MTA submits that almost all forms of alternate dispute resolution provide for a lower cost, less adversarial and faster outcome than having a dispute resolved by the court system.

(a) The Franchising Code of Conduct compels mediation as the first step in a third party resolution of disputes but the mediation is not outcome oriented and there is no requirement that a result has to be reached. While it is often beneficial to have parties:

(i) in the same room;

(ii) with a mediator; and

(iii) forced to outline their grievances and desired solution,

there have been instances where the Code procedure has been followed with no advance in the prospects of resolution.

(b) As there are no limits on representation, Code mediation has the ability to greatly increase the cost of litigation (if the matter has to go to court anyway) and also increase the delay. This could favour the party with the deepest pockets.

(c) There is no obligation to mediate in good faith. The MTA is concerned that parties comply with the Code provisions to satisfy their obligations under the Code and thereby avoid available criticism under s51AC(3) of the Trade Practices Act.

(d) For a serious dispute with a recalcitrant party, the Code mediation provision will only serve to increase both cost and delay of the resolution process. In these circumstances it will be received as a pre-condition and additional cost of ultimately going to court.

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(e) The Code does not formally allow a mediation between multiple franchisees and a franchisor analogous to a class action. Many difficulties with franchise system are network wide and a facility to resolve similar difficulties for a number of franchisees at the same time would be beneficial.

(f) There is no requirement that a party cannot commence court proceedings while a mediation takes place. This carries the possibility that costs may be duplicated rather than saved.

(g) The unfortunate fact is that many disputes relating to franchises require some form of interim or status quo orders to prevent the subject matter of the dispute from disappearing. Any effective alternate dispute resolution regime should require the status quo to remain until resolution. Of course the necessary corollary to this is speedy resolution.

Many other legal relationships have been the subject of general or specific alternate dispute resolution. We have mentioned the tenancy tribunals and the takeovers' panel. Security of payments legislation has a fast and absolutely binding (almost non-appealable) adjudication system. Such a system would, in the MTA's submission, be too radical a change.

However, overseas experience has led legislators to prefer an independent and competent board with "teeth" to be able to make fast and binding decisions.

The MTA put forward the Texas Motor Vehicle Board as a satisfactory model which has worked in that jurisdiction for decades.

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PART G – CONCLUSION

The MTA believes that the current protections available to dealers do not afford adequate controls and sanctions for anti-competitive and oppressive conduct in the motor vehicle industry.

In an ideal world, the MTA believes that the imposition of duties to act fairly and in good faith would cure all current deficiencies.

However, realistically, terms such as these will import a subjective element to conduct assessment which will be a breeding ground for disputes between manufacturer/distributors and dealers.

To be effective, these concepts need to be backed up by objective proscription of categories of conduct which are regarded as inappropriate.

The MTA argues that, at least in the motor vehicle industry, most of the necessary assessment work preparatory to legislative change has already been carried out in the jurisdiction of our trading partners.

The Texas Code, which the MTA puts forwards as an appropriate model, has operated in substantially its present form for decades and has survived review and challenge based on the government's acceptance that the legislation strikes the appropriate balance between the competing interests of all parties in an economically important industry.

The MTA therefore submits that for the motor vehicle industry, specific legislation is required (as has occurred with the associated important and high capital petroleum industry).

If this is not within the Federal Government's purview, then at least the discussed amendments to the general franchising legislation should be contemplated.

*In this submission the words manufacturer, factory, distributor and franchisor are interchangeable

TEXAS

° 2301.001. Construction; Purpose

The distribution and sale of motor vehicles in this state vitally affects the general economy of the state and the public interest and welfare of its citizens. This chapter shall be liberally construed to accomplish its purposes, including the exercise of the state's police power to ensure a sound system of distributing and selling motor vehicles through:

(1) licensing and regulating manufacturers, distributors, converters, and dealers of motor vehicles; and
(2) enforcing this chapter as to other persons to provide for compliance with manufacturer's warranties and to prevent fraud, unfair practices, discrimination, impositions, or other abuse of the people of this state.

° 2301.002. Definitions

In this chapter:

(1) "Ambulance" means a vehicle that is used exclusively to transport or to provide emergency medical care to an injured or ill person and that includes:

(A) a driver's compartment;
(B) a compartment to accommodate an emergency medical care technician or paramedic and two injured or ill persons in a position that permits one of the injured or ill persons to be given intensive life-support during transit;
(C) equipment and supplies for emergency care of an injured or ill person at the location of the person or at the scene of an injury-producing incident as well as in transit;
(D) two-way radio communication capability; and
(E) equipment for light rescue or extrication procedures.

(2) "Board" has the meaning assigned by Section 2301.005.
(3) "Broker" means a person who, for a fee, commission, or other valuable consideration, arranges or offers to arrange a transaction involving the sale of a new motor vehicle, other than a person who is:

(A) a franchised dealer or a bona fide employee of a franchised dealer acting for the franchised dealer;
(B) a representative or a bona fide employee of a representative acting for the representative;
(C) a distributor or a bona fide employee of a distributor acting for the distributor; or
(D) the owner of the vehicle at any point in the transaction.

(4) "Chassis manufacturer" means a person who manufactures and produces the frame on which the body of a motor vehicle is mounted.
(5) "Conversion" means a motor vehicle, other than a motor home, ambulance, or fire-fighting vehicle, that:

(A) has been substantially modified by a person other than the manufacturer or distributor of the chassis of the motor vehicle; and
(B) has not been the subject of a retail sale.

(6) "Converter" means a person who before the retail sale of a motor vehicle:

(A) assembles, installs, or affixes a body, cab, or special equipment to a chassis; or
(B) substantially adds, subtracts from, or modifies a previously assembled or manufactured motor vehicle other than a motor home, ambulance, or fire-fighting vehicle.

(7) "Dealer" means a person who holds a general distinguishing number issued by the board under Chapter 503, Transportation Code.
(8) "Dealership" means the physical premises and business facilities on which a franchised dealer operates the dealer's business, including the sale and repair of motor vehicles. The term includes premises or facilities at which a person engages only in the repair of a motor vehicle if the repair is performed under a franchise and a motor vehicle manufacturer's warranty.
(9) "Department" means the Texas Department of Transportation.
(10) "Director" means the director of the division.
(11) "Distributor" means a person, other than a manufacturer, who distributes or sells new motor vehicles to a franchised dealer.
(12) "Division" means the Motor Vehicle Division of the department.
(13) "Executive director" means the executive director of the department.
(14) "Fire-fighting vehicle" means a motor vehicle the only purposes of which are to transport firefighters to the scene of a fire and to provide equipment to fight the fire, and that is built on a truck chassis with a gross carrying capacity of at least 10,000 pounds, to which the following have been permanently affixed or mounted:

(A) a water tank with a combined capacity of at least 500 gallons; and

(B) a centrifugal water pump with a capacity of at least 750 gallons per minute at 150 pounds per square inch net pump pressure.

(15) "Franchise" means one or more contracts between a franchised dealer as franchisee and a manufacturer or a distributor as franchisor, including a written communication from a franchisor to a franchisee in which a duty is imposed on the franchisee, under which:

(A) the franchisee is granted the right to sell and service new motor vehicles manufactured or distributed by the franchisor or only to service motor vehicles under the contract and a manufacturer's warranty;
(B) the franchisee is a component of the franchisor's distribution system as an independent business;

(C) the franchisee is substantially associated with the franchisor's trademark, tradename, and commercial symbol;
(D) the franchisee's business substantially relies on the franchisor for a continued supply of motor vehicles, parts, and accessories; or
(E) any right, duty, or obligation granted or imposed by this chapter is affected.

(16) "Franchised dealer" means a person who:

(A) holds a franchised motor vehicle dealer's license issued by the board under Chapter 503, Transportation Code; and
(B) is engaged in the business of buying, selling, or exchanging new motor vehicles and servicing or repairing motor vehicles under a manufacturer's warranty at an established and permanent place of business under a franchise in effect with a manufacturer or distributor.

(17) "General distinguishing number" means a dealer license issued by the board under Chapter 503, Transportation Code.

(18) "License holder" means a person who holds a license or general distinguishing number issued by the board under this chapter or Chapter 503, Transportation Code.
(19) "Manufacturer" means a person who manufactures or assembles new motor vehicles.

(20) "Manufacturer's statement of origin" means a certificate on a form prescribed by the department showing the original transfer of a new motor vehicle from the manufacturer to the original purchaser.

