



30th June 2011

General Manager
Small Business and Deregulation Branch
Department of Innovation, Industry, Science and Research
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Dear Sir / Madam

Re – “Resolution of Small Business Disputes” - Options Paper

The Motor Trades Association Queensland (MTA Queensland) responds to the Department of Innovation, Industry, Science and Research’s (the Department) invitation for submissions to the *Resolution of Small Business Disputes* Options Paper (the Paper). MTA Queensland’s comments are confined to issues that are within the purview of its Members.

MTA Queensland commends the Department’s initiative to consult on the options for dispute resolutions for small business and offers the following comments below.

Introduction

We note the statement of Senator The Hon Nick Sherry Minister for Small Business that the approach is “about a national dispute resolution service that makes the process accessible, prompt and as low cost as possible for small business users.”

Our response is formed from the views of MTA Queensland’s Members with retailing operations and their practical business experiences.

The Department’s Small Business Dispute Resolution Survey highlighted the incidence rate of small business disputation with other Australian based businesses and in doing so drew attention to the fact that limited dispute management skills and experience of small business was adding to the risk of small business failure. These findings generally correlate with our experiences.

It is the general view of MTA Queensland that small businesses, in the event of a significant dispute, do not have the financial resources to retain the legal expertise to advocate their interests when seeking redress through protracted traditional court processes. This is particularly so in the prevailing economic circumstances following the Global Financial Crisis; from which most small businesses do not have the financial capacity to participate in extended legal proceedings.

This is illustrated by the MYOB April 2011 Business Monitor indicating a significant decline “in business confidence among Small Medium Enterprises with more than half (52%) believing an economic recovery is more than 12 months away – (up from 37% in April 2010).” These findings correlate with our internal monitoring and can be emphasised by reference to YTD May V-Facts data for new vehicles, which indicates a year over year decline

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of 3.8% and full year projected volume at pre-2005 level. Used cars and motor cycles follow a similar trend.

Members that proceed with a legal dispute can apply to their industrial organisation to assist with appropriate advisory or other mediation costs. Small Businesses also have access to several dispute resolution agencies - both State and Federal, including the Queensland's Office of Fair Trading, the Australian Competition and Consumer Competition (ACCC), the Oilcode Dispute Resolution Advisor, the Office of the Franchising Mediation Advisor or the Queensland Civil and Administrative Tribunal. There is however, as identified in The Paper, little general understanding by small businesses of the mechanisms and services that are available to them or their accessibility.

Response to The Paper's Options –

Option one – National Information and Referral Service and

Option two – National Dispute Resolution Service

Option Three – National Small Business Tribunal

Option Four – Small Business Advocate

Ideally, the outcome preferred by MTA Queensland is one that is **a hybrid comprising the elements of each of the four Options to constitute a comprehensive dispute resolution mechanism, with a strong emphasis on Option Four.** A National Small Business Tribunal could include a Small Business Advocate and also provide both the National Information and Referral Service and National Dispute Resolution Service. We encourage consideration of an increased on-line information system for self-determination of the architecture of a dispute and for assessing the scope for immediate mediation remedies.

This proposal could allow all small business advisory and related services to be located within the Tribunal having the benefits of creating a one-stop-shop which includes dispute resolution and avoids duplication and redundancy. Such a Tribunal would have the capacity to enhance small business potential and reduce small business failure risk.

Recommendation

It has long been the view of the Association's automotive value chain that there is a market power and financial imbalance between small business and other larger Australian based businesses which use this dominance to impose contract conditions and operating arrangements that are biased in their favour. In particular we refer to the automotive sector and the relationship between the Manufacturer / Distributer / Franchisor and the Motor Dealer (Franchisee). Other examples include the relationship between Oil Companies and Service Station Operators as well as Insurers and Crash Repairers.

The amendments last year to the Franchise Code of Conduct have improved Franchisee's business arrangements with the Franchisor but there remains significant difficulty in resolving disputes between these parties because corporate and large business entities, acting in their own interests, avoid resolution in courts so that legal precedents are not established even when disputes are settled in favour of the small business; and so doing, circumvent precedents that small business can reference to achieve a timely and cost effective dispute resolution. This means that there is limited "case law or legal precedents" to guide general dispute resolution practice.

