



MTA*i*Q | **LEADING AUTOMOTIVE INNOVATION**

SUBMISSION

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Automotive Franchising: Discussion paper August 2021

Introduction

Franchising arrangements in the automotive sector have, as the discussion paper highlights, been the subject of numerous reports over many years. The 2017 Australian Competition and Consumer Commission (ACCC) [report](#) of automotive retailing shone a light on the power imbalance between manufacturers and dealers that has underpinned a range of concerns from dealers, the broader motor trades sector, regulators and governments.

Along with broader reforms to franchising arrangements, in June 2020 a new vehicle dealership agreement schedule was added to the Franchising Code of Conduct, the first-time industry sector specific regulations were added. It covered matters relating to end of term obligations, capital expenditure disclosure and dispute resolution.

The [Code of Conduct](#) was amended further in June 2021 with a raft of requirements in relation to dispute resolution, pre-entry disclosure and exit arrangements, amongst others. The specific new vehicle dealership provisions (Schedule 11) were also strengthened to include agency arrangements (like Honda has recently introduced) and the requirement for compensation arrangements to be included in franchise agreements.

The Motor Trades Association of Queensland (MTA Queensland) also notes a number of automotive industry groups have already sought to take advantage of the ACCC's collective bargaining class exemptions introduced in June 2021.

Notwithstanding these reforms, the decision by General Motors (GM) to essentially exit the Australian retail market in 2020 had a significant impact, not least on its dealer network. There were widespread concerns with GM's compensation package, dealers' perceived lack of bargaining power and inadequate dispute resolution mechanisms.

As the most recent regulatory reforms have yet to be 'tested', there is understandable concern to ensure the GM 'experience' is not repeated. Certainly, GM's decision at the time to not participate in arbitration has raised calls for stronger measures to address the perceived lack of dealers' negotiating power relative to motor vehicle manufacturers.

Given a history of 'rolling' reforms over a number of years that have attempted to address this fundamental power imbalance, it is instructive to reflect on the advice of the ACCC in its submission to a 2020 regulation impact statement:

"The ACCC considers that mandatory solutions are required to overcome entrenched conduct in the new car retailing industry. A voluntary code is unlikely to resolve issues when there is a significant imbalance in power between parties. For example, as noted in our market study, we consider the earlier attempt to encourage car manufacturers to voluntarily share technical information has failed.

Mandatory sharing of information to better enable the service and repair of motor vehicles has, of course, recently been enacted due to the failure of previous voluntary arrangements highlighted by the ACCC.

Given the recent history of the industry and the significant further upheaval in prospect, additional reforms are necessary.

Standalone automotive franchising code

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?

Need for improved oversight of reforms

While GM's withdrawal from the Australian market was due to a range of factors, the Australian automotive industry is undergoing its most significant upheaval in generations. Growing global trends away from internal combustion engines, government mandates (internationally at least) regarding electric vehicle uptake and a broader technological revolution will see massive changes in the motor vehicle retail market in Australia over the coming years.

New players are entering what is already one of the most competitive retail passenger vehicle markets in the world. There will, no doubt, also be some further exits from the market.

Motor Trades Association of Queensland

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The adoption of online vehicle sales models and the agency model (recently introduced by Honda) are likely to accelerate, adding to the 'disruption' of the sector over the coming years.

While there have been a number of welcome major reforms to the Franchising Code, the fundamental issue has been, and remains, the bargaining power of manufacturers and the entrenched conduct in the industry.

Recent reforms to the Franchising Code, along with proposed legislative reforms to Unfair Contract Terms (UCTs) will help address this power imbalance. But a constant in all the reports that have led to various reforms addressing concerns is the reluctance of dealers to 'risk' their relationship with manufacturers. There are remaining concerns on security of tenure for agreements and consideration should be given to a reasonable minimum term.

What is now required is proactive compliance measures to ensure implementation of the reforms. The regulatory measures introduced need to be matched by effective compliance and enforcement. As the ACCC quote above highlights, strong strategies are required to overcome entrenched conduct in the new car retailing industry.