(21) "Motor home" means a motor vehicle that is designed to provide temporary living quarters and that:

(A) is built on a motor vehicle chassis as an integral part of or a permanent attachment to the chassis; and

(B) contains at least four of the following independent life support systems that are permanently installed and designed to be removed only for repair or replacement and that meet the standards of the American National Standards Institute, Standards for

Recreational Vehicles:

(i) a cooking facility with an on-board fuel source;

(ii) a gas or electric refrigerator;

(iii) a toilet with exterior evacuation;

(iv) a heating or air conditioning system with an on-board power or fuel source separate from the vehicle engine;

(v) a potable water supply system that includes at least a sink, a faucet, and a water tank with an exterior service supply connection; or

(vi) a 110-125 volt electric power supply.

(22) "Motor home manufacturer" means a person other than the manufacturer of a motor vehicle chassis who, before the retail sale of the motor vehicle, performs modifications on the chassis that result in the finished product being classified as a motor home.

(23) "Motor vehicle" means:

(A) a fully self-propelled vehicle having two or more wheels that has as its primary purpose the transport of a person or persons, or property, on a public highway;

(B) a fully self-propelled vehicle having two or more wheels that:

(i) has as its primary purpose the transport of a person or persons or property;

(ii) is not manufactured for use on public streets, roads, or highways; and

(iii) has been issued a certificate of title;

(C) an engine, transmission, or rear axle, regardless of whether attached to a vehicle chassis, manufactured for installation in a vehicle that has:

(i) the transport of a person or persons, or property, on a public highway as its primary purpose; and

(ii) a gross vehicle weight rating of more than 16,000 pounds; or

(D) a towable recreational vehicle.

(24) "New motor vehicle" means a motor vehicle that has not been the subject of a retail sale regardless of the mileage of the vehicle.

(25) "Nonfranchised dealer" means a person who holds an independent motor vehicle dealer's general distinguishing number or a wholesale motor vehicle dealer's general distinguishing number issued by the board under Chapter 503, Transportation Code.

(26) "Party" means a person or agency named or admitted as a party and whose legal rights, duties, or privileges are to be determined by the board after an opportunity for adjudicative hearing.

(27) "Person" means a natural person, partnership, corporation, association, trust, estate, or any other legal entity.

(28) "Relocate" means to transfer an existing dealership operation to facilities at a different location, including a transfer that results in a consolidation or dualing of an existing dealer's operation.

(29) "Representative" means a person who:

(A) is or acts as an agent or employee for a manufacturer, distributor, or converter; and
(B) performs any duty in this state relating to promoting the distribution or sale of new motor vehicles or contacts dealers in this state on behalf of a manufacturer, distributor, or converter.

(30) "Retail sale" means any sale of a motor vehicle other than:

(A) a sale in which the purchaser acquires a vehicle for resale; or
(B) a sale of a vehicle that is operated in accordance with Section 503.061, Transportation Code.

(31) "Rule":

(A) means a statement by the board of general applicability that:

(i) implements, interprets, or prescribes law or policy; or

(ii) describes the procedure or practice requirements of the board;

(B) includes the amendment or repeal of a prior rule; and

(C) does not include a statement regarding only the internal management or organization of the board and not affecting the rights of a person not connected with the board.

(32) "Towable recreational vehicle" means a nonmotorized vehicle that:

(A) was originally designed and manufactured primarily to provide temporary human habitation in conjunction with recreational, camping, or seasonal use;

(B) is titled and registered with the department as a travel trailer through a county tax assessor-collector;

(C) is permanently built on a single chassis;

(D) contains at least one life support system; and

(E) is designed to be towable by a motor vehicle.

(33) "Transportation commission" means the Texas Transportation Commission of the department.

(34) "Vehicle lease" means a transfer of the right to possess and use a motor vehicle for a term of more than 180 days in return for consideration.

(35) "Vehicle lease facilitator" means a person, other than a franchised dealer, a vehicle lessor, or a bona fide employee of a franchised dealer or vehicle lessor, who:

(A) holds the person out to any other person as a "motor vehicle leasing company" or "motor vehicle leasing agent," or uses a similar title, to solicit or procure another person to enter into an agreement to become the lessee of a motor vehicle that is not, and will not be, titled in the name of or registered to the facilitator;

(B) otherwise solicits another person to enter into an agreement to become a lessee of a motor vehicle that is not, and will not be, titled in the name of or registered to the facilitator; or

(C) is otherwise engaged in the business of securing lessees or prospective lessees of a motor vehicle that is not, and will not be, titled in the name of or registered to the facilitator.

(36) "Vehicle lessor" means a person who, under a lease, transfers to another person the right to possession and use of a motor vehicle titled in the name of the lessor.

(37) "Warranty work" means parts, labor, and any other expenses incurred by a franchised dealer in complying with the terms of a manufacturer's or distributor's warranty.

° 2301.003. Effect on Agreements

(a) The terms and conditions of a franchise are subject to this chapter.

(b) An agreement to waive the terms of this chapter is void and unenforceable. A term or condition of a franchise inconsistent with this chapter is unenforceable.

° 2301.004. Chapter Exclusive

Unless otherwise specifically provided by law not in conflict with this chapter, all aspects of the distribution and sale of motor vehicles are governed exclusively by this chapter.

° 2301.005. Title Changes

(a) A reference in law, including a rule, to the Texas Motor Vehicle Commission or to the board means the director, except that a reference to the board means the commission if it is related to the adoption of rules.

(b) A reference in law, including a rule, to the executive director of the Texas Motor Vehicle Commission means the director.

(c) A reference in law, including a rule, to the Texas Motor Vehicle Commission Code means this chapter.

(d) A reference in law other than this chapter to a dealer licensed by the Texas Motor Vehicle Commission or a dealer licensed by the Motor Vehicle Board of the Texas Department of Transportation means a franchised dealer.

(e) A reference in this chapter to a rule or to a board rule means a rule adopted by the commission, except that all board rules that were in effect on June 1, 2005, remain in effect until amended or repealed by the commission.

° 2301.006. Brokers Prohibited

A person may not act as, offer to act as, or claim to be a broker.

° 2301.007. Towing Vehicle by License Holder

Notwithstanding any other law, a person licensed under this chapter does not commit an offense by employing a person to tow a disabled vehicle to or from the premises for which the person is licensed regardless of whether the person employed to tow the vehicle:

(1) holds a certificate issued by a state agency

authorizing the person

to engage in the business of towing vehicles for hire; or

(2) commits an offense by towing the vehicle.

Sections 2301.008 to 2301.050. Reserved for expansion. ° 2301.051 to 2301.060. Repealed by Acts 2005, 79th Leg., ch. 281, ° 7.06(1), eff. June 14, 2005

Sections 2301.061 to 2301.100. Reserved for expansion.

° 2301.101. Director

(a) The director is the division's chief executive and administrative officer and shall administer and enforce this chapter.

(b) The director must be licensed to practice law in this state.

(c) The director serves at the will of the executive director.

° 2301.102. Repealed by Acts 2005, 79th Leg., ch. 281, ° 7.06(2), eff. June 14, 2005

°2301.103. Personnel

A division employee is subject to dismissal if the employee has an interest in or is related within the first degree by consanguinity or affinity, as determined under Chapter 573, Government Code, to a person who has an interest in a business that manufactures, distributes, converts, sells, or leases motor vehicles.

° 2301.104. Repealed by Acts 2005, 79th Leg., ch. 281, ° 7.06(2), eff. June 14, 2005

° 2301.105. Career Ladder Program; Performance Evaluations

(a) The director or the director's designee shall develop an intra-agency career ladder program that addresses opportunities for mobility and advancement of employees in the division. The program must require intra-agency postings of all positions concurrently with any public posting.
(b) The director or the director's designee shall develop a system of annual performance evaluations based on documented employee performance. All merit pay for employees of the division must be based on the system established under this subsection.

° 2301.106. Equal Opportunity Policy; Report

(a) The director or the director's designee shall prepare and maintain a written policy statement to ensure implementation of an equal employment opportunity program under which all personnel transactions are made without regard to race, color, disability, sex, religion, age, or national origin. The policy statement must include:

    (1) personnel policies, including policies relating to recruitment, evaluation, selection, appointment, training, and promotion of personnel that comply with Chapter 21, Labor Code;
    (2) a comprehensive analysis of the division workforce that meets federal and state laws, rules, and regulations and instructions adopted directly under those laws, rules, or regulations;
    (3) procedures by which a determination can be made of significant underuse in the division workforce of all persons for whom federal or state laws, rules, and regulations and instructions adopted directly under those laws, rules, or regulations encourage a more equitable balance; and
    (4) reasonable methods to appropriately address those areas of significant underuse.

(b) A policy statement prepared under Subsection (a) must be:

(1) prepared to cover an annual period;
(2) updated at least annually;
(3) reviewed by the Commission on Human Rights for compliance with Subsection (a)(1); and
(4) filed with the governor.

