



CONSIDERATION OF A LICENSING REGIME FOR THE FRANCHISE SECTOR: MTAA RESPONSE

DECEMBER 2024



INTRODUCTION

As the national automotive industry body, the Motor Trades Association of Australia (MTAA) serves as the unified voice for Australia's automotive sector. We are dedicated to identifying and monitoring issues across the industry, advising governments on the impacts and trends affecting it, and actively participating in the development of sound public policy. Our focus encompasses various elements, including the retail motor trades, the Australian vehicle fleet, and the mobility needs of local communities.

Our membership comprises over 15,000 businesses, including dealers, repairers, tow truck operators, service stations, and a diverse range of automotive retail operations. Collectively, these organisations form a critical backbone of the Australian economy, responsible for selling, servicing, repairing, refuelling, and maintaining the country's motor vehicle fleet of 21.2 million vehicles.

The automotive retail trades sector alone contributes approximately \$39.35 billion annually to Australia's GDP, representing 2.1% of the total.¹

MTAA is unique in its position as the only Australian member association representing the entire spectrum of automotive franchise dealer participants. Our representation extends to new car dealers, motorcycle dealers, farm machinery dealers, industrial machinery dealers, and aftermarket repairer franchisees. This broad perspective allows us to advocate effectively for the diverse interests of our members.

We actively participated in the Independent Review of the Franchising Code of Conduct (**the Code**), led by Dr Michael Schaper, providing comprehensive input on the essential changes needed to better protect automotive franchisees. While we acknowledge the report tabled in February 2024, and appreciate the Government's response to the report recognising that the Code requires modifications to enhance its functionality and effectiveness, we believe it did not go far enough. The MTAA submission to the review as well as our submission to the government's consultation into the New Vehicle Efficiency standard are attached to this submission.

Although the Government agreed, or agreed in principle, to all 23 of Dr Schaper's recommendations, we feel that these measures still fall short of what is necessary for robust protection of franchisees in the automotive sector.

We did welcome, however, the establishment of a Franchising Sector Licencing Taskforce (**the Taskforce**) within Treasury to conduct a comprehensive cost-benefit analysis of introducing a licensing regime for the franchising sector. We consider that the establishment of the Taskforce is a promising step forward. We provide our in-principle support for franchise licensing and outline a number of recommendations to the Government on how this initiative should operate within this submission.

¹ MTAA. (2021). *Directions in Australia's Automotive Industry – An industry report 2021*. Available at: https://vacc.com.au/Portals/0/Publications/Industry%20Report%202021/2021%20Directions%20in%20Australia's%20Automotive%20Industry_pp.pdf?ver=2021-05-20-14 (Accessed: 14 October 2024).

Despite this positive development, MTAA was disappointed that Dr. Schaper's review did not go far enough in recommending changes to better protect franchised dealers against the actions of franchisors. In particular, the review failed to incorporate several critical recommendations MTAA previously submitted, which we believe are essential for ensuring fair treatment and support for franchisees. These include:

- > Improved protections for dealers' investments in goodwill
- > Expansion of the Code to clearly cover ancillary automotive sectors, including trucks, farm machinery, industrial machinery and motorcycles
- > Removal of 'no fault' termination rights that disproportionately affect dealers
- > Expansion of the 'unfair contractual terms' regime to encompass all franchises and dealers
- > Establishment of minimum terms for dealer agreements to ensure stability
- > Granting dealers exclusive rights to exercise renewal options for their agreements.

The single most crucial outcome for MTAA members is the inclusion of additional automotive industry franchisee sectors. Motorcycle, commercial vehicle, and agricultural/industrial machinery franchise dealers should be recognised and included in the automotive dealer-specific reforms that are being enacted by the Government (as well as the existing automotive dealer-specific sections).

There is, fundamentally, no difference between truck dealers and car dealers for instance; often, they are the same Original Equipment Manufacturer (OEM), their operations are very similar, and they face comparable power imbalances and investment requirements. It is vital that these sectors receive the same level of protection and consideration in the reform process.

