FCA

FIAT CHRYSLER AUTOMOBILES

FCA Australia Submission to the Department of Treasury's Paper August 2021 Automotive Franchising Discussion

FCA AUSTRALIA PTY LTD
ABN 23 125 956 505

Contact:

Claude Harran
Legal Director
September 2021

FCA Australia Pty Ltd trading as FCA Australia
437 Plummer Street, Port Melbourne, VIC 3207
PO Box 23267, Docklands, VIC 3008
Ph. +61 3 8698 0200, Fax. +61 3 8698 0250
ABN 23 125 956 505

This submission is made by FCA Australia Pty Ltd (**"FCA Australia"**) in response to the August 2021 Automotive Franchising Discussion Paper (**"Discussion Paper"**) published by the Australian Government Treasury Department (**"Treasury"**).

1. FCA AUSTRALIA COMPANY PROFILE

FCA Australia is a wholly owned subsidiary of its ultimate parent company, FCA Minority LLC (a Stellantis Group company), which owns and operates amongst other global vehicle brands the Chrysler, Jeep, Dodge, Fiat, Alfa Romeo and Fiat Professional automotive brands globally.

FCA Australia is the local national sales company of passenger, light commercial and SUV vehicles for Chrysler, Jeep, Dodge, Alfa Romeo, Fiat and Fiat Professional vehicles in Australia. It does so via a network of franchised motor vehicle dealers. It currently has approximately 89 full sales, service and parts dealers operating across Jeep (66), Fiat Alfa Romeo (9) and Fiat Professional (18) dealership businesses across all states and territories of Australia.

Annexure 1 shows diagrammatically each of the Jeep, Fiat Alfa Romeo and Fiat Professional Dealership networks.

FCA Australia has had the opportunity to consider the submission of the Federal Chamber of Automotive Industries (**"FCAI"**) and agrees with the content of its submission.

FCA Australia nevertheless recognises the value to Treasury of submissions from Original Equipment Manufacturers (**"OEM"**) to the Discussion Paper in Treasury's evaluation of its assessment of the automotive industry and as such provides the following FCA Australia specific responses to the topics raised in the Discussion Paper.

By way of background, FCA Australia has in the last 2 years negotiated a new generation Dealer Agreement with the Jeep National Dealer Council and implemented this across its Jeep, Fiat Alfa Romeo and Fiat Professional Dealer networks 12 months ago. In the case of all three networks, 100% of Dealers have executed the new generation Dealer Agreement. Given that this is a very recent activity, FCA Australia's submission will seek to provide Treasury with an insight into how this process occurs in practice and also draw upon its industry experience.

2. OVERVIEW

Automotive Industry Landscape

The new car industry has and continues to be subject to significant change. In recent times we have seen the merger of Automotive Holdings Group and AP Eagers into the one entity – Eagers Automotive.

The industry has also seen the emergence of private equity into the automotive dealership space and medium size dealer groups looking to list on the ASX.

It should also be noted that 3 of the Top 10 Largest Dealer Groups is overseas owned.

Why have dealer groups invited private equity to become involved in automotive dealerships?

Prior to the Automotive Holdings Group and AP Eagers merger, it was recognised that there was a big gap between these 2 publicly listed companies and the 20 plus medium size private groups with approximate $5,000,000 turnover. The merger only operated to increase that gap. The opportunity is therefore for these medium sized dealer groups to get bigger and fill the gap between the big publicly listed companies and the medium size private groups. The business thinking has been that the big publicly listed companies would not be able to grow larger and that therefore there would be an opportunity for growth from within the medium size private dealer groups. This is not FCA Australia speculating on the reasons for dealer groups partnerships with private equity but is rather based on the justification provided to the industry to approve shareholding changes to a dealer group partnering

with private equity. In the last 12 months, FCA Australia has been requested to consent to IPO activities involving 2 Dealer groups seeking to list on the ASX.

General Distributors and unauthorised third party importers

It is not the case that all distribution models of vehicles in the Australian market are through a locally based national sales company of global brands.

- **General distributors**

  Within the Australian automotive landscape there are local distributors (i.e. local entities that are not a national sales company of a global brand) that are contractually permitted to distributed brands in the local Australian market. For example, RAM Trucks are distributed by the Ateco Group in the Australian market based on the requirements to convert the Left Hand Factory produced vehicle to a Right Hand Drive vehicle.

  Ateco Group is Australia's largest independent automotive distribution company with offices in Australia, New Zealand and South Africa. The Ateco Group has played a critical role in establishing many automotive brands in Australia over the years – from Volkswagen and Audi, to Kia and Suzuki – and in recent times has lead the roll-out of Chinese brands, with LDV Automotive.

  Ateco has a unique portfolio of brands; as well as distributing RAM Trucks in Australia, Ateco distributes Alfa Romeo, Chrysler and Jeep in New Zealand. Their broad brand portfolio also includes Maserati and LDV Automotive.

  There are also General Distributors that have company owned retail stores and Dealer Agreements with other manufacturers. This means that they operate both as a General Distributor on behalf of a global automotive brand in distribution of that brand in the Australian market but are also Dealers for other brands in Australia. That means FCA Australia has a Dealer Agreement with General Distributor for a Jeep brand Dealership.

- **Third party importers**

  The implementation of the *Road Vehicle Standards Act 2018* (Cth) (**"RVSA"**) has opened the door for another potential distributor to the Australian automotive landscape, the non-factory authorised importer, which threatens to significantly impact consumers, dealers and OEMs.

  A consequence of the RVSA, particularly its changes to the Special and Enthusiast Vehicle Scheme, is allowing entities outside of the traditional authorised OEM/dealer franchise model to import an unlimited number of vehicles (that already have brand presence in Australia). These vehicles are distributed in direct competition to OEMs and Australian dealers. As an example, FCA Australia is aware of a several entities - including at least one boasting multi-million dollar revenues - whose sole business model is to parallel import already established vehicle brands in Australia – and which appears to not have the same compliance costs and requirements typically demanded of OEMs or General Distributors, such as crash-testing.

  Of concern, FCA Australia also has evidence of these importers failing to conduct mandatory and necessary safety recalls (such as the mandatory Takata recall).

  The proposed legislative changes cannot be considered in a vacuum. They are in addition to other legislative reforms that continue to ask OEMs to shoulder significant compliance burdens and costs (at the risk of substantial fines), whilst simultaneously devaluing its investment in Australia and potential for both OEMs and dealers to make a return.

Nature of vehicle technology changes

In addition to the evolution of changes in network structures and participants, the nature of vehicles is changing. Three automotive trends that are challenging the automotive industry and which are currently playing out for FCA Australia are:

- *Connectivity*

  Connectivity-enabled technologies are increasingly finding their way into vehicle development.

- *Autonomous driving*

  The timeline for level 4/5 autonomous vehicles keeps accelerating as necessary economics, regulations and technology fall into place.

- *Shared*

  The nature of vehicle ownership is quickly evolving with the introduction of sharing and subscription business models which require OEM to adapt to new consumer purchasing decisions and options.

- *Electrification*

  Momentum for electrification is building among OEMs due to increasing regulatory pressure and accelerating technology advancement.

With the potential for the automotive industry to change over time in order to meet the ever changing needs of customers, FCA Australia is of the view that over regulation of the automotive industry will lead to a position where Australian customers are not able to obtain the best of what new technologies may deliver. If FCA Australia is unable to adapt to economic market shifts, then both it and its Dealers will suffer from lagging technology opportunities.

Business models of selling vehicles

The methods of selling vehicles are also changing, albeit not necessarily at the same rate as in some other retail industries.

Geographic proximity is becoming less important and there have been some tentative steps towards selling motor vehicles online and consideration of finance product for the purchase of vehicles. This is likely to increase as consumers become more comfortable with buying goods online or utilising finance products such as guaranteed future value. This has been no more evident than during the COVID-19 pandemic where the automotive industry has had to adapt to an online environment through their own needs.

Regulatory changes impacting the Automotive Industry

The changes mentioned in the 'Overview' section on page 5 of the Discussion Paper are regulatory changes that have already been introduced, and only came into effect on 1 July 2021.

Of particular significance are new clauses 46A and 46B concerning compensation and opportunity for return on investment.

The changes to the unfair contract term provisions are already being introduced. The addition of new clause 6(3A) to the Franchising Code of Conduct (**"Code"**) further strengthens the legislative position that terms must be fair and reasonable.

