



MTAA

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Inter-agency

Franchising Taskforce

Department of Employment, Skills, Small and Family Business

10-14 Mort Street

Canberra ACT 2602

Submitted via email: [franchising@employment.gov.au](mailto:mailto:franchising@employment.gov.au)

Dear Franchising Taskforce Members,

The [Motor Trades Association of Australia Limited](https://www.mtaa.com.au/) (**MTAA**) appreciates the opportunity to make this submission to current consultations on the Franchising Taskforce issued Regulation Impact Statement (RIS). **MTAA** is a federation of various state and territory motor trades associations and automobile chambers of commerce. Membership of these organisations, also entitles businesses to simultaneous membership of specific national automotive industry committees, which operates under the MTAA umbrella.

MTAA represents, and is the national voice of, the 69,365 automobile sector businesses which employ over 379,000 Australians and contribute around $37.1 billion to the Australian economy equating to about 2.2% of GDP. MTAA member constituents include automotive retail, service, maintenance, repair, dismantling recycling and associated businesses that provide essential services to a growing Australian fleet fast approaching 20 million vehicles by 2020.

Some automotive sector industries are significant participants in franchising including new car and motorcycle retailing, farm and industrial machinery and mechanical and vehicle body repair services.

This submission supports previous submissions and input provided by the MTAA into current and previous inquiries into franchising.

Please contact [redacted], if any further information or clarity is required regarding this submission at [redacted] and / or [redacted].

Yours Sincerely,

[Redacted]



## **Executive Summary**

* MTAA notes specific matters relating to automotive sector franchising and specifically new car retailing; unfair contract terms and conditions and whistleblower protection are not within the remit of the RIS and subject to separate policy investigations. This submission therefore confines itself to the issues, options and questions raised in the Regulatory Impact Statement (RIS).
* MTAA respectfully reminds the Inter Agency Taskforce and other departments and agencies currently investigating separate but related policy streams, of the need to ensure any legislative and / or regulatory solutions adopted by Government are consistent. MTAA appreciates the significant resources and whole of government approach in responding to the various concerns and issues raised by MTAA and members and those captured by the Parliamentary Joint Committee (PJC) Inquiry and engaging with industry to identify improved and sustainable outcomes.

* The Motor Trades Association of Australia Limited (MTAA) supports the principles-based approach outlined in the RIS and is generally comfortable with the seven principles presented.
* MTAA also notes commentary in the RIS preamble that options presented are not necessarily isolated and ‘could form a cumulative response to the problems identified, and the options identified are not mutually exclusive’, nor ‘exhaustive’. MTAA’s responses in some areas support a cumulative approach of the options presented.
* MTAA is not supportive of a ‘status quo’ option for any of the problems identified. After significant reviews and inquiries over many years and the considerable work of the Parliamentary Joint Committee (PJC) and subsequent investigations by the Taskforce and various Government Departments and Agencies, MTAA and Members support significant change to improve the franchising sector.
* MTAA remains available to assist the Taskforce and Government to progress and finalise changes and strengthen small business, franchising and the economy.

## **MTAA Responses to options and Questions**

## **Principle 1**. Prospective franchisees should be able to make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor

| **Options to address Problem 1.1:** Disclosure is hard to comprehend, and critical information may be hidden or not included in the disclosure document. | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 1.1.1 | * Status Quo is not supported. |
| Option 1.1.2 | * MTAA supports changes to increase disclosure as outlined. As MTAA has raised in previous submissions and from evidence provided by automotive franchisees during the PJC inquiry, it is not necessarily the head franchising agreement that contains terms and conditions that cause detriment or distress, but the supporting processes and operational requirements contained in supporting documentation tied to the agreement. * Franchisor concerns about the risks associated with reliability of financial information and / or commerciality can be mitigated by use of already verified data through reporting requirements under the Corporations Act and other appropriate legislation and regulation and through the application of binding confidentiality agreements and other legal undertakings. * MTAA supports electronic and hard copy disclosure recognising variances in reference and use of the documentation. This should include provision of the ACCC Franchisee Manual. * MTAA supports increased leasing disclosure. |
| Option 1.1.3 | * MTAA does not support simplified disclosure requirements While recognising the responses of stakeholders as outlined in the RIS, MTAA is of the view that the Taskforce should consider additional options including a ‘Summary’ document that captures in plain language the ‘headline’ provisions of the agreement. It is suggested that this be supplemented with further detailed disclosure documentation that is graduated to the levels of complexity, capital investment, term and other criteria. * There should be no weakening of provisions that require compliance for comprehensive disclosure by franchisors and the need for franchisees to seek specialist legal, financial and other relevant advice. |