The ACCC will need to be resourced to have a proactive, dedicated role in monitoring automotive franchising agreements, particularly during this period of significant disruption to the industry. The significant issues that led to the establishment of the first-time dedicated automotive Franchising Code measures (Schedule 11) require a strong, dedicated compliance and enforcement mechanism.

A dedicated (perhaps time-limited) ACCC capacity would build on its expertise and understanding of the industry gained over the last five years, in particular. It would enable a strong education, compliance and enforcement capacity. The education role would be particularly valuable to ensure a full understanding of the changes. Enhanced monitoring would enable early engagement with Original Equipment Manufacturers (OEMs) in regard to their existing and proposed franchising agreements. It would help address the understandable reluctance of dealers to challenge OEMs. Without a strong enforcement capacity the entrenched conduct will not change.

This dedicated resource would also be useful in working with the industry to understand and implement agreements that are consistent with the proposed UCT legislative measures that are currently being consulted.

Extension of the Franchising Code to other markets

In its recent [agricultural machinery market study](#), the ACCC noted the agricultural sector had many of the same features as the passenger and light commercial vehicle market. In fact, this study found it was perhaps more concentrated in terms of franchisors, with dealers experiencing some of the same power imbalances as new vehicle dealerships. Noting these similar features and its strong focus on the repair market, the ACCC recommended the agricultural machinery market be added to the mandatory Motor Vehicle Service and Repair Information Sharing Scheme that was recently enacted.

Given the similarities in the arrangements between manufacturers and dealerships, the motor dealership provisions contained in Schedule 11 of the Franchising Code (or a separate automotive franchising code)

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should be extended not only to the agricultural machinery market but also to the motorcycle and truck markets.

It must also be made clear that these provisions extend across dealership operations, that is sales, parts, service and repair.

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

As noted above, the ACCC found that the agricultural machinery market exhibits many of the same features as the retail passenger and light commercial vehicle market. This finding is echoed in the Productivity Commission's recent Right to Repair draft [report](#) that found a concentrated market with a few prominent OEMs.

While the size of the two markets is different, this report highlights the very significant implications for dealers and their customers where OEMs exert significant control over the repair aspect of the agricultural machinery market. There is anecdotal evidence of OEMs not appropriately reimbursing dealers for warranty work undertaken with the latter having to 'cop it' without realistic avenues for redress. This is a significant concern given the relatively high proportion repairs contribute to agricultural dealer revenues.

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

Noting the similarity of the fundamentals across the motor industry, the Franchising Code should be extended across the agricultural machinery, truck and motorcycle markets who are subject to the same types of behaviours. This is regardless of the Franchising Code model.

There has been considerable change to the Franchising Code over the last two years, in particular. The final form of the proposed legislative reforms to UCTs also needs to be determined and legislated. There is a case to have these existing and proposed measures 'bed-down' rather than focusing on a separate automotive franchising code. It may be better that this issue is reviewed as part of the normal legislative review processes and the experience 'on the ground'.

More immediately important, is the need to ensure that the existing provisions in the Franchising Code (particularly Schedule 11) provide the protection envisaged. Just as agency arrangements have been clarified in regard to the Franchising Code, so too should the ability to separate parts and service agreements from sales agreements. We are concerned separation may mean parts and service agreements may fall outside of the regulations and avoid the Franchising Code provisions. "Motor vehicle dealership" should by definition encompass all areas of the relationship with the Franchisor.

More broadly, it is important there is a strong compliance function in place. The ACCC should be resourced

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to provide a dedicated compliance and enforcement capacity, at least until recent reforms are bedded-down.

Options for Arbitration

A fundamental problem in the automotive industry in Australia is the entrenched culture highlighted by the ACCC and other recent reports. At this time of significant upheaval in the industry it is important there are efficient, timely and effective means to deal with disputes between OEMs and dealers.

Mandatory solutions are required, and this includes arbitration. This need was highlighted by GM's decision not to participate in arbitration, even at the Federal Government's urging, following its decision to retire the Holden brand in Australia.