The absence of the protections outlined above in the Government's response to Dr Schaper's review, as well as in the exposure draft of the *Competition and Consumer (Industry Code – Franchising) Regulations 2024* (**Exposure Draft**) that was recently released, is highly concerning, as we consider these changes are essential for leveling the playing field between dealers and OEMs. Unfortunately, the Dr. Schaper report, the Government's response to that report and the Exposure Draft do not address these shortcomings.

While this submission relates to a franchising licensing regime, we will continue to advocate for a strengthened franchising code to better protect franchised automotive dealers and repairers across all vehicle categories, including those in light vehicles, motorcycles, farm machinery and vehicle sales and commercial heavy vehicles.

A strengthened code is particularly important at this time given the New Vehicle Efficiency Standard (NVES) will commence in January 2025. MTAA has growing concerns that dealers may become increasingly vulnerable to manufacturers who may exit the Australian market, potentially leaving them with stranded investments, or shifting to disadvantageous business models (see Honda case study below).

The ongoing transition toward electrification and automation in the automotive industry further heightens the likelihood of disputes between manufacturers and vehicle dealers, emphasising the urgent need for stronger protections for local automotive businesses.

MTAA has a long-standing commitment to advocating for specific franchise protections tailored to the automotive industry. We therefore wish to reiterate the key requests MTAA made during the Schaper review, which we strongly believe need to be revisited, these include:

1. Extend the Franchising Code to cover motorcycle, farm machinery, industrial machinery, and truck dealers.
2. Mandate that service and parts agreements relating to motor vehicle dealer agreements fall within the protective umbrella of the Franchising Code.
3. Acknowledge the right of dealers to be compensated for established goodwill within the Franchising Code.
4. Allow dealers the right to sell their dealerships and recover their investment in goodwill if a new dealer agreement is not offered upon expiration of the current agreement or renewal.
5. Provide compensation for established goodwill if dealers are not offered a new agreement and are not permitted to sell their dealership.
6. Prohibit 'no fault' termination rights from applying to dealer agreements.
7. Clarify that franchisors cannot include clauses in dealer agreements suggesting that the terms offered provide a reasonable opportunity for a return on investment as a means of compliance with the Code.
8. Grant a minimum five-year term for dealer agreements to provide certainty for obtaining returns on investment.
9. Protect against unfair contracts and unjust conduct as established for dealers in New South Wales under the *Motor Vehicle Dealers and Repairers Act 2013* (NSW).
10. Create a specialised Franchise Dispute List in the Federal Circuit Court of Australia to facilitate quicker and lower-cost resolution of franchise disputes.

MTAA firmly believe that the Franchising Code must evolve in tandem with the changing automotive marketplace and vehicle distribution models. As franchisors adapt their behaviours to navigate the restrictions imposed by the Code, it is essential to ensure that the Code effectively protects the interests of dealers and fosters a fairer operating environment.

The protection of goodwill for new vehicle retailers has been a subject of discussion for many years, and MTAA believe the time has come for meaningful reform in this area. As the automotive landscape continues to shift,

the need to safeguard dealers from franchisor opportunism, particularly the risk of being converted into agents, has become increasingly urgent.

While we urge the government to reconsider our requests in the short term, at a minimum they should be adequately addressed during the next review period which we understand is expected to be in five years' time.

In relation to this consultation on a licensing regime for the franchise sector, our responses to the question posed by Treasury are outlined below.

CASE STUDY

HONDA TRANSITION TO AGENCY MODEL

The high cost of prosecuting claims against distributors/OEMs often acts as a 'barrier to entry' for dealers to protect their rights. The recent case involving Honda dealers in Australia is a good recent example.

After Honda Australia elected to transition to an 'agency' model, it terminated a large portion of its dealer network midway through the term of their dealer agreements. All dealers disputed Honda Australia's settlement offers made to them, however all but three dealers accepted confidential settlement offers made by Honda Australia during mediations instigated pursuant to Franchising Code of Conduct.

The remaining three dealers commenced legal proceedings. Two of those dealers accepted settlement offers prior to trial and only one dealer was willing to take its claim all the way to trial. The costs of conducting the legal proceeding have been in excess of \$1.8M and taken over two years, to date.