| **Options to address Problem 1.2:** The reliability of information provided to prospective franchisees may be difficult to assess. | |
| --- | --- |
| **MTAA Preferred Option** | |
| Options 1.2.1 | * Status Quo is not supported |
| Option 1.2.2 | * MTAA supports this option in its entirety including requirements to verify financial statements and the creation of a national franchise register. The creation of the register will likely assist in dispute resolution as there will be a central database available to mediators and others involved in dispute resolution processes. |
| Option 1.2.3 | * MTAA supports increased awareness and education of franchisees AND franchisors. While MTAA is not opposed to Option 1.2.3, it is suggested that regulations should not prescribe but capture providers including industry specific education resources in accompanying guidelines and other materials. |

| **Options to address problem 1.3:** A potential franchisee might be unaware of which information is crucial to inform their decision to enter an agreement. | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 1.3.1 | * Status Quo is not supported. |
| Option 1.3.2 | * MTAA supports the creation of a new government online educational resource including suggested contents as outlined. |
| Option 1.3.3 | * While not opposed to the mandating the requirement for legal and financial advice, MTAA suggests that this option should perhaps be considered in a staged approach pending the success of 1.3.2, if implemented. If there is still an issue following the introduction of more comprehensive information and education resources, then mandating requirements may provide a further mitigation. |

### **MTAA Responses to Principle 1 Questions**

***1. What are the critical pieces of information that should be contained in a summary document?***

* It is MTAA’s view that prospective franchisees must be able to make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor. Disclosure is a critical component and must be inclusive of all elements and transparent. They must be able to do so without fear of repercussions, with transparent, meaningful and good faith negotiation.
* MTAA has previously submitted case studies and examples of where this has not occurred in the automotive sector. Important and defining detail has in some cases not been readily provided in the franchise head agreement but included in supporting documentation that the franchise agreement refers to. Disclosure requirements must address these concerns and ensure that all requirements are transparent, upfront, and their potential impact and implications are understood by all parties.
* Critical information must include current provisions, as well as enhancements to mitigate the above-mentioned risk. It must include but not be restricted to full financials, investment requirements for the term of the agreement, marketing schemes and related financial requirements, term conditions, tenure, termination and termination arrangements including rights and arrangements for goodwill, stock, goods, equipment, legislation and regulatory requirements; requirements to use franchisor provided tools, equipment, suppliers, and rationale why other available sources are not permitted etc. Of paramount importance is that information disclosure is fit for purpose for the industry sector it covers and is readily identifiable and not ‘buried’ in supporting documentation such as procedure or operational manuals.
* As part of consultation on this part of the RIS, MTAA Member, MTA-SA canvassed their business members on RIS options
* An MTA-SA member advised, anecdotally, of franchisees taking over a location being required to purchase brand new equipment to fit out a store, when the same equipment was already present and included. The implication being that the franchisor benefited financially from the arrangement.
* Another member reported that franchise agreements included unfair requirements regarding the need to upgrade facilities and signage. While the upgrade costs are shared 50/50 with the franchisor, the member reported that as they are in a regional location, the anticipated upgrade costs are comparable to the value of the site itself. The MTA was also advised that franchisees are sometimes forced to buy licenced/official tools, in circumstances where significantly cheaper non- official options, which serve the same purpose, are available. These are important disclosures.