Arbitration is currently available, but it is not mandatory. The ACCC's most recent collective bargaining exemptions permit collective bargaining, but they don't mandate the requirement where it is sought.

The [Senate inquiry](#) (released in March 2021) that considered in great detail GM's decision and related actions provided a number of recommendations including mandatory and binding arbitration during contract negotiations where other dispute resolution mechanisms have been unsuccessful.

MTA Queensland supports this approach, noting the constitutional limitations highlighted in the discussion paper.

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

The circumstances surrounding GM's exit from the Australian market highlighted the inadequacy of current voluntary arbitration provisions. The ACCC's collective bargaining exemption reforms are most welcome. Of course, it is 'early days' but pleasing to note some early applications by automotive businesses.

Nonetheless, mandatory pre-contractual arbitration needs to be added to the 'armoury' of measures available to address the power imbalance and entrenched conduct in the industry.

If the reforms implemented in recent years 'take hold', along with a stronger role for the ACCC, MTA Queensland believes the mandatory arbitration would be used sparingly. It should be used only after other voluntary measures have been pursued.

Consistent with the recent Senate inquiry recommendation, there should also be appropriate resourcing in the Office of the Australian Small Business and Family Enterprise Ombudsman to facilitate arbitration.

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

Given the recent history of rolling reforms that aim to plug identified shortcomings in the Franchising Code, it would not be appropriate to adopt an ‘in or out’ approach to contract terms, particularly in the early stages of such reform. With the pace of change in the industry expected over the coming years it may be difficult to keep an up-to-date ‘list’ of terms for inclusion. Of course, over time court decisions about UCTs would provide clear guidance about what cannot be included in pre-contractual negotiations.

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

MTA Queensland welcomes the ACCC’s recent extension of the collective bargaining exemption provisions. This reform not only provides a ‘strength in numbers’ approach to bargaining; it provides some remedy to dealer concerns about jeopardising their individual relationship with OEMs.

The dedicated, proactive role for the ACCC proposed above would also assist in this regard. Upfront engagement by the ACCC with OEMs, particularly around significant proposed franchising agreements (or changes), would allow for early identification of issues of concern before dealer contractual negotiations commence.

While the courts are to determine UCTs, their remedies and penalties under the proposed legislative reforms are currently being consulted on, the ACCC would be well placed to inform the market of significant court determinations and implications for others in the same market.

There is also a role for the industry’s representative bodies to continue their efforts to inform members of the legislative and other reforms and to facilitate access to the remedies these reforms provide.

MTAQ Background

The Motor Trades Association of Queensland (MTA Queensland) is the peak body representing the interests of employers in the retail, repair, and service sectors of Queensland’s automotive industry. MTA Queensland has been performing its vital representative role for the automotive industry since 1929. In Queensland there are some 15,500 automotive businesses employing more than 90,000 people, that generate more than \$20 billion annually. The Association represents and promotes issues of relevance to all levels of government. In 2019 MTA Queensland was announced as an ABA100 winner in The Australian Business Awards and a finalist in the Lord Mayor’s Business Awards, for Business Innovation.

The MTA Institute (RTO 31529) is the leading automotive training provider in Queensland offering nationally recognised training, covering technical, retail and the aftermarket sectors of the automotive industry. The MTA Institute is the largest independent automotive training provider in Queensland, employing experienced trainers who are geographically dispersed from Cairns to the Gold Coast and Toowoomba to Emerald.

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In the last year, the MTA Institute delivered accredited courses to more than 2,000 students. The MTA Institute is the first trade RTO in Australia to be approved under the ITECA Industry Certification Program and was the winner of the Small Training Provider of the Year at the 2019 Queensland Training Awards.

MTAiQ, Australia's first automotive innovation hub established by MTA Queensland in 2017, is an ecosystem that supports innovation and research for the motor trades. Thank you for your consideration.

Yours sincerely



Rod Camm
Group Chief Executive Officer

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