(c) The governor shall deliver a biennial report to the legislature based on the information received under Subsection (b). The report may be made separately or as a part of other biennial reports made to the legislature.

Sections 2301.107 to 2301.150. Reserved for expansion.

° 2301.151. General Jurisdiction of Board

(a) The board has the exclusive original jurisdiction to regulate those aspects of the distribution, sale, or lease of motor vehicles that are governed by this chapter, including the original jurisdiction to determine its own jurisdiction.
(b) The board may take any action that is specifically designated or implied under this chapter or that is necessary or convenient to the exercise of the power and jurisdiction granted under Subsection (a).

° 2301.152. General Duties of Board

(a) In accordance with this chapter, the board shall:

(1) administer this chapter;
(2) establish the qualifications of license holders;
(3) ensure that the distribution, sale, and lease of motor vehicles is conducted as required by this chapter and board rules;
(4) provide for compliance with warranties; and
(5) prevent fraud, unfair practices, discrimination, impositions, and other abuses in connection with the distribution and sale of motor vehicles.

(b) In addition to the duties delegated to the board under this chapter, the board shall enforce and administer Chapter 503, Transportation Code.

° 2301.153. General Powers of Board

(a) Notwithstanding any other provision of law, the board has all powers necessary, incidental, or convenient to perform a power or duty expressly granted under this chapter, including the power to:

(1) initiate and conduct proceedings, investigations, or hearings;
(2) administer oaths;
(3) receive evidence and pleadings;
(4) issue subpoenas to compel the attendance of any person;
(5) order the production of any tangible property, including papers, records, or other documents;
(6) make findings of fact on all factual issues arising out of a proceeding initiated under this chapter;
(7) specify and govern appearance, practice, and procedures before the board;
(8) adopt rules and issue conclusions of law and decisions, including declaratory decisions or orders;
(9) enter into contracts;
(10) execute instruments;
(11) retain counsel;
(12) use the services of the attorney general and institute and direct the conduct of legal proceedings in any forum;

(13) obtain other professional services as necessary and convenient;
(14) impose a sanction for contempt;
(15) assess and collect fees and costs, including attorney's fees;
(16) issue, suspend, or revoke licenses;
(17) prohibit and regulate acts and practices in connection with the distribution and sale of motor vehicles or warranty performance obligations;
(18) issue cease and desist orders in the nature of temporary or permanent injunctions;
(19) impose a civil penalty;
(20) enter an order requiring a person to:

(A) pay costs and expenses of a party in connection with an order entered under Section 2301.465;
(B) perform an act other than the payment of money; or
(C) refrain from performing an act; and

(21) enforce a board order.

(b) The board may inspect the books and records of a license holder in connection with the performance of its duties under this chapter.

° 2301.154. Delegation of Powers

The director may delegate any of the director's powers to one or more of the division's employees.

° 2301.155. Rules

The authority to adopt rules under this chapter is vested in the board. In accordance with this chapter and the rules, decisions, and orders of the board, the board shall adopt rules as necessary or convenient to administer this chapter and to govern practice and procedure before the board.

° 2301.156. Deposit of Revenue

Notwithstanding any other law to the contrary, all money collected by the board under this chapter shall be deposited in the state treasury to the credit of the state highway fund.

° 2301.157. Immunity From Liability

(a) Notwithstanding any other law, the director or a board member, hearings examiner, or division employee is not personally liable for damages resulting from an official act or omission unless the act or omission constitutes intentional or malicious malfeasance.
(b) The attorney general shall defend a person described by
Subsection (a) in an action brought in connection with the act or omission by the person regardless of whether the person serves the board or division in any capacity at the time the action is brought.
(c) The state shall indemnify a person for a judgment in an action described by Subsection (a), but the state may seek contribution from the person if liability is otherwise permitted by this section.

° 2301.158, 2301.159. Repealed by Acts 2005, 79th Leg., ch. 281, ° 7.06(2), eff. June 14, 2005

° 2301.160. Tolling of Time Limit During Mediation

A time limit relating to a board proceeding that is imposed by this chapter on the board or on a dealer is tolled during the pendency of mediation required by this chapter or by a franchise agreement.

Sections 2301.161 to 2301.200. Reserved for expansion.

° 2301.201. Public Interest Information

(a) The director or the director's designee shall prepare information describing the functions of the board and the procedures by which complaints or protests are filed with and resolved by the board.
(b) The board shall make the information available to the public and appropriate state agencies.

° 2301.202. Complaints; Records

(a) The board shall provide to a person who files a complaint, and to each person that is the subject of the complaint, information about the board's policies and procedures relating to complaint investigation and resolution.
(b) The board shall keep an information file about each complaint filed with the board that the board has authority to resolve. The board shall keep the following information for each complaint filed by the board for the purpose of enforcing this chapter:

(1) the date the complaint is filed;
(2) the name of the person filing the complaint;
(3) the subject matter of the complaint;
(4) each person contacted in relation to the complaint;
(5) a summary of the results of the review or investigation of the complaint; and
(6) if the board does not take action on the complaint, an explanation of the reasons that action was not taken.

(c) If a written complaint is filed with the board that the board has authority to resolve, the board, at least quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an ongoing board investigation.

° 2301.203. Complaint Investigation and Disposition

(a) If the board has reason to believe, through receipt of a complaint or otherwise, that a violation of this chapter or a rule, order, or decision of the board has occurred or is likely to occur, the board shall conduct an investigation unless it determines that the complaint is frivolous or for the purpose of harassment.
(b) If the investigation establishes that a violation of this chapter or a rule, order, or decision of the board has occurred or is likely to occur, the board shall initiate proceedings as it determines appropriate to enforce this chapter or its rules, orders, and decisions.
(c) The board may not file a complaint alleging a violation of this chapter or a board rule relating to advertising until the board has notified the license holder involved of the alleged violation and given the license holder an opportunity to cure the violation without further proceedings or liability.

° 2301.204. Complaint Concerning Vehicle Defect

(a) The owner of a motor vehicle or the owner's designated agent may make a complaint concerning a defect in a motor vehicle that is covered by a manufacturer's, converter's, or distributor's warranty agreement applicable to the vehicle.
(b) The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.
(c) The owner may also invoke the board's jurisdiction by sending a copy of the complaint to the board.
(d) A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.

° 2301.205. Notice of Complaint Procedure

(a) A franchised dealer shall provide notice of the complaint procedures provided by Section 2301.204 and Subchapter M to each person to whom the dealer sells a new motor vehicle.
(b) The board may require its approval of the contents of the notice required by Subsection (a) or may prescribe the contents of the notice.
(c) The failure to provide notice as required by this section is a violation of this chapter.

° 2301.206. Public Participation

(a) The board shall develop and implement policies that provide the public with a reasonable opportunity to appear before the board and to speak on any issue under the board's jurisdiction.
(b) The board shall prepare and maintain a written plan that describes how a person who does not speak English or who has a physical, mental, or developmental disability may be provided reasonable access to the board's programs.

Sections 2301.207 to 2301.250. Reserved for expansion.

° 2301.252. License Required: Sale of New Motor Vehicles

(a) A person may not engage in the business of buying, selling, or exchanging new motor vehicles unless the person:

(1) holds a franchised dealer's license issued under this chapter for the make of new motor vehicle being bought, sold, or exchanged; or
(2) is a bona fide employee of the holder of a franchised dealer's license.

(b) For purposes of this section:

(1) the make of a conversion, ambulance, or fire-fighting vehicle is that of the chassis manufacturer; and
(2) the make of a motor home is that of the motor home manufacturer.

° 2301.253. License Required: Vehicle Lease Facilitators

Unless a person holds a vehicle lease facilitator license and complies with this chapter, the person may not:

(1) act in the capacity of or engage in the business of a vehicle lease facilitator;
(2) hold the person out to any other person as a "leasing company," "leasing agent," "lease facilitator," or similar title, directly or indirectly engaged in the business of a vehicle lease facilitator; or
(3) otherwise engage in the solicitation or procurement of a prospective lessee for a motor vehicle that is not titled in the name of and registered to the person.

° 2301.254. License Not Required for Certain Vehicle Lessors or Vehicle Lease Facilitators

(a) A person is not required to obtain a license to act as a vehicle lessor or a vehicle lease facilitator if the person is:

(1) a state or federally chartered financial institution or a regulated subsidiary of the financial institution; or

(2) a trust or other entity that owns an interest in a vehicle lease and the vehicle that is the subject of the lease, if the lease covering the vehicle is initiated, managed, serviced, and administered by a licensed vehicle lessor.

(b) A franchised dealer is not required to have a vehicle lessor or vehicle lease facilitator license to engage in any capacity in the business of leasing a motor vehicle that the dealer owns and is licensed under this chapter to sell.