***2. If a national franchise register is established, what information should it contain? What would be the benefits and costs of a national franchise register?***

MTAA has not had enough time to undertake a cost benefit analysis but nonetheless supports a national register. MTAA is of a view that a national register could contain information on the specific industry sector, business, franchisor and franchisee company details including ABN, AusKey, TFN, Super Guarantee obligations, (derived from and cross referenced with existing databases), other relevant business / supplier relationships, company structures, key persons, agreements and supporting documentation.

The national register will provide a single database that will provide improved reporting, offer improved means of capturing all franchise agreements and their compliance with requirements and regulation. Regular review of the register may provide early identification of inconsistent approaches or non-compliance and in the event of disputation be an important first response source for mediators and other dispute resolution mechanisms.

***3. There are a number of existing educational resources on franchising. What additional education options for prospective franchisees should be made available? If there was an online educational resource which brought together the available franchising education options, what would its costs and benefits be?***

MTAA has not be able to provide a cost benefit analysis on the provision of an online education resource in the time available. MTAA suggests a central resource as outlined could include contributions, guidelines, fact sheets and other materials from industry associations and peak organisations, government departments and agencies. As noted by the Taskforce there is information available but for time and resource poor small businesses, it is difficult to identify and access in a ‘one-stop’ resource. The online resource need not necessarily duplicate but link to resources already available. MTAA suggests that any and every effort to improve awareness and education is important.

## **Principle 2.** Franchisees should have time to consider whether the relationship is right for them before committing to an agreement

| **Options to address Problem 2.1:** Cooling off rights expire before franchisees and franchisors have adequate time to review materials at entry, and reappraise their business arrangements after entering the agreement | |
| --- | --- |
| **MTAA Preferred Options** | |
| Option 2.1.1 | * Status quo is not supported. |
| Options 2.1.2 | * MTAA does not necessarily support unilateral cooling off periods. However, in the context of franchise agreements an extension and modification of a cooling off 14 days is considered beneficial. For renewals or end of term adjustments perhaps a waiver provision is included as outlined in option 2.1.3. |
| Options 2.1.3 | * MTAA supports extending the disclosure period to 21 days provided the waiver conditions are included such conditions are fair, transparent, and equitable. |

| **Options to address Problem 2.2:** Cooling off rights may expire before lease arrangements are disclosed | |
| --- | --- |
| **MTAA Preferred Options** | |
| Option 2.2.1 | * Status quo is not supported. |
| Option 2.2.2 | * MTAA supports the inclusion of the option. While many automotive small businesses own their site and leasing is not as large an issue as it may be in other sectors, most franchise agreements in new car retailing in particular specify location and facility requirements in detail. MTAA notes franchisor concerns about the length of time and costs involved in site negotiations, MTAA is aware of one live case study where the franchisee has been subjected to more than eight years of negotiations, changes to franchisor positions and failure to address compensation for these changes. |
| Option 2.2.3 | * MTAA supports the inclusion of this option. |
| Option 2.2.4 | * MTAA supports any efforts to improve awareness and education around leasing and franchising and this should form a separate heading in the proposed online resource. |

| **Options to address Problem 2.3: Cooling off rights in transfers, extensions and renewals are unclear** | |
| --- | --- |
| **MTAA Preferred Options** | |
| Option 2.3.1 | * Status quo is not supported. |
| Options 2.3.2 | * MTAA supports this option. MTAA suggests more work is required in this option to cater for undue influence or control by a franchisor in the transfer, extension and renewal process. Of particular concern are provisions which deal with a case study the MTAA is aware of and featured in evidence provided to the PJC inquiry that concerned franchisor influence in transfer of the franchisee to a ‘preferred’ new franchisee that limited the existing franchisee’s ability to sell the franchise and property and facilities associated with it. |
| Options 2.3.3 | * MTAA does believe this option is necessary given support for option 2.3.2. |

### **MTAA Responses to Principle 2 Questions**

***Questions 4,5,6:*** MTAA has no further information available for comment on these matters.

## **Principle 3.** Each party to a franchise agreement should be able to verify the other party is meeting its obligations and is generating value for both parties

| **Options to address Problem 3.1** Transparency of marketing funds | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 3.1.1 | * Status quo is not supported |
| Option 3.1.2 | * MTAA supports the full adoption of this option. |
| Option 3.1.3 | * MTAA supports this option. |