The dealer who has seen the dispute through to trial received a substantial compensation award in its favour. But given the time and cost of prosecuting the case, it is not surprising that only one dealer sought to prosecute its case to trial.

CONSULTATION QUESTIONS

Understanding the nature of the issue

- 1. What issues have you identified in the current regulatory framework for franchising? How significant are they?**

Beyond MTAA's specific concerns regarding the treatment of automotive franchisees outlined above, MTAA members have raised broader concerns on two key issues:

- The cost and time involved in accessing court dispute resolution – Members have expressed frustration with the extensive time and financial investment required for legal recourse in cases involving significant changes to the business relationship. The Honda case study above serves as a prime example, illustrating how protracted litigation can burden both franchisees and franchisors, leading to unnecessary financial strain and delays in resolution.
- Impact on the extinguishing of significant goodwill value at the end of term – Another key concern is the loss of goodwill value at the end of a franchise agreement. Automotive franchisees often invest years of

effort and resources into building a strong business reputation, but the termination of the franchise agreement can lead to the devaluation or complete loss of this goodwill. Members have highlighted that this outcome is especially problematic in the automotive sector, where goodwill is often a major asset tied to brand recognition and customer loyalty.

These concerns highlight the need for a more balanced and efficient approach to resolving disputes and addressing franchisee rights, particularly in relation to the automotive industry and the end-of-term implications for franchisees.

2. Considering the issues you have identified, are they significant enough to require government intervention?

Considering the issues we have identified above, we believe they warrant government intervention. The challenges faced by automotive franchisees, such as the high cost and lengthy process of accessing court dispute resolution, coupled with the loss of substantial goodwill value at the end of the franchise term, have a profound impact on the viability of these businesses. These issues not only affect the individual franchisees but also have broader implications for the industry as a whole.

The current system is inadequate in addressing these concerns, leaving many franchisees vulnerable to unfair business practices and financial strain. Government intervention could provide much-needed support in establishing clearer, fairer regulations that protect the interests of franchisees, promote efficient dispute resolution processes, and safeguard the value of goodwill in franchise agreements.

3. Have previous attempts to regulate failed, or failed to keep up with new circumstances?

The franchise sector regulatory framework has struggled to adequately address the evolving needs and challenges faced by franchisees, often falling short or failing to keep pace with new circumstances and adapting to the rapid changes in the market, particularly in the automotive industry.

One significant issue within automotive is the changing market dynamics, driven by technological advancements, shifting consumer preferences, and the growing importance of sustainability. For instance, the shift towards electric vehicles (EVs) and advancements in digital platforms have fundamentally altered the way automotive businesses operate. Many franchise agreements and regulations that were designed before these changes are now outdated, leaving franchisees with agreements that no longer reflect the current market reality.

Additionally, the commencement of the NVES in January 2025 is expected to pose additional financial risks and potential instability for car dealerships. As automakers adapt to these regulations, some may choose to exit the market or scale back their presence depending on their ability to meet mandated CO2 targets, potentially leaving franchisees with stranded investments.

The risk of OEMs leaving the Australian market presents significant challenges for franchisees, not only in terms of immediate financial loss but also in how it impacts the stability and viability of the franchising model as a whole. These risks require careful attention, with automotive franchisees requiring stronger protections and contingency plans to navigate potential OEM exits and market changes.

Regulatory oversight

4. Does the regulator currently have sufficient powers to respond to and limit the impact of persistent issues in the sector? What powers could the regulator have to incentivise better outcomes for all participants in the sector?

MTAA believes the regulator needs stronger powers to address the growing trend of franchisors converting franchise dealerships into agency arrangements, a practice currently unprotected by the Code. This issue was recently highlighted in a Federal Court case where Mercedes-Benz converted dealer agreements to agency agreements. The presiding judge, Justice Beach, dismissed the dealers' claims but called for reform of the Code particularly given the absence of any recognition of 'goodwill'.

A similar case occurred with Honda, which transitioned its dealers from franchise models to agency arrangements, resulting in the non-renewal of agreements for approximately 30 per cent of its franchisees.