° 2301.255. Nonfranchised Dealers; General Distinguishing Number

(a) A nonfranchised dealer may not operate as a dealer unless the person holds a general distinguishing number. A nonfranchised dealer is not required to obtain an additional license under this chapter.

(b) For purposes of a nonfranchised dealer, a reference to a license in this chapter means a general distinguishing number.

° 2301.256. Review of New Applications

A new application for a license under this chapter shall be reviewed and may be investigated to determine compliance with this chapter.

° 2301.257. Application for Dealer's License

(a) An application for a dealer's license must be on a form prescribed by the board. The application must include:

(1) the information required by Chapter 503, Transportation Code; and

(2) information relating to the applicant's financial resources, business integrity, business ability and experience, franchise if applicable, physical facilities, vehicle inventory, and other factors the board considers necessary to determine the applicant's qualifications to adequately serve the public.

(b) If a material change occurs in the information included in an application for a dealer's license, the dealer shall notify the board of the change within a reasonable time but not later than the next annual renewal. The board shall prescribe a form for the disclosure of the change.

(c) A franchised dealer must apply for a separate license under this section for each separate and distinct dealership as determined by the board. Before changing a location, a dealer must obtain a new license for that location.

Confidential

Notwithstanding any other law or rule, a request for an application for a dealer's license is confidential, is not an open record, and is not available for public inspection.

° 2301.258. General Requirements for Application for Manufacturer's, Distributor's, Converter's, or Representative's License

An application for a manufacturer's, distributor's, converter's, or representative's license must be on a form prescribed by the board. The application must include information the board determines necessary to fully determine the qualifications of an applicant, including financial resources, business integrity and experience, facilities and personnel for serving franchised dealers, and other information the board determines pertinent to safeguard the public interest and welfare.

° 2301.259. Application for Manufacturer's License

(a) An applicant for a manufacturer's license must provide a list of each distributor or representative acting for the applicant and each dealer franchised to sell the applicant's products in this state and their respective locations. An applicant for or holder of a manufacturer's license must inform the board of a change to the list not later than the 15th day after the date of the change. Information submitted under this subsection becomes a part of the application.

(b) An application for a manufacturer's license must include a document stating the terms and conditions of each warranty agreement in effect at the time of the application on a product the manufacturer sells in this state so that the board may determine:

(1) the protection provided a retail purchaser of the manufacturer's products;
(2) the obligation of a franchised dealer under the agreement; and
(3) the basis for compensating a franchised dealer for labor, parts, or other expenses under the agreement.

(c) An application for a manufacturer's license must include a statement regarding the manufacturer's compliance with Subchapter I and Sections 2301.451-2301.476.

(d) An application for a manufacturer's license must specify:

(1) the preparation and delivery obligations of the manufacturer's franchised dealers before delivery of a new motor vehicle to a retail purchaser; and
(2) the schedule of compensation to be paid to a franchised dealer for the work and service performed under Subdivision (1).

° 2301.260. Application for Distributor's License

(a) An application for a distributor's license must disclose:

(1) the manufacturer for whom the distributor will act;
(2) whether the manufacturer is licensed in this state;
(3) the warranty covering the motor vehicles to be sold;
(4) the persons in this state who will be responsible for compliance with the warranty;
(5) the terms of the contract under which the distributor will act for the manufacturer; and
(6) the franchised dealers with whom the distributor will do business.

(b) An applicant for a distributor's license that has a responsibility under a warranty agreement must provide the same information relating to the agreement as is provided by an applicant for a manufacturer's license under Section 2301.259.

(c) An applicant for or holder of a distributor's license must inform the board of a change in the information provided under this section not later than the 15th day after the date of the change. Information submitted under this subsection becomes a part of the application.

° 2301.261. Application for Vehicle Lessor's License

(a) An application for a vehicle lessor's license must:

(1) be on a form prescribed by the board;

(2) contain evidence of compliance with Chapter 503, Transportation Code, if applicable; and

(3) state other information required by the board.

(b) This chapter does not require a separate license for each employee of a vehicle lessor.

° 2301.262. Application for Vehicle Lease Facilitator License

(a) An application for a vehicle lease facilitator license must be on a form prescribed by the board and contain the information required by the board.

(b) This chapter does not require a separate license for each employee of a vehicle lease facilitator.

° 2301.263. License Issued Subject to New Law and Rules

A license issued under this chapter is subject to each provision of this chapter and board rule in effect on the date the license is issued and each provision of this chapter and board rule that takes effect during the term of the license.

° 2301.264. License Fees

(a) The annual fees for a license issued under this chapter are:

(1) $ 900 for a manufacturer or distributor, plus $ 20 for each dealer franchised by the manufacturer or distributor;

(2) for a franchised dealer:

(A) $ 175, if the dealer sold fewer than 201 new motor vehicles during the preceding calendar year;

(B) $ 275, if the dealer sold more than 200 but fewer than 401 new motor vehicles during the preceding calendar year;

(c) $ 400, if the dealer sold more than 400 but fewer than 801 new motor vehicles during the preceding calendar year;

(D) $ 500, if the dealer sold more than 800 but fewer than 1,201 new motor vehicles during the preceding calendar year;

(E) $ 625, if the dealer sold more than 1,200 but fewer than 1,601 new motor vehicles during the preceding calendar year;

(F) $ 750, if the dealer sold more than 1,600 new motor vehicles during the preceding calendar year; and

(G) $ 100 for each location separate from the dealership at which the dealer does not offer motor vehicles for sale but performs warranty service work on vehicles the dealer is franchised and licensed to sell;

(3) $ 25 for an amendment to a license;

(4) $ 100 for a representative;

(5) $ 375 for a converter;

(6) for a vehicle lessor:

(A) $ 175, if the lessor leased 200 or fewer motor vehicles during the preceding calendar year;

(B) $ 275, if the lessor leased more than 200 but fewer than 401 motor vehicles during the preceding calendar year;

(C) $ 400, if the lessor leased more than 400 but fewer than 801motor vehicles during the preceding calendar year;

(D) $ 500, if the lessor leased more than 800 but fewer than 1,201 motor vehicles during the preceding calendar year;

(E) $ 625, if the lessor leased more than 1,200 but fewer

than 1,601 motor vehicles during the preceding calendar year; and

(F) $ 750, if the lessor leased more than 1,600 motor vehicles during the preceding calendar year;

(7) $ 375 for a vehicle lease facilitator; and

(8) $ 50 for a duplicate license.

(b) A person who fails to apply for a license required under this chapter or fails to pay a fee within the required time must pay a penalty equal to 50 percent of the amount of the fee for each 30 days after the date the license is required or the fee is due.

(c) The board may prorate the fee for a representative's license to allow the representative's license and the license of the manufacturer or distributor who employs the representative to expire on the same day.

(d) The board may refund from funds appropriated to the board for that purpose a fee collected under this chapter that is not due or that exceeds the amount due.

° 2301.265. Service of Process on License Holder

Obtaining a license under this chapter constitutes doing business in this state. A license holder who fails to designate an agent for service of process is considered to have designated the secretary of state as the agent for receipt of service of process.

° 2301.266. Duplicate License

The board may:

(1) issue a duplicate license for any license the board issues;

(2) charge a fee for the issuance of a duplicate license; and

(3) adopt rules applicable to the issuance of a duplicate license.

Sections 2301.267 to 2301.300. Reserved for expansion.

° 2301.301. Annual Renewal Required

(a) A license issued under this chapter expires on the first anniversary of the date the license is issued.

(b) The board may issue a license for a term of less than one year to coordinate the expiration dates of licenses held by a person that is required to obtain more than one license to perform activities under this chapter.

(c) The board by rule may implement a system under which licenses expire on various dates during the year. For a year in which a license expiration date is changed, the fee for the license shall be prorated so that the license holder pays only that portion of the fee that is allocable to the number of months during which the license is valid. On renewal of the license on the new expiration date, the entire license renewal fee is payable.

(d) A license renewal may be administratively granted unless a protest is made to the board.

° 2301.302. Notice of License Expiration

The board shall notify each person licensed under this chapter of the date of license expiration and the amount of the fee required for license renewal. The notice shall be mailed at least 30 days before the date of license expiration.

° 2301.303. Renewal of Dealer's License

A dealer shall renew the dealer's license annually on an application prescribed by the board. The board shall include in the renewal application a request for disclosure of material changes described by Section 2301.257.

° 2301.304. Procedure for Renewal of Certain Licenses

The holder of a manufacturer's, distributor's, converter's, or representative's license may apply for a renewal of the license by complying with the application process specified by this chapter and board rule.

° 2301.351. General Prohibition

A dealer may not:

(1) violate a board rule;

(2) aid or abet a person who violates this chapter; or

(3) use false, deceptive, or misleading advertising.