### **MTAA Responses to Principle 3 Questions**

1. ***What would ‘meaningful information’ look like in terms of marketing fund disclosure***

MTAA suggests meaningful information includes but is not restricted to: Full disclosure of contributions to Marketing Funds and by whom including Franchisor inputs, any scale of increases or decreases over the term of the agreement, franchisor incurred costs including ‘administration’, specific detail on where the marketing funds are expended and where possible KPI’s of such marketing campaigns including location, localisation, achieved penetration, etc., quarterly or half yearly verified balances of marketing funds.

1. ***How does the benefit of increased frequency of reporting of marketing funds compare to the costs of increased administration?***

MTAA is of the view that there should be little additional costs as such funds should be a key component of financial reporting requirements.

## **Principle 4.** A healthy franchising model fosters mutually beneficial cooperation between the franchisor and the franchisee, with shared risk and reward, free from exploitation and conflicts of interest

| **Options to address Problem 4.1** Supplier rebates can lead to conflicts of interest | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 4.1.1 | * Status quo is not supported. |
| Option 4.1.2 | * MTAA supports increased disclosure of supplier rebates. MTAA is of the view that transparency outweighs commercial-in-confidence issues which can be addressed through legally binding confidentiality undertakings and providing enforcement capacity in the event of a breach. |
| Option 4.1.3 | * MTAA does not support full prohibition as this will likely negatively impact on automotive sector business models. MTAA supports increased flexibility. For example, new car retailers should not be forced to procure tools, equipment and other supplies from a franchisor when other (in some case franchisor supported) cheaper alternatives are available. |

| **Options to address Problem 4.2** Conflicts of interest in the context of capital expenditure | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 4.2.1 | * Status quo is not supported. |
| Option 4.2.2 | * MTA fully supports this option and considers its implementation critical. * MTAA respectfully suggests that any concerns regarding potential costs of increased regulation of capital expenditure are outweighed by increased transparency and better business practice. MTAA rejects concerns that the imposition of this option will negatively impact business’s ability to respond to changing consumer demands in a timely manner. MTAA, Members and their business constituents in the automotive sector have provided numerous examples of the issues surrounding capital investment and returns on such investment including term of agreement and the significant impacts on business where this investment cannot be recouped because of the requirements of franchisors. |
| Option 4.2.3 | * MTAA fully supports this option. |

| **Options to address problem 4.3 Unilateral variations can lead to conflicts of interest and exploitation** | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 4.3.1 | * Status quo is not supported. |
| Option 4.3.2 | * MTAA fully supports this option as presented as it addresses considerable matters raised over some time by MTAA on behalf of members and their automotive franchisee constituents. MTAA rejects assertions there maybe ‘unintended consequences’ or that the introduction of this option would ‘slow down or inhibit’ decisions that benefit the franchise network. MTAA points to long established dealer franchise councils in the automotive sector as an example of how these reforms can be implemented without negative impacts. * The problem has been that despite the presence of these franchise networks in new car retailing, there has been a lack of regulation to ensure unilateral variations are negotiated in good faith with a majority of franchisees. There is no rationale or reason why even ‘simple business’ changes cannot be negotiated in a timely manner to address changing market conditions or consumer behaviours. Often franchisees in the automotive sector have a better knowledge of impacts and can provide valuable input into potential solutions and any increase in communications and forums will assist improved performance of the entire network. |

| **Options to address problem 4.3 Unilateral variations can lead to conflicts of interest and exploitation** | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 4.3.3 | * MTAA supports this option and suggests materials could also be incorporated in the proposed online resource centre. |

### **MTAA Responses to Principle 4 Questions**

1. ***What information should franchisors disclose in relation to supplier rebates? Are there any barriers to providing this?***
2. ***If franchisors are required to ensure franchisees get a return on their significant capital expenditure, how might this be done in practice?***
3. ***If franchisees are given a right to review capital expenditure business cases (which must be presented to franchisees by the franchisor under clause 30(2)(e) of the Franchising Code for expenditure that the franchisor considers is necessary for capital investment), how would this right be exercised?***