These changes are significant, especially when viewed in the context of the *Treasury Laws Amendment (2021 Measures No.6) Bill 2021* (Cth) which passed both parliamentary houses on 2 September 2021

and will significantly increase civil penalties for breaches of the Code. All of these significant changes are still new and need to be tested before any further changes are considered.

The motor vehicle industry is subject to a very high level of existing regulation. In FCA Australia's view, the unfair contract terms requirements in conjunction with the obligations under the Code and *Competition and Consumer Act 2010* (Cth) provide effective and sufficient regulation.

Annexure 2 diagrammatically indicates the various compliance requirements and checks and balance for Dealers in entering and influencing the relationship between the OEM, Dealer and end Customer.

3. CONSIDERATION OF ADDITIONAL AUTOMOTIVE FRANCHISING REFORMS

FCA Australia shares the position adopted by the FCAI in its submission in that it is critical that the legislative and regulatory framework remain proportionate and that the recently implemented requirements have time to take effect to better assess whether there is in fact a problem that remains outstanding.

What is the problem to be addressed?

The Senate Inquiry found that multi-national corporations that are car manufacturers can exploit new car dealers due to power imbalances. FCA Australia is of the view that the matters in the first set of bullet points on page 7 of the Discussion Paper have now been addressed with the introduction of clauses 46A, 46B and 6(3A) into the Code.

In addition to the then relevant and anticipated legislative requirements, FCA Australia developed and implemented a new generation Dealer Agreement which sought to further address these concerns. The legislative framework has changed twice since then which ultimately means that FCA Australia has to consider and administer new appointments under a different regulatory framework than existing Dealers.

FCA Australia recognises that the ongoing success of FCA Australia relies on the strength of the relationship between FCA Australia and its Dealer partners. It is therefore crucial to that success that any new Dealer Agreement not only captured the commercial terms governing its relationship with its Dealers but also entrenched an underlying spirit of mutual trust, respect and fairness on which that relationship is to be based. FCA Australia recognises that together it and its Dealers must achieve a balance between:

- the individual interests of each FCA Australia Dealer; and
- the broader interests of the Dealer Network as a whole; and
- FCA Australia's own business.

FCA Australia submits that it is of criticat importance for Treasury to consider what a proportionate and balanced regulatory system ought to take into account in seeking to protect the interests of individual Dealers. A single Dealer may have an overall impact economically on a broader section of the interests of the Dealer network as a whole. For example, a consistently poor perfroming Dealer can have economic and brand reputational issues for the broader surrounding Dealer network and not only for the OEM.

The new Dealer Agreement was the product of a significant review and total rewrite. An extensive (and intensive) consultation process was undertaken between FCA Australia representatives and the National Dealer Council which now benefits all FCA Australia brands. This consultative process has exemplified the spirit of common purpose, openness and fairness that FCA Australia has set out to capture within the new Dealer Agreement itself.

In answer to the 'problems' stated on page 7 of the Discussion Paper, FCA Australia submits that these have been addressed via both legislative changes and further by FCA Australia in its own Dealer Agreements:

Problem outlined in Discussion Paper	FCA Australia Submissions
Ensure opportunity for recoupment of capital investments	**The current legislative model solves this problem** The significant capital expenditure changes to the Code that affected new automotive dealerships came into effect in June 2020. As a result of these changes, those in the automotive franchising industry have for over a year now been required openly to disclose and discuss capital expenditure before entering a new agreement. In addition, the exceptions where significant capital expenditure is permitted have been significantly tightened. For example, where the expenditure is required to be disclosed in the disclosure document, there are now specific obligations that are in place to encourage discussions surrounding recoupment of such expenditure (clause 30A of the Code). Further, the franchisor no longer has the ability to require significant capital expenditure during the term of the agreement on the basis that it considers it necessary as capital investment in the franchised business, justified by a written statement given to each affected franchisee as was previously allowed. Therefore, FCA Australia believes that as a result, and in conjunction with the points mentioned below, Dealers are already able to make an informed decision about recoupment of capital expenditure. Further, manufacturers will now be subject to a (now increasing) civil penalty if the Dealer Agreement does not provide the Dealer a reasonable opportunity to make a return, during the term of the agreement, on that capital expenditure (clause 46B of the Code). In addition, new clause 46A(1)(b)(ii) of the Code requires compensation for unamortised capital expenditure to be determined and provided if any of the limbs of clause 46A(1)(a) of the Code applied. These changes more than sufficiently ensure there is greater transparency such that the Dealers are well-informed and protected, specifically in relation to capital expenditure. As is the common theme with this submission, these changes are still very new and require a much longer period of time to see how effective they are to solve any alleged 'power imbalance'.
Ensure unfair contract terms are eliminated from franchise agreements	**The current legislative model solves this problem** At a high level there are potentially three main regulatory aspects to consider in connection an OEM with managing a Dealer's performance, being: • the Franchising Code of Conduct as prescribed under Part IVB section 51AE of the *Competition and Consumer Act* 2010 (Cth); • the 'unfair contracts and unjust conduct' provisions of the *New South Wales Motor Dealers and Repairers Act 2010* (NSW); and • the 'Australian Consumer Law' contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**"ACL"**), which includes prohibitions against misleading and deceptive conduct and unconscionable conduct, sections implying statutory

warranties/guarantees into the supply of goods and services and protections against the use of unfair contract terms in consumer and small business contracts.

Further, the ACL renders void 'unfair contract terms' (**"UCTs"**) that are used in standard form 'small business contracts' (i.e. one party to the contract employs under 20 persons and the upfront price payable in the contract is under $300,000 or does not exceed $1 million for contracts over 12 months). The UCT regime is another mechanism that protects Dealers in their commercial relationship with OEMs.

A term in a small business contract will be unfair if it:

- would cause a significant imbalance in the parties' rights and obligations under the contract;
- would cause detriment to a party if it were to be applied or relied on; and
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged.
- As this threshold for unfairness under the UCT regime is relatively low, the protection that small dealers are afforded by the UCT regime is relatively wide in scope. Courts can currently declare UCTs void and Dealers can claim compensation for loss or damage suffered (or even likely suffered) as a result of these terms.

This protection will substantially increase if the proposed amendments to the UCT law contained in Treasury's exposure draft UCT legislation are implemented by Government (which FCA Australia understands may be likely). These options include expanding the scope of small businesses captured by the UCT regime (eg, businesses employing under 100 persons or that have an annual turnover of less than $10 million for the previous income year), making UCTs illegal and subject to pecuniary penalties, expanding the remedies available to those impacted by UCTs and creating rebuttable presumptions about the unfairness of particular terms already found to be unfair.

More broadly, the ACL prohibits 'unconscionable conduct'. This is conduct that goes well beyond what is regarded by society as acceptable commercial behaviour or good conscience. Conduct which is likely to be considered unconscionable generally involves one party taking advantage of its strong bargaining power. It can include:

- using unfair pressure tactics on a weaker party;
- taking advantage of a special disadvantage or a lack of understanding of another party;
- relying on harsh, unfair or oppressive terms or otherwise acting in bad faith; and
- acting with little or no regard to conscience.

	The UCT regime and the unconscionable conduct prohibition together protect Dealers against unfair or oppressive conduct by manufacturers. In addition to the ability of Dealers to take private action against OEMs, a significant additional layer of protection is afforded by the threat of regulatory enforcement action, including the potential for significant penalties to be imposed, in the event of non-compliance with the ACL. Treasury should take this existing regulatory framework (and any proposed amendments to it) into account when considering regulatory changes in the form of a standalone automotive code and any arbitration options. FCA Australia considers that the existing regulatory framework is sufficient to protect Dealers. FCA Australia is of the view that the existing regulatory regime provides sufficient protections for Dealers navigating their commercial relationship with OEMs, including where there is a concern that an OEM may have contravened any of the above-mentioned regulatory frameworks. Given the size and scale of Dealers, it is difficult to accept that Dealer groups are not sufficiently resourced or financially capable of litigating these topics if required. **What has FCA done to address this problem?** FCA Australia further seeks Treasury to consider the application of clause 10(2) of the Franchising Code of Conduct which requires Dealers to seek independent legal advice. In our experience, Dealers often do not seek independent legal advice on the terms and conditions of the Dealer Agreement.
Adequately reimburse dealers for warranty and recall work	**The current legislative model solves this problem** The Australian automotive industry is extremely competitive and potential purchasers of motor vehicles are increasingly very well-informed. In this environment, brand value and reputation is critically important. In this regards the ACL under the *Competition and Consumer Act 2010* (Cth) specifically details implies statutory warranties, called the **"Consumer Guarantees"**, as they relate to the supply of goods and Consumer Guarantees as they relate to services to consumers. These guarantees include that: • vehicles will be of 'acceptable quality' (eg, fit for purpose, acceptable in appearance and finish, free from defects, safe and durable); • vehicles will match their description; • any express warranties made about a vehicle are honoured (e.g. any extra promises about the vehicle's performance); and • vehicle repair facilities or spare parts will be made available for a reasonable time. Consumers primarily take action against a 'supplier' (ie, a Dealer) for a breach of these consumer guarantees. Vehicle manufacturers are then liable to indemnify Dealers where Dealers incur costs as a result of a consumer guarantee failure caused by the manufacturer (eg, if a vehicle is

defective). This includes the costs to the Dealer of repairing, replacing or refunding a vehicle. This indemnity provides Dealers with significant protection as against an OEM. This protection should be taken into account by Treasury when considering the appropriateness of added regulation in this sector.