° 2301.352. Prohibition: Requiring Additional Equipment After

Retail Sale

A franchised dealer may not require as a condition of the sale and delivery of a new motor vehicle a retail purchaser of the vehicle to purchase special features, equipment, parts, or accessories that the purchaser did not order or desire and that were not already installed on the vehicle at the time of sale.

° 2301.353. Prohibition: Performance of Obligation Under

Agreement With Manufacturer

A franchised dealer may not fail to perform an obligation placed on:

(1) the selling dealer in connection with the preparation and delivery of a new motor vehicle for retail sale as provided in the manufacturer's preparation and delivery agreements on file with the board that are applicable to the vehicle; or

(2) the dealer in connection with the manufacturer's warranty agreements on file with the board.

° 2301.354. Use of Signs

(a) A franchised dealer may not operate without appropriate signs that:

(1) are readily and easily visible to the public; and

(2) identify the dealer's place of business and the products the dealer offers for sale.

(b) To the extent of a conflict between this section and another law, including an ordinance, this section prevails.

(c) If a dispute arises under this section:

(1) the board has exclusive jurisdiction to determine whether a sign complies with this section; and

(2) the board shall uphold an ordinance of a home-rule municipality and protect a franchised dealer from retribution by a manufacturer or distributor for complying with the ordinance.

° 2301.355. Use of Multiple Locations

(a) A franchised dealer may conduct business at more than one location, except that the dealer may establish and maintain a separate location for the display and sale of new motor vehicles only if expressly authorized by the dealer's franchise and license.

(b) A franchised dealer must hold a separate license for each separate and distinct dealership as required by Section 2301.257.

° 2301.356. Notice of Certain Proposed Changes

A licensed dealer shall promptly notify the board of any proposed change in its ownership, location, franchise, or any other matter the board by rule may require.

° 2301.357. Prohibited Fee

(a) A franchised dealer may not directly or indirectly pay a fee to a vehicle lessor or a vehicle lease facilitator.
(b) For purposes of Subsection (a), an adjustment in the purchase price paid for the lease or leased vehicle is not a fee. This subsection does not authorize a fee for referring leases or prospective lessees.

° 2301.358. Vehicle Show or Exhibition

(a) A person who holds a license issued under this chapter may not participate in a new motor vehicle show or exhibition unless:

(1) the person provides the board with written notice at least 30 days before the date the show or exhibition opens; and
(2) the board grants written approval.

(b) A person who holds a license issued under this chapter may not sell or offer for sale a new motor vehicle at a show or exhibition, but dealership personnel may be present to aid in showing and exhibiting new motor vehicles.
(c) This section does not prohibit the sale of a towable recreational vehicle, motor home, ambulance, fire-fighting vehicle, or tow truck at a show or exhibition if:

(1) the show or exhibition is approved by the board; and
(2) the sale is not otherwise prohibited by law.

(d) A rule adopted by the board regulating the off-site display or sale of towable recreational vehicles must include a provision that authorizes the display and sale of towable recreational vehicles at a private event in a trade area that would not otherwise qualify for the private event under the application of general participation requirements for organized dealer shows and exhibitions.

° 2301.359. Transfer of Ownership by Dealer

(a) A dealer must notify the manufacturer or distributor of a vehicle the dealer is franchised to sell of the dealer's decision to assign, sell, or otherwise transfer a franchise or a controlling interest in the dealership to another person. The notice is the application by the dealer for approval by the manufacturer or distributor of the transfer.
(b) Notice under Subsection (a) must:

(1) be in writing and include the prospective transferee's name, address, financial qualifications, and business experience; and
(2) be sent by certified mail, return receipt requested.

(c) The notice must be accompanied by:

(1) a copy of pertinent agreements regarding the proposed assignment, sale, or transfer;
(2) completed application forms and related information generally used by the manufacturer or distributor in reviewing prospective dealers, if the forms are on file with the board; and
(3) the prospective transferee's written agreement to comply with the franchise to the extent that the franchise is not in conflict with this chapter.

(d) Not later than the 60th day after the date of receipt of a notice and application under this section, a manufacturer or distributor shall determine whether a dealer's prospective transferee is qualified and shall send a letter by certified mail, return receipt requested, informing the dealer of the approval or the unacceptability of the prospective transferee. If the prospective transferee is not acceptable, the manufacturer or distributor shall include a statement setting forth the material reasons for the rejection.
(e) A manufacturer or distributor may not unreasonably withhold approval of an application filed under Subsection (a). It is unreasonable for a manufacturer or distributor to reject a prospective transferee who is of good moral character and who meets the written, reasonable, and uniformly applied standards or qualifications, if any, of the manufacturer or distributor relating to the prospective transferee's business experience and financial qualifications.
(f) An application filed under this section is approved unless rejected by the manufacturer or distributor in the manner provided by this section.

° 2301.360. Review by Board Following Denial of Transfer

(a) A dealer whose application is rejected under Section 2301.359 may file a protest with the board. A protest filed under this section is a contested case.
(b) In a protest under this section, the board must determine whether the prospective transferee is qualified. The burden is on the manufacturer or distributor to prove that the prospective transferee is not qualified. The board shall enter an order holding that the prospective transferee either is qualified or is not qualified.
(c) If the board's order is that the prospective transferee is qualified, the dealer's franchise is amended to reflect the change in franchisee, and the manufacturer or distributor shall accept the transfer for all purposes.
(d) If the board's order is that the prospective transferee is not qualified, the board may include in the order:

(1) specific reasons why the prospective transferee is not qualified; and
(2) specific conditions under which the prospective transferee would be qualified.

(e) If the board's order that a prospective transferee is not qualified includes specific conditions under which the prospective transferee would be qualified, the board may retain jurisdiction of the dispute for a time certain to allow the dealer and prospective transferee to meet the conditions.

Sec. 2301.361. OFFSITE SALES. (a) Except a provided by Subsection (b) and Sections 2301.358(c) and (d), a dealer may only sell or offer to sell a motor vehicle from an established and permanent place of business;

(1) that is approved by the division; and
(2) for which a general distinguishing number has been issued.
(b) A dealer may sell or offer to sell a motor vehicle online through an advertisement on the Internet to a buyer who never personally appears at the dealer's established and permanent place of business.

(2007 Amendment)

° 2301.401. Filing Requirements

(a) A manufacturer or distributor shall file with the board a copy of the current requirements the manufacturer or distributor imposes on its dealers with respect to the dealer's:

(1) duties under the manufacturer's or distributor's warranty; and
(2) vehicle preparation and delivery obligations.

(b) Warranty or preparation and delivery requirements placed on a dealer by a manufacturer are not enforceable unless the requirements are reasonable and are disclosed and filed as required by Subsection (a).

° 2301.402. Rate of Compensation

(a) A manufacturer or distributor shall fairly and adequately compensate its dealers for warranty work.
(b) A manufacturer or distributor may not pay or reimburse a dealer an amount of money for warranty work that is less than the amount the dealer charges a retail customer for similar nonwarranty work.
(c) In computing the amount of money a dealer charges a retail customer under Subsection (b), the manufacturer or distributor shall use the greater of:

(1) the average labor rate charged during the preceding six months by the dealer on 100 sequential nonwarranty repair orders, exclusive of routine maintenance; or
(2) the average labor rate charged for 90 consecutive days during the preceding six months by the dealer for nonwarranty repairs, exclusive of routine maintenance.

° 2301.403. Adjustment of Warranty Labor Rate

(a) A dealer may request an adjustment in the dealer's warranty labor rate. The request must be sent to the manufacturer or distributor by certified mail, return receipt requested, and must state the requested rate and include information reasonably necessary to enable the manufacturer or distributor to adequately evaluate the request.
(b) Not later than the 60th day after the date of receipt of a request under this section, the manufacturer or distributor shall provide written notice to the requesting dealer of the approval or disapproval of the request. If the request is disapproved, the manufacturer or distributor shall state the reasons for the disapproval.

° 2301.452. Delivery of Motor Vehicle or Part

(a) A manufacturer, distributor, or representative shall deliver in a reasonable quantity and within a reasonable time to a franchised dealer who holds a franchise for a motor vehicle sold or distributed by the manufacturer, distributor, or representative any new motor vehicle or part or accessory for a new motor vehicle as covered by the franchise if the vehicle, part, or accessory is publicly advertised as being available for delivery or is actually being delivered.

(b) This section does not apply to a delivery prevented by:

(1) an act of God;
(2) a work stoppage or delay because of a strike or labor dispute;
(3) a freight embargo; or
(4) another cause beyond the control of the manufacturer, distributor, or representative.