These questions prompted some considerable discussion with some franchisees that could be contacted, but because of the lack of alignment between scheduled meetings of automotive sector groups and the consultation timeframe, it was difficult to gather the necessary input from all jurisdictions and all automotive industries impacted. MTAA suggests the automotive sector and new car and motorcycle retailing provides a valuable insight into the issue of supplier rebates, capital investment and required returns outlined in the supported options. MTAA suggests a workshop with a group of automotive retailing franchisee members to further explore best practice implementation of the suggested and supported options. New car retailing is likely among the most complex of the franchising arrangements and it was felt that the Taskforce may benefit from a specific workshop to address these specific questions that would be organised quickly by teleconference of face to face meeting.

## 

## **Principle 5.** Where disagreements turn into disputes, there is a resolution process that is fair, timely and cost effective for both parties

| **Options to address Problem 5.1:** Some disputes are not being resolved in a fair, timely and cost-effective manner | |
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| **MTAA Preferred Option** | |
| Option 5.1.1 | Status quo is not supported |
| Option 5.1.2 | As part of consultation on this part of the RIS, MTAA Member, MTA-SA canvassed their business members.MTA-SA Members expressed a desire for an independent escalation and mediation process for disputes, separate from the franchisee and franchisor.Members were concerned that if, as a franchisee, they spoke up about an issue, they can be ‘singled out’ as ‘troublemakers’, putting them out of favour with the franchisor. In this regard, franchise contracts including ‘no- fault termination clauses’ are of concern to franchisees, effectively causing them to stay silent regarding their concerns.Members saw value in an independent government led mediation process for disputes in franchise relationships, such as the Small Business Commissioner in South Australia.MTAA heard similar responses in other jurisdictions.MTAA supports expanded options for dispute resolution and streamlined mediation procedures and services outlined in this option.However, MTAA is concerned regarding the placement of an industry levy based on numbers of complaints and will require additional information on what this actually means, and the potential costs involved. MTAA suggests further consideration be given to simplified cost structures where franchisor and franchisee bear their owns costs unless a breach or illegality is proven and the potential for costs to be attributed to the at fault party.  * MTAA suggests strengthened third party involvement could be achieved through a ‘binding determination’ step outlined in the answers to questions for this section rather than arbitration and the complex legal considerations that a pure arbitrated solution may evoke. |
| Option 5.1.3 | MTAA supports this option. |

### **MTAA Responses to Principle 5 Questions**

1. ***A number of stakeholders have told the Taskforce that the cost of arbitration can be comparable to going through the court system, and that conciliation may be a preferable alternative alongside mediation. In what circumstances could conciliation be an effective alternative dispute resolution process.***

MTAA suggests a graduated dispute resolution process that adds a determination phase prior to arbitration.

A franchisor and / or franchisee can notify a dispute and attempt to resolve through a documented process of consultation within a specified timeframe.

Failure to resolve within the specified timeframe then triggers mediation by third party independent mediators appointed and managed by a merged OFMA /ASBFEO.

If mediation fails to resolve the dispute within a specified timeframe, MTAA suggests a further dispute resolution step could be enacted where the dispute is forwarded for binding independent determination (or a further form of conciliation). The determination process would be performed by an independent qualified authority, again managed by a merged OFMA /ASBFEO, but not connected with previous failed mediation. The determination, which considers the dispute and previous attempts at resolution through mediation, in a specified timeframe, would be binding on all parties.

Arbitration disadvantages small businesses because of the cost, time and resources involved, particularly against a larger powerful franchisor. A determination step in a dispute resolution process is considered a more resource effective process for all parties provided there is strict timelines and agreement that the outcome is binding on all parties. This would not necessarily rule out further arbitration or litigation options. MTAA can provide examples from another automotive industry where determination processes have been used effectively.