Services must be carried out with due care and skill

This means at least to the standard of a competent person with average skills and experience would achieve. Reasonable steps must also be taken to avoid loss or damages to the consumer when providing these services.

Services must be fit for any disclosed or represented purpose

This applies when a Dealer is explicitly or impliedly made aware of a particular purpose for which a vehicle is required to be serviced or repaired. A Dealer has guaranteed that a vehicle will be fit for a special job or purpose if the consumer, before providing the vehicle for service or repair has:

- expressly or implicitly told the Dealer what they want to use the vehicle for; and
- relied on the Dealer's knowledge or expertise when deciding whether to go ahead with the service or repair on the vehicle for that use or purpose.

Services are to be completed within a reasonable period of time

Unless a specific time is agreed, services will be provided within a reasonable time, depending on the nature of the service and other relevant factors such as availability of parts.

In addition, recent amendments to the *Competition and Consumer Act 2010* have included a new mandatory scheme for the sharing of motor vehicle service and repair information.

Treasury to consider the interests of all parties

FCA Australia and its Dealers have obligations under the Australian Consumer Law to ensure that customers receive the correct level of product quality and customer experience.

Without taking away any entitlements from a customer, Treasury is requested to take into consideration the fact that FCA Australia and Dealers are unable to hide from problems with motor vehicles or poor customer service. FCA Australia is also completely reliant on its Dealers to appropriately prioritise service repairs to ensure they are completed 'within a reasonable time'. Dissatisfied customers are very quick to litigate and publicise their displeasure – FCA Australia is well versed in this and is continually seeking to rebuild trust in its brand.

If Treasury is considering taking into account overseas experience as it relates to Dealer and OEM relationships, then FCA Australia is of the view that the review should also factor in that overseas jurisdictions formally allow for depreciation of vehicles over time where the customer has derived a benefit out of the use of the vehicle. By comparison, in Australia consumers may in certain circumstances be entitled to a refund or

	replacement for a vehicle that is several years old with substantial use (and despite them persisting with the vehicle when it has experienced faults). All that FCA Australia requests is that any framework Treasury considers appropriate must seek to balance FCA Australia's interests with that of the Dealer and the end consumer while not imposing unnecessary compliance burdens on the business – the result of which may be to hinder the market economy, and restrict effective competition and market innovation.
Provide fair and reasonable compensation when dealership agreements are terminated or not renewed.	**The current legislative model solves this problem** The current Code already ensures that agreements provide for compensation in the event of early termination. Clause 46A of the Code requires agreements to provide for the compensation of franchisees in the event of early termination of a Dealer Agreement for the reason that the franchisor is: i. withdrawing from the Australian market; or ii. optimising its networks in Australia; or iii. changing its distribution models in Australia, and requires the Dealer Agreement to address how the compensation is to be determined with specific reference to the following: i. lost profit from direct and indirect revenue; ii. unamortised capital expenditure requested by the franchisor; iii. loss of opportunity in selling established goodwill; iv. costs of winding up the franchised business FCA Australia is of the view that this requirement is more than adequate in addressing this 'problem'. FCA Australia rejects the suggestion that there should be a requirement to provide compensation to Dealers where the Dealer Agreement is not renewed beyond its expiry. The Dealer Agreement is no different to any other contract in that a term is introduced such that both parties can be commercially flexible in the future. The requirement that Dealers are compensated beyond the end of the term, in FCA Australia's view, would act as an impediment to responding and adapting to an ever changing market to the detriment of the consumer as well as the franchisor. In addition, clause 46B of the Code addresses concerns that the Dealer is not given a reasonable opportunity to make a return on its investment during the term. Clause 46B requires automotive franchise agreements to provide the Dealer a reasonable opportunity to make a return, during the term of the agreement, on its investment required by the manufacturer. The term must therefore be long enough such that the Dealer can make such a return. Why then would the Dealer require extra compensation for non-renewal? Manufacturers are already subject to good faith provisions, as well as the requirement to ensure the agreement terms are fair and reasonable (see clause 6(3A) of the Code). Therefore, further

compensation is not required at the end of the term of the contract in the circumstances of non-renewal.

Furthermore, Dealers are also protected in the event of non-renewal by the extended notice requirements when compared to other franchise businesses. Clause 47 of the Code requires at least 12 months' notice (unless the agreement is for less than 12 months) is given in the event its Dealer Agreement will not be extended or renewed. This requirement ensures the Dealer is afforded sufficient time to mitigate any losses that may occur as a result of non-renewal – further reinforcing the lack of need for further compensation after the expiry of the term.

Extra protection is also afforded via clause 10 of the Code which allows, and encourages, the Dealer to seek independent legal, business and accounting advice. Therefore, the Dealer is able to make sound financial plans before choosing to enter into the agreement and can negotiate terms further with the manufacturer. Therefore, extra compensation is not warranted.

The current legislative regime more than adequately addresses this concern. We address further below further issues with the idea of termination compensation.

Issues with the definition of 'termination'

The first point to make in this context is that FCA Australia is not in the business of retailing vehicles. It is a material financial impediment for FCA Australia to buy back significant stock at the end of a Dealer Agreement. This places the Dealer in a position of strength in how it may seek to manage its business while it comes to an end. Where there is a requirement to support a Dealer with stock issues the general process is for FCA Australia to support movement of the stock to an alternative dealer. This approach is something that Dealers already undertake and the transfer of vehicles between Dealers is common. One manner in which this may operate practically is that Dealers may have significantly more bargaining position during end of term transition forcing FCA Australia into having to purchase vehicles back from the Dealer where the Dealer makes it difficult to transfer stock. This is purely speculative but until the industry has had an opportunity to see how the new provisions apply in practice, FCA Australia's view is that Dealer concerns are more than adequately accommodated by the current provisions.

An important definitional issue should also be taken into account as it relates to the use of the word "termination". In many instances, termination is used interchangeably between Dealers being terminated without cause during the term of their Dealer Agreement and issuing of a non-renewal in accordance with contractual requirements and the Franchising Code of Conduct. This is an important distinction to be aware of as there are occasions where the use of the word "termination" is used to suggest that a manufacturer is ending the Dealer Agreement early without cause where in fact what has occurred is that the manufacturer has issued a contractual and Code compliant notice of non-renewal at the end of the Dealer Agreement. In order to ensure that it is clear in what context FCA Australia is using the word "termination" in its submission, the following descriptions are provided in an attempt to provide clarity:

Termination for convenience

There are occasions in general commercial arrangements where the parties may agree to being permitted to terminate the commercial relation for convenience (i.e. without cause).

FCA Australia's Dealer Agreements do not contain a right to terminate for convenience.

In the consultation process with the National Dealer Council, a right to terminate for convenience was not agreed and it was removed from the Dealer Agreement.

The regulatory regime has already impacted the commercial negotiating positions of the parties. Further regulation would only further erode the commercial positions of both parties.

Termination for breach and the breach is able to be remedied

The Code and the Dealer Agreement set out where the Dealer Agreement is able to be terminated for breach of the Dealer Agreement by the Dealer.

The FCA Australia Dealer Agreement sets out various circumstances in which the Dealer may be issued with a breach notice. As is required by the existing legislative regime (clause 27 of the Code) , the Dealer Agreement requires that FCA Australia in these circumstances:

- provides the Dealer with reasonable notice that FCA Australia proposes to terminate the Dealer Agreement because of the breach;
- identifies the breach and advises the Dealer of what is required to remedy the breach; and
- that the Dealer is given a reasonable period of time to remedy the breach.