° 2301.453. Termination or Discontinuance of Franchise

(a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not terminate or discontinue a franchise with a franchised dealer or directly or indirectly force or attempt to force a franchised dealer to relocate or discontinue a line-make or parts or products related to that line-make unless the manufacturer, distributor, or representative provides notice of the termination or discontinuance as required by Subsection © and:

(1) the manufacturer, distributor, or representative receives the dealer's informed written consent;
(2) the appropriate time for the dealer to file a protest under Subsection (e) has expired; or
(3) the board makes a determination of good cause under Subsection (g).

(b) A termination or discontinuance to which this section applies includes a termination or discontinuance of a franchise that results from a change by a manufacturer, distributor, or representative of its:

(1) distributor;
(2) method of distribution of its products in this state; or
(3) business structure or ownership.

(c) Except as provided by Subsection (d), the manufacturer, distributor, or representative must provide written notice by registered or certified mail to the dealer and the board stating the specific grounds for the termination or discontinuance. The notice must:

(1) be received not later than the 60th day before the effective date of the termination or discontinuance; and
(2) contain on its first page a conspicuous statement that reads:

"NOTICE TO DEALER: YOU MAY BE ENTITLED TO FILE A PROTEST WITH THE TEXAS MOTOR VEHICLE BOARD IN AUSTIN, TEXAS, AND HAVE A HEARING IN WHICH YOU MAY PROTEST THE PROPOSED TERMINATION OR DISCONTINUANCE OF YOUR FRANCHISE UNDER THE TERMS OF CHAPTER 2301, OCCUPATIONS CODE, IF YOU OPPOSE THIS ACTION."

(d) Notice may be provided not later than the 15th day before the effective date of termination or discontinuance if a licensed dealer fails to conduct its customary sales and service operations during its customary business hours for seven consecutive business days. This subsection does not apply if the failure is caused by:

(1) an act of God;
(2) a work stoppage or delay because of a strike or labor dispute;
(3) an order of the board; or
(4) another cause beyond the control of the dealer.

(e) A franchised dealer may file a protest with the board of the termination or discontinuance not later than the latter of:

(1) the 60th day after the date of the receipt of the notice of termination or discontinuance; or
(2) the time specified in the notice.

(f) After a timely protest is filed under Subsection (e), the board shall notify the party seeking the termination or discontinuance that:

(1) a timely protest has been filed;
(2) a hearing is required under this chapter; and
(3) the party may not terminate or discontinue the franchise until the board issues its final order or decision.

(g) After a hearing, the board shall determine whether the party seeking the termination or discontinuance has established by a preponderance of the evidence that there is good cause for the proposed termination or discontinuance.

(h) If a franchise is terminated or discontinued, the manufacturer, distributor, or representative shall establish another franchise in the same line-make within a reasonable time unless it is shown to the board by a preponderance of the evidence that the community or trade area cannot reasonably support such a dealership. If this showing is made, a license may not be issued for a franchised dealer in the same area until a change in circumstances is established.

(i) A manufacturer that changes its distributor or the method of distribution of its products in this state in a manner that results in unlawful termination or discontinuance of a franchise without good cause may not directly or indirectly distribute its products in this state.

° 2301.454. Modification or Replacement of Franchise

(a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not modify or replace a franchise if the modification or replacement would adversely affect to a substantial degree the dealer's sales, investment, or obligations to provide service to the public, unless:

(1) the manufacturer, distributor, or representative provides written notice by registered or certified mail to each affected dealer and the board of the modification or replacement; and
(2) if a protest is filed under this section, the board approves the modification or replacement.

(b) The notice required by Subsection (a)(1) must:

(1) be given not later than the 60th day before the date of the modification or replacement; and
(2) contain on its first page a conspicuous statement that reads:

"NOTICE TO DEALER: YOU MAY BE ENTITLED TO FILE A PROTEST

WITH THE TEXAS MOTOR VEHICLE BOARD IN AUSTIN, TEXAS, AND HAVE A HEARING IN WHICH YOU MAY PROTEST THE PROPOSED MODIFICATION OR REPLACEMENT OF YOUR FRANCHISE UNDER THE TERMS OF CHAPTER 2301, OCCUPATIONS CODE, IF YOU OPPOSE THIS ACTION."

(c) A franchised dealer may file a protest with the board of the modification or replacement not later than the latter of:

(1) the 60th day after the date of the receipt of the notice; or
(2) the time specified in the notice.

(d) After a protest is filed, the board shall determine whether the manufacturer, distributor, or representative has established by a preponderance of the evidence that there is good cause for the proposed modification or replacement. The prior franchise continues in effect until the board resolves the protest.

° 2301.455. Determination of Good Cause for Termination, Discontinuance, Modification, or Replacement

(a) Notwithstanding the terms of any franchise, in determining whether good cause has been established under Section 2301.453 or 2301.454, the board shall consider all existing circumstances, including:

(1) the dealer's sales in relation to the sales in the market;
(2) the dealer's investment and obligations;
(3) injury or benefit to the public;
(4) the adequacy of the dealer's service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;
(5) whether warranties are being honored by the dealer;
(6) the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter; and
(7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power.

(b) The desire of a manufacturer, distributor, or representative for market penetration does not by itself constitute good cause.

° 2301.456. Use of Advertising

A manufacturer, distributor, or representative may not:

(1) use any false, deceptive, or misleading advertising; or
(2) notwithstanding the terms of any franchise, require that a franchised dealer join, contribute to, or affiliate with, directly or indirectly, any advertising association.

2301.457. Prohibition: Change of Franchised Dealer's Capital Structure

Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not prevent a franchised dealer who meets reasonable capital requirements from reasonably changing:

(1) the capital structure of the dealership; or
(2) the means by or through which the dealer finances the operation of the dealership.

° 2301.458. Prohibition: Change in Dealer Ownership

Notwithstanding the terms of any franchise, except as provided by Section 2301.359 or 2301.360, a manufacturer, distributor, or representative may not fail to give effect to or attempt to prevent the sale or transfer of:

(1) a dealer, dealership, or franchise;
(2) an interest in a dealer, dealership, or franchise; or
(3) the management of a dealer, dealership, or franchise.

° 2301.459. Prohibition: Use of Promissory Note, Security Agreement, or Insurance Policy

Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not require or attempt to require that a franchised dealer assign to or act as an agent for a manufacturer, distributor, or representative to secure:

(1) a promissory note or security agreement given in connection with the sale or purchase of a new motor vehicle; or
(2) an insurance policy on or having to do with the operation of a vehicle that is sold.

° 2301.460. Warranty, Preparation, or Delivery Agreement Obligations

Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not, after a complaint and a hearing, fail or refuse to perform an obligation placed on the manufacturer in connection with the preparation, delivery, and warranty of a new motor vehicle as provided in the manufacturer's warranty, preparation, and delivery agreements on file with the board.

° 2301.461. Liability of Franchised Dealer

(a) Notwithstanding the terms of any franchise or any other law, a franchised dealer's preparation, delivery, and warranty obligations as filed with the board are the dealer's sole responsibility for product liability as between the dealer and a manufacturer or distributor.
(b) Notwithstanding the terms of any franchise or any other law, a manufacturer or distributor shall reimburse the dealer for any loss incurred by the dealer, including legal fees, court costs, and damages, as a result of the dealer having been named a party in a product liability action, except for a loss caused by the dealer's:

(1) failure to comply with an obligation described by Subsection (a);
(2) negligence or intentional misconduct; or
(3) modification of a product without the authorization of the manufacturer or distributor.

° 2301.462. Succession Following Death of Franchised Dealer

(a) Notwithstanding the terms of any franchise, except as provided by Subsection (b), a manufacturer, distributor, or representative shall honor the succession to a dealership by a legal heir or devisee under:

(1) the will of a franchised dealer; or
(2) the laws of descent and distribution of this state.

(b) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may refuse to honor a succession if, after notice and hearing, it is shown to the board that the result of the succession will be detrimental to the public interest and to the representation of the manufacturer or distributor.
(c) This section does not prevent a franchised dealer, during the dealer's lifetime, from designating any person as a successor dealer by a written instrument filed with the manufacturer or distributor.

° 2301.463. Prohibition: Payment of Rebate by Franchised Dealer

Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not require a franchised dealer to directly or indirectly pay or assume any part of a refund, rebate, discount, or other financial adjustment made by the manufacturer, distributor, or representative to, or in favor of, a customer of the dealer, unless the dealer voluntarily agrees.

° 2301.464. Relocation of Franchise

(a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not deny or withhold approval of a written application to relocate a franchise unless:

(1) the applicant receives written notice of the denial or withholding of approval not later than the 60th day after the date the application is received; and
(2) if the applicant files a protest with the board, the board makes a determination of reasonable grounds under this section.