1. ***Would you consider including arbitration to resolve disputes in your franchising agreement, if a clear voluntary option were provided?***

MTAA Member constituents raised concerns regarding the time and costs involved in arbitrated outcomes and are supportive of a dispute resolution system where mediation and potentially determination within specific timeframes are provided. Concern was expressed about the time taken in any dispute resolution process and the ability of small businesses to absorb the impact if a matter were to drag over months and years. Arbitration was considered by some to still be a viable option, but again raised timeframe and the power of other market participants to increase the time and costs associated with resolution.

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## **Principle 6.** Franchisees and franchisors should be able to exit in a way that is reasonable to both parties

| **Options to address Problem 6.1:** Reasonable exit arrangements may not be, or may not be perceived to be, available or accessible for some franchisees | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 6.1.1 | Status quo is not supported |
| Option 6.1.2 | MTAA supports this option in principal, but suggests further work is required to cater for matters where the franchisor intends to terminate the franchisee, for reasons of consolidation or amalgamation of geographic or other market identifying attributes. A capacity should be included where There should be an |
| Option 6.1.3 | MTAA supports this option |

| **Options to address problem 6.2:** Excessive restraint of trade clauses may inhibit lawful pursuit of subsequent business interests. | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 6.2.1 | Status quo is not supported |
| Option 6.2.2 | MTAA supports increased clarification by addressing the wording of clause 23 of the Franchising Code of Conduct. |
| Option 6.2.3 | MTAA supports this option |

| **Options to address problem 6.3:** There are different expectations around the treatment of goodwill in franchise arrangements. | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 6.3.1 | Status quo is not supported |
| Option 6.3.2 | MTAA fully supports this option and provides further rationale in its following response to Question 15. |
| Option 6.3.3 | MTAA supports this option |

### **MTAA Responses to Principle 6 Questions**

1. ***Under what circumstances should franchisees be allowed a no-fault exit from the franchise system?***

MTAA has extensively canvassed this matter in previous submissions and representations to the PJC Inquiry and previous reviews of the franchise system and Code of Conduct.

1. ***If goodwill was required to be fully clarified in the franchise agreement, how might this be done in practice? What would be the costs and benefits of this approach?***

MTAA suggests goodwill be fully clarified in the franchise system and incorporated into planned revisions as outlined in the options supported.

This is particularly important for automotive sector franchisees who are generally involved in long established franchisors and brands. Many new car retailing franchisees for example have developed multi-generation customer bases largely of their own making, yet constantly battle unfair influence and interference from some vehicle manufacture franchisors who insist that such customer databases are their property not the franchisee’s, and unilaterally dismiss any notion that such databases form a component of goodwill.

While acknowledging difficulties applying such clarity to franchising, MTAA suggests there is enough information, guidance materials and standards to enable inclusion of, and calculations for, goodwill. Goodwill should be included in disclosure and negotiated accordingly. MTAA recognises this may be more difficult for start-up franchised opportunities, as well as long established franchised networks subject to intense competition and fluctuating fortunes of brand market share. However, these difficulties are not considered enough for no action to be taken on such a critical issue. As a starting point clarity should be consistent with existing advice for example as outlined in business.gov.au. which states:

*Goodwill can include:*

*• customer loyalty and relations*

*• brand recognition*

*• staff performance*

*• customer lists*

*• reputation of your business*

*• business operation procedures*

MTAA suggests this is a broad enough base for clarity.

It is suggested the complexity raised by the Taskforce in the RIS is likely because different results will be obtained depending on the calculation method used. This can be mitigated by inclusion of consistent calculations driven by International Financial Reporting Standards (IFRS).

International Accounting Standard (IAS) 38 ‘Intangible Assets’ essentially stipulates the only accepted form of establishing goodwill value is one that is not ‘created internally’ but one that is acquired externally through business mergers or acquisition processes. Undertaking such a process although the company may not be necessarily sold may provide a fair and transparent outcome.