An example of where this process may apply is where a Dealer consistently fails to meet the Dealer's performance requirements. The Dealer in these circumstances will be given an opportunity to improve its performance but ultimately if it is unable to meet its performance requirements, FCA Australia ought to be able to seek to appoint a different Dealer to represent it in that geographical location.

This process was adequately accommodated by the common law and original Code provisions.

Termination on particular grounds

There will be circumstances in which the Dealer will have breached the Dealer Agreement giving rise to a right to terminate the Dealer Agreement with seven days' notice in accordance with clause 29 of the Code.

Examples of circumstances where this may occur include where the Dealer becomes insolvent, is involved in fraudulent activity or where the Dealer does (or fails to do) something which is listed as a ground for such termination under the Code.

Termination by Agreement

The Code and generally Dealer Agreements permit the parties to agree to mutually end the Dealer Agreement.

Non-renewal

Under the Code amendments introduced on 1 June 2020, Dealers are to be provided with a 12-month non-renewal notice period.
The only opportunity FCA Australia therefore has to non-renew a Dealer is 12 months from the end of the term of the Dealer Agreement.

In practical terms, if the Dealer Agreement has an end date of 30 September 2025 the latest that FCA Australia can non-renew the Dealer is 30 September 2024.

Any ending of the Dealer Agreement before that date would constitute a termination.

Termination by the Dealer

Under clause 26B of the Code, the Dealer may also seek to terminate the Dealer Agreement via giving the franchisor a written proposal.

Issues with the idea of a compensation scheme

What is to be regarded as fair and reasonable compensation when Dealership Agreement are terminated fails to take into account the various means under which a Dealer Agreement can be brought to an end as detailed above.

One of the reasons this argument is often put forward is that in the context of a "termination", Dealers may be left with significant amounts of unsaleable stock.

As outlined above, the current buy-back regime already creates risks that Dealers may have significantly more bargaining position during end of term transition forcing FCA Australia into having to purchase vehicles back from the Dealer where the Dealer is unreasonable in its dealings with the purchaser of its business in relation to the transfer of stock to that purchaser.

A regime that applies to all termination events, shifts commercial risks that ought to lie with the Dealer to FCA Australia in that:

1. where a Dealer becomes insolvent and the Dealer Agreement is terminated, FCA Australia may have a greater risk to the administrators of the Dealer's business than it would otherwise have had without a regulated compensation scheme. Put differently, if in normal circumstances an administrator was only able to recover 20c to the $1 but there was a contractual or regulatory entitlement for the Dealer to receive compensation in the event of a termination of 80% of the purchase price of any current Dealer stock, then the administrator has a potential claim against FCA Australia that it would otherwise not be entitled to in the normal course of business.

FCA Australia cannot be expected to be accountable for the solvency risk of the Dealer's business.

2. where a Dealer is terminated for proven fraudulent activity, the question is whether FCA Australia should be expected in these circumstances to compensate the Dealer at all.

3. where a Dealer relinquishes its Dealer Agreement, the Dealer controls this outcome.

   FCA Australia is of the view that the Dealer is in control of its stock risk as it decides when and how to exit the relationship. In these circumstances, FCA Australia is of the view that as the Dealer is in control, it ought to have the initial responsibility for stock inventory.

4. Under the Franchising Code of Conduct provisions introduced on 1 June 2020, Dealers are to be provided with a 12-month non-renewal notice period.

   FCA Australia does not in itself consider the contention that Dealers may be left with significant amounts of unsaleable stock to be totally accurate in the practical operations, for the following reasons:

   - If a Dealer receives 12 months' notice of a non-renewal, it has ample time to run down stock reserves should the Dealer wish to do so.

   - In circumstances where a non-renewed dealership is able to be sold as a going concern, typically there is no reason or desire to run down stock, and remainder stock is not a concern for the outgoing Dealer as inventory will be taken over by the purchasing Dealer.

   - If the non-renewed dealership is not being sold as a going concern, the FCA Australia dealer agreement does not prohibit Dealers from selling the remaining stock after the end of the Dealer Agreement. For example, such stock will often be sold in the Dealer's used car business or parts continued to be used for repairs.

   - Where a non-renewal notice has been issued, FCA Australia does not seek to unfairly enforce its strict contractual rights regarding targets towards the end of a Dealer Agreement. Rather, FCA Australia takes account of the Dealer's circumstances and intentions at the end of the arrangement.

   FCA Australia is also able to indicate that even where there is an identified process for addressing buybacks, a Dealer has not necessarily accepted the documented contractual position and has sought additional compensation.

Are automotive dealers different from other franchisees?

It is interesting to FCA Australia for the Discussion Paper to document that automotive dealers maintain that they are different to other franchise businesses due to those matters listed in the second set of bullet points on page 7. In any event, if the automotive franchise industry is truly considered so different from other franchised businesses by the Treasury, then FCA Australia requests that the same

rationale be applied to the manner in which vehicles are treated for the purposes of the Consumer Guarantees. The FCAI and manufacturers have for many years been claiming that you cannot treat a car in the same way you treat a toaster when it comes to the application of the Consumer Guarantees. For example, diagnosing and repairing vehicle defects are substantially far more complex, time consuming and costly compared to many other consumer goods. In addition, vehicles are often modified by consumers, which adds to the complexity of considering whether a fault has been caused by a manufacturing defect or a modification.

An FCA Australia operational perspective

FCA Australia has entered into a new generation Dealer Agreement with its Dealer Network in 2019. To provide some practical insight into this arrangement at an operational level, as a business we felt the following would assist.

In the development of its new generation Dealer Agreement in 2019, FCA Australia took into account the then anticipated changes that were likely to flow from the Parliamentary Joint Treasury Inquiry into the operation and effectiveness of the Franchising Code report - *Fairness in Franchising*.

Extensive time and effort was invested pre-empting those changes and embedding them into the proposed new generation Dealer Agreement. The Dealer Council was supported by external legal support and FCA Australia worked collaboratively to develop this new Dealer Agreement. FCA Australia is of the view that at that point the current legislative frameworks that regulated the relationship between FCA Australia and its Dealers provided more than appropriate checks and balances. That legislative framework has now been further extended and additional regulatory compliance obligations added. Although the changes since the implementation of the new generation Dealer Agreement will apply to new Dealer Agreements entered into, extended or renewed, the changes will result in Dealers having inconsistent Dealer Agreements for some time.

Any further regulation governing this relationship risks over-regulation and the consequences of which may lead to:

- the administrative costs for compliance with legislative requirements being charged as fees to Dealers. For example, where a Dealer requests FCA Australia to approve the sale of a franchise;
- considerations of exiting the Australian automotive landscape; and
- charging franchise fees for the goodwill that attaches to the brand on entering a new Dealer Agreement (i.e. there are no franchise fees charged to dealers) which FCA Australia currently does not do.

The consumer will ultimately suffer from any additional costs compliance costs placed on OEMs or Dealers as these will naturally be built into the cost of the vehicle to allow OEMs and Dealers an opportunity to receive a return.

Standalone automotive franchising code

FCA Australia supports the position taken by the FCAI that there is no requirement for a standalone automotive franchising code.

In further support of this position, the implementation of a code, whether voluntary or mandated through regulation, should not be used to restrict competition or unduly interfere with the parties' freedom to contract.

It is FCA Australia's view that this has already happened extensively with recent regulatory changes, including those specifically relating to the automotive industry.

When does the government intervene with an industry code of conduct?

The Discussion Paper clearly states "markets should be free to operate without excessive regulation".

It could be argued that the manner in which automotive is regulated under the Code is already excessive and this is before consideration is given to the other recommended regulatory regimes being implemented as they relate to automotive dealer agreements and increased penalties.

As outlined above, it is FCA Australia's view that it is certainly inappropriate to add to the current regulatory framework where significant changes have just come into effect and others are still to come into effect such as those expanded unfair contract terms and also the sharing of data as referred to in the fourth and sixth paragraphs on of the Discussion Paper on page 8.

A code should furthermore only be addressing problems that cannot be addressed using existing regulation. Existing regulation has already been used to impose restrictions on the industry and that should be the same going forward. There is no evidence that that is ineffective.

FCA Australia supports the view of the FCAI in that there is no clearly identified market failure.

Recent consideration of a standalone automotive franchising code

The 2019 Parliamentary Joint Committee considered that the issues raised by Dealers were not unique "and overlapped with many of the issues identified by other sectors within franchising. Mindful of disadvantages that arise with the fragmentation of codes into multiple codes, it considered that automotive franchisees' concerns should be addressed through the existing Franchising Code."