(b) An application under Subsection (a) to relocate a franchise must contain information reasonably necessary to enable a manufacturer or distributor to adequately evaluate the application.
(c) If the applicant files a protest under Subsection
(a)(2), the board shall hold a hearing. After the hearing, the board shall determine whether the manufacturer or distributor has established by a preponderance of the evidence that the grounds for the denial or withholding of approval of the relocation are reasonable.

° 2301.465. Payment to Franchised Dealer Following Termination of Franchise

(a) In this section:

(1) "Net cost" means the franchised dealer cost for a new, unsold, undamaged, and complete motor vehicle of the current model year or the previous model year in a dealer's inventory:

(A) plus any charges by the manufacturer, distributor, or representative for distribution, delivery, and taxes; and
(B) less all allowances paid to the franchised dealer by the manufacturer, distributor, or representative.

(2) "Net discount value" is the net cost multiplied by the total mileage, exclusive of mileage placed on the motor vehicle before it was delivered to the dealer, divided by 100,000.

(b) Notwithstanding the terms of any franchise, after the termination of a franchise, a manufacturer, distributor, or representative shall pay to a franchised dealer or any lienholder, in accordance with the interest of each, the following amounts:

(1) the dealer cost of each new motor vehicle in the dealer's inventory with mileage of 6,000 miles or less, exclusive of mileage placed on the vehicle before it was delivered to the dealer, reduced by the net discount value of each vehicle, except that if a vehicle cannot be reduced by the net discount value, the manufacturer or distributor shall pay the dealer the net cost of the vehicle;
(2) the dealer cost of each new, unused, undamaged, and unsold part or accessory that:

(A) is in the current parts catalogue and is still in the original, resalable merchandising package and in an unbroken lot, except in the case of sheet metal, a comparable substitute for the original package may be used; and
(B) was purchased by the dealer either directly from the manufacturer or distributor or from an outgoing authorized dealer as a part of the dealer's initial inventory;

(3) the fair market value of each undamaged sign owned by the dealer that bears a trademark or tradename used or claimed by the manufacturer, distributor, or representative and that was purchased from or at the request of the manufacturer, distributor, or representative;
(4) the fair market value of all special tools, data processing equipment, and automotive service equipment owned by the dealer that:

(A) were recommended in writing and designated as special tools and equipment;
(B) were purchased from or at the request of the manufacturer, distributor, or representative; and
(C) are in usable and good condition except for reasonable wear and tear; and

(5) the cost of transporting, handling, packing, storing, and loading any property subject to repurchase under this section.

(c) An amount described by Subsection (b) is due:

(1) for property described by Subsection (b)(1), not later than the 60th day after the date a franchise is terminated; and

(2) for all other property described by Subsection (b), not later than the 90th day after the date a franchise is terminated.

(d) As a condition of payment, a franchised dealer must comply with reasonable requirements provided by the franchise regarding the return of inventory.
(e) A manufacturer or distributor shall reimburse a franchised dealer for the dealer's cost for storing any property covered by this section:

(1) beginning on the 91st day after the date the franchise is terminated; or
(2) before the date described by Subdivision (1) if the dealer notifies the manufacturer or distributor of the commencement of storage charges within that period.

(f) On receipt of notice under Subsection (e)(2), a manufacturer or distributor may immediately take possession of the property by repurchase under this section.
(g) A manufacturer, distributor, or representative who fails to pay an amount within the time required by this section or at the time the dealer and any lienholder proffer good title before the time required for payment, is liable to the dealer for:

(1) the dealer cost, fair market value, or current price of the inventory, whichever amount is highest;
(2) interest on the amount due computed at the rate applicable to a judgment of a court; and
(3) reasonable attorney's fees and costs.

° 2301.466. Arbitration

(a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not require a franchised dealer to submit to arbitration on any issue unless the dealer and the manufacturer, distributor, or representative and their respective counsel agree to the arbitration after a controversy arises.
(b) An arbitrator shall apply this chapter in resolving a controversy. Either party may appeal to the board a decision of an arbitrator on the ground that the arbitrator failed to apply this chapter.

° 2301.467. Prohibitions: Sales Standards, Purchase of Equipment

Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not:

(1) require adherence to unreasonable sales or service standards; or
(2) unreasonably require a franchised dealer to purchase special tools or equipment.

° 2301.468. Discrimination Among Dealers or Franchisees

A manufacturer, distributor, or representative may not:

(1) notwithstanding the terms of any franchise, directly or indirectly discriminate against a franchised dealer or otherwise treat franchised dealers differently as a result of a formula or other computation or process intended to gauge the performance of a dealership; or
(2) discriminate unreasonably between or among franchisees in the sale of a motor vehicle owned by the manufacturer or distributor.

° 2301.469. Costs of Product Recall

Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative shall compensate a franchised dealer for all costs incurred by the dealer as required by the manufacturer in complying with a product recall by the manufacturer or distributor, including any costs incurred by the dealer in notifying vehicle owners of the existence of the recall.

° 2301.470. Prohibition: Conditions for Financing Motor Vehicle

A manufacturer, distributor, or representative may not directly or indirectly, or through a subsidiary or agent, require as a condition for obtaining financing for a motor vehicle that:

(1) the purchaser of the vehicle purchase any product other than the motor vehicle from the manufacturer, the distributor, or an entity owned or controlled by the manufacturer or distributor; or
(2) an insurance policy or service contract bought by the purchaser be from a specific source.

° 2301.471. Use of Financing Subsidiary

(a) A manufacturer, distributor, or representative may not:

(1) compel a franchised dealer through a financing subsidiary of the manufacturer or distributor to agree to unreasonable operating requirements; or

(2) directly or indirectly terminate a franchise through the actions of a financing subsidiary of the manufacturer or distributor.

(b) This section does not limit the right of a financing entity to engage in business practices in accordance with the usage of trade in retail and wholesale motor vehicle financing.

° 2301.472. Addition of Line-Make

(a) Notwithstanding the terms of any franchise, a manufacturer, distributor, or representative may not deny or withhold approval of a franchised dealer's application to add a line-make or parts or products related to that line-make unless:

(1) the manufacturer or distributor provides written notice of the denial or withholding of approval to the applicant not later than the 60th day after the date the application is received; and

(2) if the applicant files a protest under this section, the board upholds the denial or withholding of approval.

(b) After receiving notice under Subsection (a)(1), a dealer may file a protest with the board.

(c) If the dealer files a protest, the board may uphold the manufacturer's or distributor's decision to deny or withhold approval of the addition of the line-make only if the manufacturer or distributor establishes by a preponderance of the evidence that the denial or withholding of approval was reasonable.

(d) In determining whether a manufacturer or distributor has established that the denial or withholding of approval is reasonable, the board shall consider all existing circumstances, including:

(1) the dealer's sales in relation to the sales in the market;
(2) the dealer's investment and obligations;
(3) injury or benefit to the public;
(4) the adequacy of the dealer's sales and service facilities, equipment, parts, and personnel in relation to those of other dealers of new motor vehicles of the same line-make;
(5) whether warranties are being honored by the dealer agreement;
(6) the parties' compliance with the franchise, except to the extent that the franchise conflicts with this chapter;
(7) the enforceability of the franchise from a public policy standpoint, including issues of the reasonableness of the franchise's terms, oppression, adhesion, and the parties' relative bargaining power;
(8) whether the dealer complies with reasonable capitalization requirements or will be able to comply with reasonable capitalization requirements within a reasonable time;
(9) any harm to the manufacturer if the denial or withholding of approval is not upheld; and
(10) any harm to the dealer if the denial or withholding of approval is upheld.

2301.473. Models Within Line-Make

A manufacturer, distributor, or representative may not:

(1) fail or refuse to offer to its same line-make franchised dealers all models manufactured for that line-make; or

(2) require as a prerequisite to receiving a model or series of vehicles that a franchised dealer:

(A) pay an extra fee;
(B) purchase unreasonable advertising displays or other materials; or
(C) remodel, renovate, or recondition the dealer's existing facilities.

° 2301.474. Payment of Costs for Administrative or Civil Proceeding

(a) A manufacturer, distributor, or representative may not require a franchised dealer to compensate the manufacturer or distributor for any court costs, attorney's fees, or other expenses incurred in an administrative or civil proceeding arising under this chapter.
(b) This section does not prohibit a manufacturer and a franchised dealer from entering into an agreement to share costs in a proceeding in which the dealer and manufacturer have the same or similar interests.

° 2301.475. Manufacturer or Distributor Incentive Programs

(a) Except as provided by Subsection (b), after the first anniversary of the ending date of a manufacturer or distributor incentive program, a manufacturer or distributor may not:

(1) charge back to a dealer money paid by the manufacturer or distributor as a result of the incentive program;
(2) charge back to a dealer the cash value of a prize or other thing of value awarded to the dealer as a result of the incentive program; or
(3) audit the records of a dealer to determine compliance with the terms of the incentive program, unless the manufacturer or distributor has reasonable grounds to believe the dealer committed fraud with respect to the incentive program.