Many references indicate an external acquired goodwill value can be obtained by:

1. **Value of Assets** – obtain the book value of assets on the business balance sheet including current assets, non-current assets, fixed assets and intangible assets obtained from validated financial statements.
2. **Fair Value of Assets** – obtain through independent financial advice the fair value of assets by comparison with current market values.
3. **Adjustments** – Calculate the adjustments by identifying the difference between the book value and fair value of each asset.
4. **Excess Purchase Price** – Calculate the excess purchase price by taking the difference between the actual purchase price likely to be paid to acquire the target company and the net book value of the company’s assets (assets minus liabilities).
5. **Calculate Goodwill** – with the above calculations take the excess purchase price and deduct fair value adjustments. The result is goodwill that will go on the acquirer’s balance sheet after the transaction has concluded.

MTAA understands there will still be variables and some elements are subjective which can cause disagreement and areas of dispute, but increased clarity and surety in revisions will mitigate some of these.

## **Principle 7. The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency**

| **Options to address Problem 7.1**: Some franchisors experience additional regulatory burden from having to comply with both the Franchising Code and the Oil Code | |
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| **MTAA Preferred Option** | |
| Option 7.1.1 | Status quo is not supported. |
| Option 7.1.2 | MTAA supports this option. MTAA has provided representations to previous reviews that aligns with the objective of increasing the number of common provisions between the Oil and Franchising Codes to reduce the regulatory burden for some franchisors. MTAA is of a view that to repeal the Oil Code at this time would be premature. Actions outlined in 7.1.2 to increase harmonisation and consistency between the two Codes (Franchising and Oil) is considered an overdue and logical step. A future scheduled review of the Oil Code could include examination the success or otherwise of these actions in terms of whether there is still a requirement for the Oil Code.  MTAA, Members and their Fuel retailing constituents who are members of the MTAA affiliated Australian Service Station and Convenience Store Association (ASSCSA), are of a view that the rationale and reasons for the creation and implementation of the Oil Code have not declined. However, there remains a task to better align the Franchising and Oil Codes including relationships with the ACL, CCA and other legislation and regulations as outlined in the PJC Inquiry and Taskforce investigations. Option 7.1.2 moves a considerable way to achieving this objective. |
| Option 7.1.3 | Repealing the Oil Code and incorporating provisions into the Franchising Code is not supported. |

| **Options to address problem 7.2:** Compliance with the Franchising Code, Oil Code and where relevant the CCA and ACL remains imperfect | |
| --- | --- |
| **MTAA Preferred Option** | |
| Option 7.2.1 | Status quo is not supported |
| Option 7.2.2 | MTAA supports this Option. While recognising the regulatory burden of penalty regimes and their enforcement, it is MTAA’s position that adequate penalty regimes with strong enforcement capacity and capability serve the purpose of enhancing Code compliance and reduce disputation.  MTAA has been critical in previous reviews and inquiries that inadequate or a lack of meaningful penalties and an inability to enforce them is a contributing factor to some of the concerns and issues raised during previous inquiries, the PJC Inquiry and with Taskforce investigations.  Strengthened, harmonised and consistent penalties applying to the Oil Code and Franchising Code will assist address these. |
| Option 7.2.3 | MTAA supports this option and increased actions and mechanisms for improved awareness and education and remains available to work with government and stakeholders to assist in the provision of these to its member constituents nationwide. |

### **MTAA Responses to Principle 7 Questions**

1. ***What are the implications of amending the Oil Code of Conduct to increase the number of common provisions between the Oil and Franchising Codes? What would be the costs and benefits of this approach?***

MTAA has not had enough time to consider a full Cost Benefit Analysis of amending the Oil Code of Conduct with common provisions. However, the Federation is supportive of common provisions between the Oil Code and the Franchising Code of Conduct. Addressing improved harmonisation, consistency, penalties is nonetheless an important pathway to increased compliance and reduced dispute potential. These outcomes will produce cost savings, but these have not been qualified or quantified in the time available. MTAA Members have constituents in fuel retailing (some franchisee) as well as other automotive industries and is well placed to observe the imperfection and inconsistency of the two mandated Codes. It is the position of the MTAA that the rationale for government intervention in the creation and implementation of the Oil Code remains, just as changes to the Franchising Code are of paramount importance to improve outcomes.

1. ***What are the implications of repealing the Oil Code of Conduct and adding specific fuel retailing provisions to the Franchising Code?***

MTAA does not support repealing the Oil Code.