Again, these changes have occurred and have only just occurred - so there is no reason for further regulation at this point in time.

There is no evidence that the latest changes have not been effective or that more is needed.

4. OPTIONS FOR FURTHER SUPPORTING THE AUTOMOTIVE INDUSTRY

Option 1: Amend the Franchising Code and its automotive specific provisions when required

FCA Australia would like to see certainty and finality regarding regulatory change in this area.

Accordingly, FCA Australia's strong preference is that the status quo is maintained. If it is determined (contrary to the views of FCA Australia) the changes are required, they should be adopted via specific amendments to the existing Code rather than the introduction of a new automotive-specific code.

This way the industry is not subject to unnecessary further uncertainty via the introduction of a new automotive-specific code of conduct, and all parties receive the benefit of what is a robust Franchising Code of Conduct that has been subject to likely 5 rounds of amendment, and multiple inquiries, in just over a decade.

Certainty is a relevant consideration in that FCA Australia negotiated and implemented a new Dealer Agreement in the context of the then pending changes but since then there have been additional changes and now suggested further changes. The series of changes in very recent times, with very little notice prior to implementation, has been extraordinarily difficult administratively, contractually and practically. The possibility of more changes in advance of the post implementation review of the most recent amendments to the automotive part of the Code (which must be completed by mid-2023), and of the review of the Code which must be undertaken by the Code-sun setting on 1 April 2025, is extraordinary and totally lacking in pragmatism – and, as we submit in this document, is not necessary.

FCA Australia notes that the Discussion Paper under Option 1 on page 8 makes reference to consistency in the laws. FCA Australia's view is therefore that no stand-alone code is required.

The Discussion Paper also references perceptions that industry specific needs are not being adequately addressed – but they can only be perceptions and they can't be based on any concerns with the current regime because the current regime has only been in effect for a couple of months.

FCA Australia agrees with the Discussion Paper statement that "more time is needed to allow these recent changes to fully take effect".

Option 2: Establish a standalone automotive franchising code

FCA Australia agrees with the position of the FCAI that there is no need for a standalone Automotive Code.

If there is a standalone code, FCA Australia is of the view that this would create a lack of consistency. FCA Australia has particular concern that this inconsistency would result in the automotive industry missing out on the evolving protections which are and will be afforded to other franchised businesses in Australia. If these future changes were to be replicated in the standalone automotive code, outside of the administrative burden it would create, it would simply demonstrate and a standalone code was never required in the first place.

5. ARE PROVISIONS NEEDED TO COVER OTHER VEHICLE TYPES?

FCA Australia is unable to comment of the requirements of how the Code applies or ought to apply to other parts of the automotive industry. For the purposes of FCA Australia's business, FCA Australia does not draw a distinction between its Code obligations as they apply to its new vehicle dealerships and its specialist Fiat Professional commercial vehicle dealerships.

Although it is the view of FCA Australia that the Code would apply equally in the context of Unauthorised Third Party Importers, FCA Australia would welcome Treasury's consideration of conducting a review of the Unauthorised Third Party Importer industry and adherence to the Code and other regulatory compliance regimes that the automotive manufacturers are subject to.

FCA Australia would happily discuss this topic further with Treasury if further insight is required.

6. QUESTIONS

FCA Australia is of the strong view that there has been a failure to reasonably identify that there are unresolved problems when there have been so many studies which have not identified issues. Further, all the issues that have been alleged to have existed have been addressed and need to have a chance for the current provisions effectiveness to be assessed over time.

1. What are the key problems or issues being faced by the automotive sector that you believe have not adequately been addressed by the Government's recent reforms?

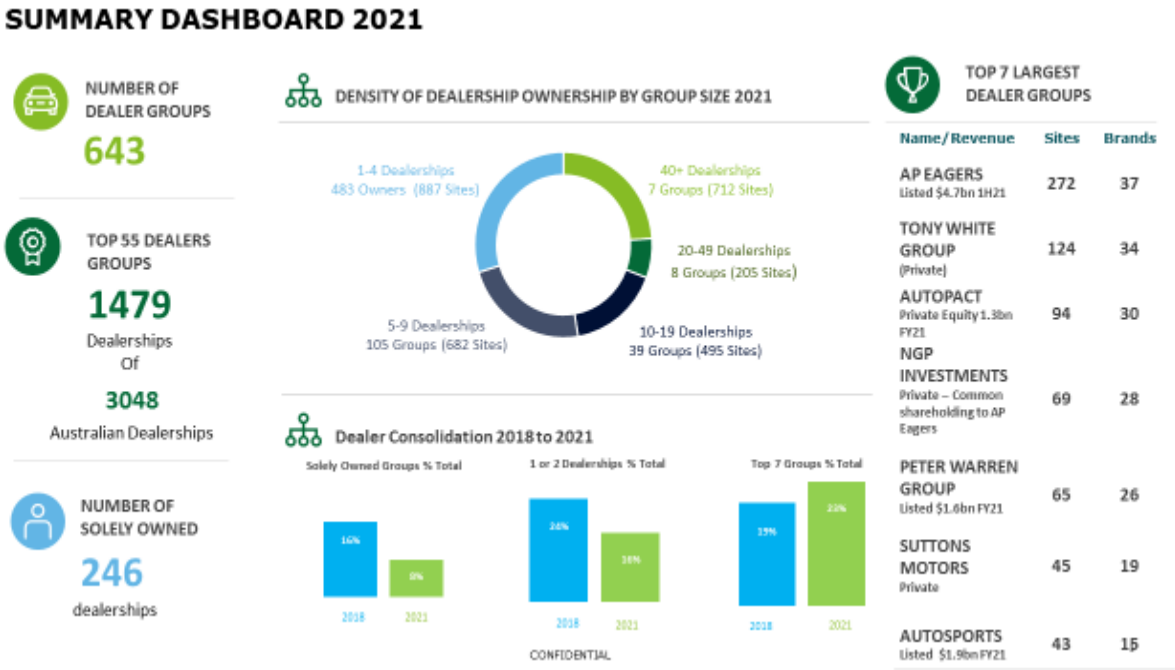
   If there is a key issue that needs to be taken into consideration it would be to fully understand the scale and sophistication of Dealer Groups and if this is truly about the protection of "small family dealer businesses" then consideration could be given to focusing any requirements of a code exclusively to the benefit of this dwindling group. It would be a failure of any legislative framework, whether via a code or more generally, that affords protection to groups other than small dealers particularly where the trend is that these small family run dealers may not exist because larger Dealer Groups have taken them over.

   The further point being that it should not be assumed that all OEMs are large organisations that command significant market power amongst Dealer Groups in Australia. To demonstrate this, for August 2021, the top 5 selling vehicle brands accounted for 52.6% of all new vehicle sales - the top 10 accounted for 74.7%. This means that there are dozens of smaller OEMs with dealer networks,

including FCA Australia, that are competing for a limited share of the remaining new vehicle market.

2. What evidence can you provide about the magnitude of the problem (i.e. quantitative and qualitative data)?

FCA Australia directs Treasury to the data provided by the FCAI as part of its submission including the information contained in the below chart.



3. Which option do you consider to be the most effective and why?

FCA Australia supports the position of the FCAI. FCA Australia is of the view that nothing further is currently required and that consideration of the current framework can be reviewed at a future date to ascertain whether the alleged problems are, in fact, problems.

If there's going to be changes, they should be made to the current Franchising Code – but these changes must be made to ensure consistency and the need for markets to be free to operate without excessive regulation.

7. OPTIONS FOR ARBITRATION

What is the problem to be addressed?

The discussion paper outlines two potential problems in relation to dealer/manufacturer disputes:

1. Better dispute resolution mechanisms are required.

2. Manufacturers exploit a power imbalance through a lack of genuine negotiation.

FCA Australia is of the view that these alleged problems do not exist within the automotive industry. The most appropriate course of conduct would be to allow the current framework time to address these issues.

The current dispute resolution mechanisms are more than satisfactory

FCA Australia does not consider that any further changes should be made to the dispute resolution processes before a thorough review of effectiveness of the recent 2020 and 2021 reforms has been undertaken.

These recent reforms are significant. The inclusion of conciliation in addition to mediation, the option of voluntary arbitration and multi-franchisee dispute resolution have the ability to wholly address the Treasury's concerns above. To use the words of the Discussion Paper:

> the implementation of recent reforms to the Franchising Code are significant and the effect of the changes…will take time to flow through and have an impact on the ground as new franchising agreements are entered into.