(b) A manufacturer or distributor may make charge-backs to a dealer if, after an audit, the manufacturer or distributor has reasonable grounds to conclude that the dealer committed fraud with respect to the incentive program.

° 2301.476. Manufacturer or Distributor Ownership, Operation, or Control of Dealership

(a) In this section, "manufacturer" includes:

(1) a representative; or
(2) a person who:

(A) is affiliated with a manufacturer or representative; or
(B) directly or indirectly through an intermediary, is controlled by, or is under common control with, a manufacturer.

(b) For purposes of Subsection (a)(2)(B), a person is controlled by a manufacturer if the manufacturer is directly or indirectly authorized, by law or by agreement of the parties, to direct or influence the person's management and policies.
(c) Except as provided by this section, a manufacturer or distributor may not directly or indirectly:

(1) own an interest in a dealer or dealership;
(2) operate or control a dealer or dealership; or
(3) act in the capacity of a dealer.

(d) A manufacturer or distributor may own an interest in a franchised dealer, or otherwise control a dealership, for a period not to exceed 12 months from the date the manufacturer or distributor acquires the dealership if:

(1) the person from whom the manufacturer or distributor acquired the dealership was a franchised dealer; and
(2) the dealership is for sale by the manufacturer or distributor at a reasonable price and on reasonable terms and conditions.

(e) On a showing of good cause by a manufacturer or distributor, the board may extend the time limit imposed under Subsection (d) for a period not to exceed an additional 12 months. An application for an extension after the first extension is granted is subject to protest by a dealer of the same line-make whose dealership is located in the same county as, or within 15 miles of, the dealership owned or controlled by the manufacturer or distributor.

(f) For the purpose of determining compliance with Subsection (d)(2), the price of a dealership and the other terms and conditions of a contract for the sale of a dealership are reasonable if the purchaser is a franchised dealer who:

(1) has made a significant investment in the dealership, subject to loss;
(2) has an ownership interest in the dealership; and
(3) operates the dealership under a plan to acquire full ownership of the dealership within a reasonable time and under reasonable terms and conditions.

(g) For the purpose of broadening the diversity of its dealer body and enhancing opportunities for qualified persons who are part of a group that has been historically underrepresented in its dealer body, or other qualified persons who lack the resources to purchase a dealership outright, but for no other purpose, a manufacturer or distributor may temporarily own an interest in a dealership if the manufacturer's or distributor's participation in the dealership is in a bona fide relationship with a franchised dealer who:

(1) has made a significant investment in the dealership, subject to loss;
(2) has an ownership interest in the dealership; and
(3) operates the dealership under a plan to acquire full ownership of the dealership within a reasonable time and under reasonable terms.

(h) A person who on June 7, 1995, held both a motor home manufacturer's license and a motor home dealer's license issued under this chapter may:

(1) continue to hold both licenses; and
(2) operate as both a manufacturer and dealer of motor homes but of no other type of vehicle.

(i) Notwithstanding the terms of this chapter, and subject to the limitations set forth in this subsection, a manufacturer or distributor may own an interest in an entity that holds a general distinguishing number if the entity:

(1) is primarily engaged in the business of renting to other persons passenger vehicles or commercial motor vehicles that the entity owns; and
(2) sells or offers for sale no vehicle other than a vehicle that the entity:

(A) owns and has taken from service in its rental fleet; or
(B) has taken in trade as part of a transaction involving the sale of a vehicle taken from service in its rental fleet.

° 2301.477. Manufacturer Doing Business in This State

A manufacturer whose products are offered for sale in this state under a franchise entered into between its distributor or representative and a dealer is bound by the terms of the franchise and this chapter as if the manufacturer had executed the franchise.

° 2301.478. Action on Franchise

(a) Notwithstanding the terms of any franchise or any other law, an action or proceeding brought by a manufacturer, representative, converter, or distributor against a dealer must be brought in an appropriate forum in this state only, and the law of this state applies to the action or proceeding.
(b) Each party to a franchise owes to the other party a duty of good faith and fair dealing that is actionable in tort.

° 2301.521. Definition

In this subchapter, " mediation" means a nonbinding forum in which an impartial mediator facilitates communication between parties to promote reconciliation, settlement, or understanding between the parties.

° 2301.522. Mediation Applicable

(a) In an action brought against a manufacturer or distributor under Sections 2301.451-2301.474 by a franchised dealer whose franchise provides for arbitration in compliance with this chapter, the board shall order the parties to submit the dispute to mediation in the manner provided by this subchapter.
(b) Subsection (a) applies only if the dealer's franchise does not contain an arbitration provision in conflict with this chapter. In a dispute concerning whether Subsection (a) applies, the board shall enter an order either that the franchise contains a provision in conflict with this chapter or that it does not. If the board determines that the franchise does not contain an arbitration provision that conflicts with this chapter, the board shall order the parties to proceed to mediation as provided by this subchapter.
(c) An order issued under Subsection (b) is not appealable.
(d) This subchapter does not apply to an action brought by the board to enforce this chapter.

° 2301.523. Mediator

(a) By agreement, the parties shall select and compensate a mediator who is qualified to serve under Section 154.052(a), Civil Practice and Remedies Code.
(b) Sections 154.053 and 154.055, Civil Practice and Remedies Code, apply to a mediator under this subchapter.
(c) A mediator may not impose the mediator's own judgment on the issues for that of the parties.

° 2301.524. Location and Schedule of Mediation

(a) The parties by agreement shall select a venue and schedule for mediation under this subchapter. If the parties are unable to agree on a venue and schedule, the mediator shall select a venue and schedule.
(b) Except by written agreement of all parties, mediation must be held in this state.
(c) Mediation must be completed not later than the 60th day after the date the board orders the parties to mediate. The deadline may be extended by the board at the request of all parties.

° 2301.525. Law Applicable; Conflict of Laws

(a) Except as provided by Subsection (b) of this section, Section 154.073, Civil Practice and Remedies Code, applies to mediation under this subchapter.

(b) If Section 154.073, Civil Practice and Remedies Code, conflicts with another legal requirement for disclosure of communications or materials, the issue of confidentiality may be presented to the board to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the board or whether the communications or materials are subject to disclosure.
(c) This subchapter controls over any other law relating to or requiring mediation between or among license holders.

° 2301.526. Costs of Mediation

(a) The board is not liable for the compensation paid or to be paid to a mediator employed under this subchapter.
(b) Without regard to the outcome of mediation or subsequent regulatory or judicial proceedings, costs incurred by a party in mediation required by this subchapter may not be imposed on the opposing party.

° 2301.527. Jurisdiction of Board

The board retains jurisdiction of the subject matter of and parties to a dispute during mediation and may, on the motion of a party or on its own motion, enter appropriate orders.

° 2301.528. Effect of Mediation on Chapter

(a) Except as provided by this subchapter, mediation under this subchapter does not affect a procedural right or duty conferred by this chapter or by board rule.
(b) Procedural time limits imposed by this chapter or under the authority of this chapter are tolled during mediation.
(c) Mediation does not affect any right of a person who is not a party to the mediation.
(d) The board shall stay proceedings involving the parties in mediation until the board receives the mediator's certification that mediation has concluded.

° 2301.529. Outcome of Mediation

(a) If mediation resolves the dispute, the board shall enter an order incorporating the terms of the agreement reached in mediation.
(b) If mediation does not resolve the dispute, the board shall proceed to a contested case hearing or other appropriate exercise of its jurisdiction.

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Texas bans Ford selling cars on-line

OUT-LAW News

The US Court of Appeals has upheld a ruling which banned Ford from selling used cars on-line direct to consumers in the state of Texas because the company is not a licensed dealer in Texas and also because the state does not allow car makers to both own dealerships and act as dealers.

Ford's site, fordpreowned.com, let internet users view a selection of used cars. Users could then arrange to have their choice of car delivered to a local Ford-licensed dealership for a test-drive before possibly purchasing the car.

Under the Texas Motor Vehicle Commission Code, car manufacturers are prohibited from owning a dealership and acting in the capacity of a dealer in the state. Direct sales must also be made by licensed dealers in the state.

The Texas Department of Transportation's Motor Vehicle Division complained to the Texas Motor Vehicle Board about Ford's site. In response, Ford filed a lawsuit in the US District Court, challenging the complaint.

The Court upheld the Commission's Code, rejecting arguments from Ford that the Code was restricting e-commerce within the state. It held that the Code protects the citizens of Texas by only licensing dealers who comply with certain warranties and conditions.