The absence of a body of case law and legal precedents in relation to small business disputes represents one of the major obstacles that has impeded most of the State agencies and

mechanisms that have been set up to achieve efficient and effective resolution of small business disputes.

On behalf of its automotive Members, MTA Queensland recommends that in addition to the Small Business Advocate it would be appropriate to **establish an impartial and credible Automotive Industry Mediator** who could use criteria that includes “standard industry best practice” and “industry conventions and reasonable operating expectations” as a basis on which disputes involving business claims relating to the automotive value chain could be mediated or arbitrated because of the absence of the law and legal precedents. There also may be a need for some legislation and regulation of some definitions applying to issues relevant to disputes and damages as a substitute for the absence of a body of case law and legal precedent needed for the dispute resolution process.

Ideally, an **Automotive Industry Mediator** should have standing in the industry and operational corporate knowledge that involves standard industry best practice and the elements that would comprise reasonable industry expectations. Advocacy in small business disputes should be in the first instance confined to the plaintiff and the defendant. Solicitors and legal counsel should be able to act in an advisory capacity but not appear on behalf of parties before the mediator.

The need for an **Automotive Industry Mediator** is reinforced by the fact that franchised motor dealerships are unique - different to other franchise models and cannot be compared, for example, with popular food or clothes franchise models. The investment and the financial facilities required to operate a motor dealership facility is significant, and goodwill in the business is totally dependent on the respective franchise agreements.

Franchise automotive agreements typically provide for 3 - 5 years and are in almost all instances presented on a “take it or leave it” basis. Provisions that may cause disputation include:

- The use of unrealistic sales targets (or KPI’s) as discipline. Targets are set by the distributor and where a dealer is not meeting their targets they are “in breach.”
- Indirect pressure on dealers not to “diversify” and take on other brands. Notwithstanding this restriction, dealers with multi franchises have to establish stand-alone premises.
- Dealers are forced to order and carry stock levels and mixtures that may not suit that business. Distributors bundle fast and slow moving stock together. In order for a dealer to obtain the faster moving stock they must accept slower stock.
- Manufacturers / Distributors dictate the terms of a “buy / sell” agreement, rather than the sale necessarily going to the highest bidder in the market place.

The manufacturer or the distributor dictates the geographic location, the style of the facilities, stipulates livery, showroom signage, training and resources in people. In the instance of a multi franchise dealership there must be dedicated personnel and sales areas for each brand of vehicle. In other words no cross management arrangement in terms of sales or reception personnel or common reception areas although the workshop itself maybe common but the service personnel must dedicated to the brand.

To maintain and encourage long term investment in their businesses, dealers need agreements that are fair to generate certainty and the suggested **Automotive Industry Mediator** would reduce frustration and disputation.

MTA Queensland Background

By way of background, the MTA Queensland is the peak organisation in the State representing the specific interests of 2,500 businesses in the retail, repair and service sector of Australia's automotive industry. It is an industrial association of employers incorporated pursuant to the *Industrial Relations Act* of Queensland.

The Association, comprising 12 separate divisions represents and promotes the issues of the automotive industries to all levels of government and within Queensland's economic structure. There is a high propensity for the automotive value chain to comprise small to medium enterprises.

MTA Queensland divisions are each representative of a specialist area of the State's automotive industry. They are: Australian Automotive Dealers' Association of Queensland; Queensland Farm and Industrial Machinery Dealers' Division; Queensland Motorcycle Industry Division; Automotive Engineers' Division; Queensland Tyre and Undercar Division; Engine Re-conditioners' Association of Queensland; Rental Vehicle Industry Division; Service Station & Convenience Store Association of Queensland; National Auto Collision Alliance; Used Car Division; Independent Tow Truck Operators and Auto Parts Recyclers' Association of Queensland.

The Association is the leading automotive training organisation in Queensland offering nationally recognised training, covering all aspects of the retail motor trades industry. The Association's Motor Industry Training entity is the largest automotive apprentice trainer in Queensland employing 27 trainers for approximately 1,300 apprentices based from Cairns to the Gold Coast and Toowoomba and Emerald.

Conclusion

Thank you for your consideration. We would be pleased to provide further comment on any matters in our submission that may require further clarification or amplification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richard Payne', with a stylized flourish at the end.

Richard Payne

Principal Policy Director