However, FCA would like to make the following points in relation to those most recent amendments.

FCA Australia is of the view that the previous mediation processes were very effective, and not in need of reform. Indeed, FCA Australia and staff on behalf of other manufacturers at the time, have participated in a number of mediations, the vast majority of which have resulted in negotiated outcomes. FCA Australia's view is that the previous processes were a cost effective method for disputes to be resolved to the satisfaction of all parties. Indeed, this is consistent with the view expressed in the Discussion Paper and the experience of the ASCFEO: 'In the majority of cases, franchising parties have successfully utilised mediation under the Franchising Code with a high degree of disputes resolved in good faith, facilitated through ASBFEO and state and territory small business commissioners'.

FCA Australia still maintains the view that multi-party dispute resolution in the automotive industry is not appropriate nor in the interests of Dealers or manufacturers. This is because:

- typically, the factual scenarios between Dealers (even those within the same network) are so different that they cannot be resolved in a timely manner in one forum; and
- competition law issues may arise where Dealers, who are competitors, are engaging with one another depending on the subject matter of the dispute.

Nevertheless, the recent Code obligations make multi-party dispute resolution available to Dealers. FCA Australia will, irrespective of its initial views on multi-party mediation, nevertheless operate in accordance with its Code obligations. FCA Australia raises this point to illustrate that the Code requirements currently extend beyond what may be considered as commercially appropriate requirements to address an unsubstantiated allegation of a problem. Further regulatory obligations establishing pre-contractual arbitration would in FCA Australia's view result in over regulation and further erosion of commercial arm's length arrangements involving commercially sophisticated Dealers.

Practical position of dealers – the imbalance in power allegation

As already noted, FCA Australia disputes the fundamental assumption that there is a significant power imbalance between car dealers and car manufacturers within new car retailing that requires redress via further regulatory intervention. The FCA Australia Dealer Council is a very effective and powerful advocate for Dealers' interests. FCA Australia engages with the Dealer Council on all significant and day to day issues applicable to the network. The following points seek to demonstrate why there is no significant power imbalance that leads to a lack of genuine negotiation.

A concern raised in previous Governmental inquiries in support of a power imbalance is that car manufacturers have the ability to easily terminate a dealership in order to create an open point in the market, or replace a Dealer with an alternative sales outlet. This is not the case for a number of reasons.

Dealers control open points

Firstly, FCA Australia does not operate a direct to consumer sales channel.

It does not own land or have an established capacity to source premises and establish a dealership business. FCA Australia does not therefore operate a company owned store model.

Accordingly, any loss of a dealership will reduce FCA Australia's sales reach, unless that open point can be filled with another Dealer. In a highly competitive market, FCA Australia cannot afford to lose sales and market share.

Secondly, if FCA Australia were to terminate a dealership, there is a high likelihood that it could be faced with the prospect of being "locked out" of the relevant area. This is because FCA Australia Dealers typically own their dealership premises or control the head lease, and FCA Australia has no legal or practical ability to take over the dealership premises.

By way of example, although not a situation that has arisen for FCA Australia, there is at least one occasion where a Dealer has decided that as a land owner that they were going to sell the land upon which the Dealership was located. The Dealership in this situation offered the dealer group cash flow while the value of the land upon which the Dealership was located improved in value. When the Dealer was offered a significant amount of money for the piece of land, the Dealer notified the OEM that they were terminating their Dealer Agreement and would no longer continue to operate as a Dealer. The particular area in which the Dealer was located did not have another appropriate location from which the brand could operate as council had re-zoned the area as residential.

Moreover, often there is simply no land available to establish a new dealership in reasonable proximity to the previous site. This issue is acutely apparent when manufacturers have sought to introduce a new brand to the Australian market. In this scenario, manufacturers have very limited options as to how to launch the brand. Practically they must negotiate with their existing network (who are best placed to sell the vehicles) and request that they stock and promote the new range. In this process manufacturers are negotiating from a position of disadvantage due to their well-known limited options, and routinely need to offer significant financial incentives to ensure enough Dealers agree to stock the new range. This also gives rise to the risk that if the new brand does not deliver a return for the Dealer, manufacturers run the risk of the Dealer seeking to recover losses against the manufacturer.

Dealers are sophisticated parties

Thirdly, Dealers are almost exclusively sophisticated, established and well-resourced business people and entities. As highlighted before, the presence of ASX listed entities and private equity firms in the Dealer space is growing. Within FCA Australia's current dealer network there are Dealership's which are controlled by private equity and ASX listed.

In respect of the remaining "independent" dealers, it is not correct to generalise that they are unsophisticated or otherwise unable to negotiate effectively with FCA Australia. Often these Dealers comprise high net worth families and individuals who hold franchises for multiple car brands. Coupled with the practical leverage that comes from their ownership and control of key locations, it is not uncommon for their relationship with FCA Australia to be critical to FCA Australia's continued success in specific markets.

Dealer Code Compliance

FCA Australia can also confidently claim that of the 93 new generation Dealer Agreements that it has rolled out and had Dealers return, FCA Australia only has a record of 3 Dealers which sought external advice (2 legal and one financial) at the time of entering the Dealer Agreement.

The relevance of this is that there is an existing requirement under section 10(2) of the Franchising Code of Conduct that before entering into a Dealer Agreement, FCA Australia must have received from the Dealer, signed statements from the Dealer that it has been given advice about the Dealer Agreement by:

- An independent legal advisor;
- An independent business advisor; or
- An independent accountant.

Section 10(2)(b) requires a signed statement to be provided to FCA Australia in which the Dealer indicates that they have received the required advice or that they have been told that the kind of advice should be sought but that the Dealer has decided not to seek the advice.

Annexure 3 is an example of the Statement of Independent Advice that FCA Australia requires Dealers to complete in order to satisfy the requirements under section 10(2) of the Franchising Code of Conduct. As indicated above, only 3 Dealers have returned the Statement of Independent Advice indicating that they have received independent legal advice. The remainder of Dealers have actively chosen not to seek independent business advice whether from an independent legal advisor, business advisor or accountant. Alternatively, advice may have been obtained by in-house lawyers of the Dealer Group but not recorded as independent legal advice.

Why if the Code already requires that Dealers seek independent legal advice prior to entering into a new Dealer Agreement, and the Dealer specifically has chosen not to seek such independent advice or has relied on in-house legal support, should Dealers now get the benefit of pre-contractual arbitration?

In the view of FCA Australia, how can the system be said to be problematic if the Dealers are not currently taking advantage of provisions under the Code and the opportunity to consider the "problems" at this early stage.

What is mandatory binding arbitration?

FCA Australia recognises the value of arbitration in certain circumstances but is of the view that mediation and, on rare occasions, litigation remain the appropriate methods for dispute resolution. There is more than merely the financial cost of litigation that needs to be taken into account when considering litigation. Sometimes the greater risk of litigation is the precedent that may be established by pursuing a matter through the court system. There may be clear factual circumstances where a Dealer does not wish to pursue litigation in fear of setting industry legal precedent. This is equally a risk for FCA Australia. Mandatory binding arbitration removes circumstances where it may be beneficial to have the matter litigated because it is significantly important.

FCA Australia agrees with the Discussion Paper that mandatory arbitration can only be exercised in limited, problematic circumstances. These circumstances are discussed below.

Mandatory binding arbitration in a voluntary code

The Discussion Paper correctly states that mandatory arbitration in a voluntary code is unlikely to be feasible. FCA Australia is of the view that there may be cases where a significant matter requires the intervention of the courts to set a precedent. As stated in the Discussion Paper:

> the implementation of recent reforms to the Franchising Code are significant and the effect of the changes, particularly the introduction of new voluntary arbitration processes, will take time to flow through and have an impact on the ground as new franchising agreements are entered into.

Voluntary arbitration in a mandatory code

This option has already been introduced and has been in place since June 2021. Three months is not an adequate amount of time before further amendments should be made. As mentioned above, the Code

requirements currently extend beyond what may be considered as commercially appropriate requirements to address an unsubstantiated allegation of a problem. It is important that these recent reforms are given a sufficient amount of time such that its effectiveness can be objectively reviewed.

Pre-contractual arbitration

The Discussion Paper rightly points out that "mandatory arbitration in the context of a mandatory code is limited and can only apply in relation to future obligations" – e.g. **pre-contractual** mandatory **arbitration**. FCA Australia considers that pre-contractual arbitration is contradictory to the principle of freedom of contract. FCA Australia raises the following significant issues associated with the proposal.