MTAA respectfully suggests that changes proposed in some options to strengthen, harmonise, improve consistency, clarity and improve compliance should be implemented. MTAA respectfully suggests that the rationale for government intervention in the creation and implementation of the Oil Code remains current despite significant market changes. MTAA is of the view that inclusion of specific fuel retailing provisions to the Franchising Code will not address other idiosyncrasies and specific fuel retailing market attributes that caused the need for a separate identified Oil Code.

### **Conclusion:**

MTAA thanks the Taskforce for a further opportunity to provide this submission to the RIS and remains available to discuss and provide any further assistance the Taskforce, Departments and Agencies or Government may require in finalising this important work.

**Attachment:** MTA-SA additional consultation material

### **Attachment 1 –** Consultation findings of the Motor Trades Association of South Australia and the Northern Territory.



While the members the MTA-SA spoke with generally agreed with the spirit of the principles, the following issues were broadly raised by members:

**Power imbalance**

There was a feeling amongst members that there is a power imbalance in the franchise relationship, with one member stating that, “No dealer expects a franchise relationship to benefit the franchisee.”

Members indicated that due to franchisors having greater market power, franchisees had little ability to have input into matters such as price setting for products. This in turn leads to an environment in which profitability can be severely limited, leading to reduced business viability.

Other members considered that they had limited ability to have input into franchisor decisions and the services and support they were required to pay for. For example, some members were frustrated that they were required to pay high advertising fees, in circumstances where they saw limited value. Another member was frustrated that franchisees were charged for services such as IT infrastructure, whether they use it or not. In general, members were frustrated by their inability to effectively negotiate on items such as this.

One member lamented that they were not able to collectively bargain with other franchisees, leaving him to negotiate one-on-one with the franchisor. This particular member indicated that they would like to see a ‘dealer council’ in their circumstances.

Conversely, another member advised that while the franchise model they operated under did have a franchise advisory council (FAC) to negotiate with the franchisor, they felt that this body was not representative for all franchisees, favouring the larger, higher volume stores and those situated on the east coast of Australia.

**Dispute management**

MTA-SA Members expressed a desire for an independent escalation and mediation process for disputes, separate from the franchisee and franchisor.

Members were concerned that if, as a franchisee, they spoke up about an issue, they can be ‘singled out’ as ‘troublemakers’, putting them out of favour with the franchisor. In this regard, franchise contracts including ‘no- fault termination clauses’ are of concern to franchisees, effectively causing them to stay silent regarding their concerns.

Members saw value in an independent government led mediation process for disputes in franchise relationships, such as the Small Business Commissioner in South Australia.

**Unnecessary set-up and ongoing location expenditure**

A member advised, anecdotally, of franchisees taking over a location being required to purchase brand new equipment to fit out a store, when the same equipment was already present and included. The implication being that the franchisor benefited financially from the arrangement.

Another member reported that franchise agreements included unfair requirements regarding the need to upgrade facilities and signage. While the upgrade costs are shared 50/50 with the franchisor, the member reported that as they are in a regional location, the anticipated upgrade costs are comparable to the value of the site itself.

The MTA was also advised that franchisees are sometimes forced to buy licensed/official tools, in circumstances where significantly cheaper non- official options, which serve the same purpose, are available.

**Misleading practices**

A member indicated that they had been misled through promotional material at the time of entering into the franchise agreement regarding the expected average revenue per month. When they subsequently queried the figure, they were advised that it was a ‘typo’ and was in fact a reference to the maximum expected revenue per month.

The same member indicated that there needs to be more time given in cooling off periods. Based on their personal experience, 7 days, which was the cooling off period for their franchise, was not a reasonable amount of time in which to make an informed decision.

**Control over customer information**

A member was concerned about the high level of control that franchisors seek to gain over a franchisee’s customer information, asserting that franchisor support may be withheld if access to customer information is not provided.

The member alleged that franchisors would claim ownership over the franchisee’s customer information and provide it to a new franchisee at change of ownership or restructure.

ends