- ***Pre-contractual arbitration is wholly inappropriate for the automotive franchise industry***

  The Discussion Paper acknowledges there is absolutely no precedent in this type of industry where it has been used. It is usually used where there are small numbers of agreements and for a limited range of issues (e.g. remuneration). In the automotive franchise industry, as the Discussion Paper rightly flags, is almost exclusively subject to a multitude of contracts with different parties covering vast commercial matters.

  The Discussion Paper also refers to the use of pre-contractual arbitration in the context of the Sugar and Wheat Code. FCA Australia understands its use for one-off "transactional agreements", however, again this example demonstrates why pre-contractual arbitration is wholly inappropriate in the context of automotive franchise agreements which are long-term agreements made in a high volume.

  Further, the Discussion Paper points to the Media Bargaining Code as an example of pre-contractual arbitration. Again, this example shows a fundamental misunderstanding of the automotive franchise industry. In the context of the Media Bargaining Code, use is limited to a single issue (remuneration) and seem to be concerning agreements for one-off circumstances, rather an ongoing relationship. The Media Bargaining Code addresses provisions and protections unique to that industry. Furthermore, these provisions are new and have not been tested. To seek to emulate these in a wholly different situation is questionable particularly where the alleged problems that are seeking to be addressed do not relate to pre-contractual disputes. FCA Australia is of the view that this is a very flimsy foundation on which to introduce a very serious provision which removes the fundamental rights of a contractual party to negotiate their position.

- ***Pre-contractual arbitration has the potential to undermine what it means to run a franchise***

  Fundamental to any franchise model is consistency across its franchisees – especially in the context of branding and performance criteria and obligations. FCA Australia is of the view that pre-contractual arbitration opens up the possibility of substantial variations between Dealers throughout the franchise network. If this were the case, this may result in consumers no longer being able to rely on brand consistency from anything from services to brand utilisation.

- ***A third party should not be able to bind parties to a contract***

  FCA Australia views freedom of contract as perhaps the most important part of any agreement. Especially in the context of a long-term agreement which involves significant and onerous obligations on both parties, it is of utmost importance that the parties are free to negotiate the terms of such an agreement. Importantly, if a party does not feel comfortable with the terms, or even a specific term, in the agreement, that party is under no legal obligation to enter into that agreement. FCA Australia strongly advocates against the idea that an independent and unrelated third-party should have the power to bind the parties to create binding rights and obligations on each party – especially if one or both parties are not comfortable with those terms.

  FCA Australia recognises that arbitration has potential benefits in resolving disputes relating to existing agreements, however, in terms of imposing what the parties will agree, that is in

FCA Australia's view an over reach. It should not even be countenanced without extensive review and extensive evidence of problems in a particular environment. The environment that the motor vehicle industry has now is a new environment because of all the other conditions that have been imposed upon a party. The position needs to be considered over a period of time before any further changes made.

Industry-led improvements to dispute resolution

FCA Australia believes there is already a number of useful and commercial dispute resolution procedures in the current version of the Code. The addition of industry-led dispute resolution procedures is unnecessary and is likely to add duplication whilst undermining the current dispute resolution process – the majority of which have only been in place for a few months and are yet to be fully tested.

If Treasury is considering implementation of legislative, regulatory and self-regulatory arrangements found in international markets then FCA Australia submits that this will need to be undertaken in a holistic manner on not merely on the reliance generalisations and cherry picking jurisdictions that most favour the generalisation.

Consideration ought to be given the how each of the international markets manage automotive legislative topics and seek to understand the particular drivers behind each legislative, regulatory and self-regulatory arrangement. This consideration should also consider matters beyond merely the relationship between manufacturers and Dealers and consider whether there is any consumer related legislative, regulatory and self-regulatory framework that can be reviewed to develop balance between manufacturers, Dealers and end consumers. In this regard FCA Australia points out that there is no formal depreciation allowance in the Consumer Guarantee regime that often creates significant imbalances for manufacturers and Dealers and which are contained in legislative, regulatory and self-regulatory arrangements found in international markets.

Annexure 4 provides some examples of legislative, regulatory and self-regulatory arrangements that specifically address depreciation of vehicles where the customer has obtained a benefit from the vehicle.

In response to the Discussions Paper as it relates to the Mandatory Motor Vehicle Services and Repair Information Sharing Scheme, again this is a new scheme which has not yet come into effect. To use it as the basis for an option across the whole industry would in FCA Australia view be unsound.

8. QUESTIONS

As noted above, the concept of pre-contractual mandatory arbitration is a total contradiction to the principles of contractual freedom. There is no evidence of any other implementation in any other industry which is on all fours with the motor vehicle industry or even remotely approaching it, which would give some comfort to justify overturning of those principles in such a stark and dangerous manner.

1. Could pre-contractual mandatory arbitration enable better access to justice for Dealers in relation to resolving disputes?

   FCA Australia seriously struggles to see how pre-contractual mandatory arbitration would enable better access to justice for Dealers in relation to resolving disputes.

2. What types of contract terms could be best suited to a pre-contractual arbitration model?

   As to question two, please refer to the content under the subheading "pre-contractual arbitration is wholly inappropriate for the automotive franchise industry" which outlines the difficulties associated with this question.

3. What measures could be put in place to reduce any potential risks of adversely affecting the franchising relationship before a contract starts?

As to question three, please refer to the subheadings "pre-contractual arbitration is wholly inappropriate for the automotive franchise industry", "pre-contractual arbitration has the potential to undermine what it means to run a franchise" and "a third party should not be able to bind parties to a contract" which outline the difficulties associated with this question.

9. NEXT STEPS

FCA Australia supports the position of the Discussion Paper that time is needed.

A review has to take place by mid-2023 and then an overall review on 1 April 2025.

It is FCA Australia's view that no further changes are needed until these reviews have taken place.

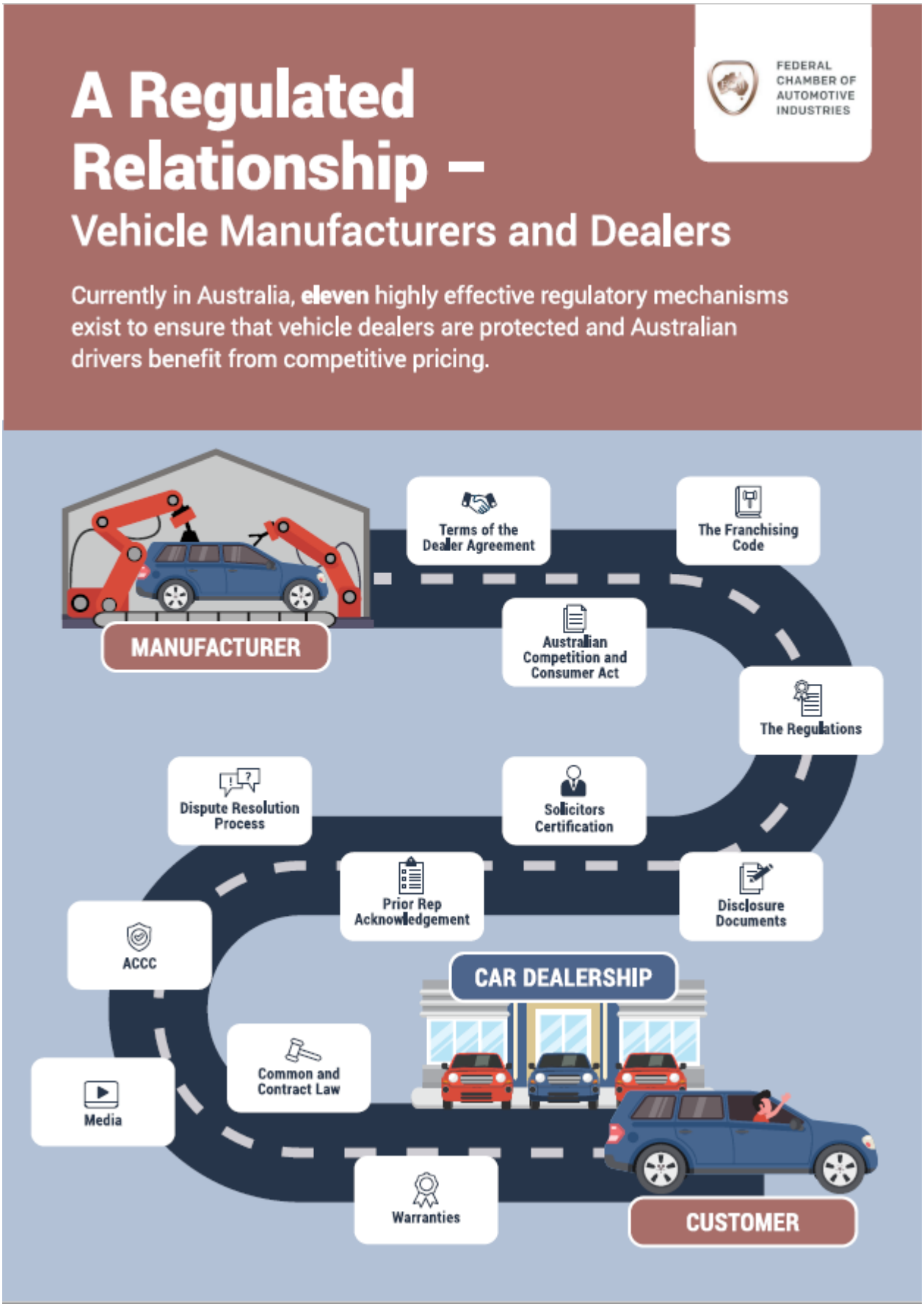
ANNEXURE 1 – FCA Australia Dealer Networks

JEEP

FIAT ALFA ROMEO

FIAT PROFESSIONAL

ANNEXURE 2 –


A Regulated Relationship –
Vehicle Manufacturers and Dealers
FEDERAL CHAMBER OF AUTOMOTIVE INDUSTRIES
Currently in Australia, eleven highly effective regulatory mechanisms exist to ensure that vehicle dealers are protected and Australian drivers benefit from competitive pricing.
MANUFACTURER
Terms of the Dealer Agreement
The Franchising Code
Australian Competition and Consumer Act
The Regulations
Dispute Resolution Process
Solicitors Certification
Prior Rep Acknowledgement
Disclosure Documents
ACCC
CAR DEALERSHIP
Common and Contract Law
Media
Warranties
CUSTOMER

Layers of Franchising Regulation

FEDERAL CHAMBER OF AUTOMOTIVE INDUSTRIES

Terms of the Dealer Agreement

Articulates the details of the relationship between a prospective dealer and the manufacturer and forms part of the determination of the capital investment a dealer may make.

Australian Competition and Consumer Act

The Australian Competition and Consumer Act protects and promotes competition and fair trading.

The Franchising Code

Operating under The Act, the Code requires prospective dealers to seek business and accounting advice. It details what is agreed, and what is to be disclosed prior to an agreement being made.

The Regulations

Dictate acceptable terms in various outcomes including end of term, buy backs of parts and vehicles, multi-franchise dispute resolution and so on.

Disclosure Documents

Part of the Franchising Code. Important for new and existing franchisees and dealers. Regularly updated per law, these provide the commercial and legal framework for any new motor vehicle dealership distribution agreement.

Solicitors Certification

Certification that the manufacturer and distributor has furnished a prospective dealer with the terms of agreement, and acknowledgement dealer has sought, received or has rejected assessment and objective advice from their legal or business counsel.

Prior Rep Acknowledgement

A questionnaire asking a prospective dealer questions like 'Have you been inducted?', *'Have you been promised X?' 'Have you been advised of X, Y or Z?'*. This step is the dealer's opportunity to lodge issues about representations and make issues public and on the record.

Dispute Resolution Process

Disputes are managed either under the franchise code, through the dealer council or under contract law mediation proceedings. Multi-party resolution is allowed, and in some states lobby groups can act on behalf of dealers.

Media

Fourth estate provides an additional form of public scrutiny from a reputational risk perspective.

ACCC

Enforcement body for unconscionable conduct, unfair contract terms, consumer law aspects of the indemnity that OEMs supply to the dealers when a consumer has a major failure.

Common and Contract Law

Common Law and Contract Law provide protections against a range of different behaviours and situations.

Warranties

Manufacturer warranties protect motoring dealers and customers if vehicles are delivered with any defects.

FCA
FIAT CHRYSLER AUTOMOBILES

ANNEXURE 3 – Section 10(2) Franchising Code of Conduct Statement of Independent Advice

STATEMENT OF INDEPENDENT ADVICE

Dealer Entity Name:	**Ellis Automotive Pty Ltd**
Trading Name:	**Ellis Jeep**
PMA:	**Port Melbourne**

Statement to FCA Australia Pty Ltd ACN 125 956 505 ("FCA Australia") by **Ellis Automotive Pty Ltd** ACN 000 000 000 ("Dealer") in respect of the dealership to be operated under the name **Ellis Jeep** ("Dealership").

The Dealer acknowledges and confirms that:

- The Dealer is a proposed dealer of FCA.
- The Dealer has been provided with
  - a Disclosure Document prepared by FCA Australia dated **30 April 2020**,
  - a copy of the Franchising Code of Conduct, and
  - a copy of the proposed Dealer Agreement (in duding all attachments and annexures)

("Documents")

- The Dealer was advised that it could request details of the Site and Territory History Document for the particular Dealership location.
- The Dealer has been told that the Dealer should seek
  - independent legal advice;
  - independent accounting advice; and
  - independent business advice

about the proposed Dealer Agreement and the Dealership business, including in relation to the Documents and any other documents ancillary to the Dealer being appointed as a Dealer.

- If applicable, the Dealer has set out in Schedule 1 details of the lawyer who has provided independent legal advice, the accountant who has provided independent accounting advice and/or the business advisor that has provided independent business advice, to the Dealer.

Unless otherwise set out in Schedule 1, the Dealer confirms that the Dealer has elected not to obtain such independent legal advice, accounting advice and/or business advice.

Signed by the Dealer:

Executed by Ellis Automotive Pty Ltd **ACN** 000 000 000 trading as Ellis Jeep in accordance with section 127 of the *Corporations Act* 2001:

Signature of Director/Company Secretary	**Signature of Director**
Name of Director (BLOCK LETTERS)	**Name of Director (BLOCK LETTERS)**

FCA Australia Pty Ltd trading as FCA Australia
437 Plummer Street, Port Melbourne, VIC 3207
PO Box 23267, Docklands, VIC 3008
Ph. +61 3 8698 0200, Fax. +61 3 8698 0250
ABN 23 125 956 505

FCA
FIAT CHRYSLER AUTOMOBILES

SCHEDULE 1 – INDEPENDENT ADVICE FORM

Unless otherwise set out in this Schedule 1, the Dealer confirms that the Dealer has elected not to obtain such independent legal advice, accounting advice and/or business advice.

Lawyer Name	Firm Name	Firm Address

Accountant Name	Firm Name	Firm Address

Business Advisor Name	Firm Name	Firm Address

FCA Australia Pty Ltd trading as FCA Australia
437 Plummer Street, Port Melbourne, VIC 3207
PO Box 23267, Docklands, VIC 3008
Ph. +61 3 8698 0200, Fax. +61 3 8698 0250
ABN 23 125 956 505

ANNEXURE 4 - LEMON LAW COMPARISON TABLE

Jurisdiction	Specific 'Lemon Law'?	Vehicle required to be 'new'?	Limitations?	Remedies?
New Zealand	No	Yes	Must have been brought from a registered motor dealer	Repair, refund, compensation.
Canada	No	Yes – or close to new	New vehicles from the current year, plus vehicles from the four previous model years that have travelled less than 160,000 kilometres.	Repair, refund, compensation.
Singapore	Yes	Yes	No	Repair, refund, compensation, reduction in price.
United States - federal	No	Yes	No – based on express and implied warranties unless sold 'as is'	Repair, replace. Also possibility for civil action for mass breach of warranty.
United States - state	Yes	Yes – in majority of states	Varies based on state	Varies based on state, usually replacement or refund.
China	Yes	Yes	Repairs must have been attempted twice within a two-year, 50,000 km period.	Refund or replacement
South Korea	Yes	Yes	Two major repairs in a 20,000km period	Refund or exchange.
United Kingdom	No	Yes	Defect must have arisen within 30 days of delivery for a full replacement or refund.	Defect arose within 30 days – full refund or replacement Defect arose within six months – refund or repair with deductions for wear and tear
European Union	No	No	Defect must have arisen within two years, and consumer must demonstrate that the defect first arose within six months of delivery.	Initially, free repair and replacement and if those remedies do not satisfy the consumer, refund with deductions for wear and tear.