MTAA members do not inherently oppose the agency model. However, our concern lies in the forced or unilateral imposition of this model on existing franchisees, often under a "take it or leave it" approach. This situation highlights the need for regulatory intervention to protect franchisees from unfair practices and to incentivise better outcomes for all parties involved in the sector.

To address this, the regulator could require franchisors to seek approval before making significant changes to the business model, such as converting franchise agreements to agency agreements. This would prevent unilateral and forced transitions, ensuring that franchisees have a fair opportunity to assess and negotiate any proposed changes.

Additionally, the regulator could introduce protections against the unilateral termination or non-renewal of franchise agreements, ensuring that franchisees cannot be forced out of their businesses without adequate justification and compensation.

5. Would an early intervention power more efficiently and effectively address the current issues in the franchising sector?

The effectiveness of an early intervention power largely depends on the scope and nature of the government's involvement. If the government were to implement a broad intervention, such as stress-testing franchising agreements or imposing extensive regulations, there is a risk of increasing compliance costs and the overall complexity of the franchising model. This could result in "red tape" that burdens both franchisors and franchisees, potentially stifling business growth and innovation within the sector.

However, if early intervention is focused on targeted areas where franchising practices are most problematic—such as protecting franchisees from unfair contract terms, ensuring transparency in business model changes, or addressing systemic power imbalances between franchisors and franchisees—it could prove to be a highly effective way to resolve ongoing issues in a more efficient manner. Early intervention could help prevent disputes from escalating into prolonged legal battles, saving both time and money for all parties involved.

6. What powers could the regulator have to incentivise better outcomes for both franchisees and franchisors? For example, giving the regulator powers to sanction in response to breaches of the Code.

To improve outcomes for automotive franchisees, MTAA believes the following regulator powers should be considered:

1. Sanctions for unfair practices – The regulator could impose penalties on franchisors who unfairly change business models, for example, transitioning from franchise to agency agreements without appropriate consultation or compensation.
2. Approval of business model changes – The regulator could require franchisors to seek approval before converting dealership franchising agreements to a new businesses model preventing forced shifts to agency models that disadvantage franchisees.
3. Goodwill protection – The regulator could implement measures to protect franchisee goodwill and ensure compensation for franchisees whose agreements are terminated or not renewed to safeguard their investments.
4. Transparency in agreements – The regulator could mandate clearer disclosures on the impact of model changes, helping franchisees make more informed decisions.
5. Compliance audits – The regulator could conduct regular audits to ensure franchisors comply with fair practices and minimise the likelihood of escalating conflicts.

It is anticipated that these measures would create a fairer, more balanced franchising environment to the benefit of both franchisees and franchisors in the Australian automotive sector.

Dispute resolution

7. Does the current dispute resolution framework under the Code offer meaningful, timely and cost-effective dispute resolution?

The current dispute resolution framework for the automotive industry under Part 5 of the Code and with the MOU between the FCAI, MTAA and AADA has not been effectively tested, mainly because the three triggers for dispute resolution have not been activated due to higher profitability during the COVID period. As a result, the framework has not been fully utilised or evaluated.

MTAA is therefore unable to comment on the effectiveness of the current dispute resolution framework, however we welcome any change to the Code that makes dispute resolution more time efficient and cost effective for dealers. It is important at this point to reference the earlier referenced Honda Case study.

In a significant automotive franchising dispute, and if a dealer does not have millions of dollars to spend on litigation, they are effectively forced to settle at mediation. However, this does not necessarily mean that the OEM/Franchisor has not acted contrary to law - it simply means that the dealer has made a pragmatic decision based on the high cost of litigation. A more straight forward, less expensive dispute process may allow dealer entities to better pursue their claims, rather than simply accepting settlements out of fear of costs.

For this reason, the MTAA calls for the creation of a specialised Franchise Dispute List in the Federal Circuit Court of Australia which would provide for a quicker and lower cost court forum for resolving franchise disputes.

8. How do you think the current dispute resolution framework under the Code could be improved or enhanced?

See response above.

9. Are there any barriers to accessing the current dispute resolution options?

To enable better access to justice for dealers resolving disputes, MTAA supports the introduction of compulsory, binding arbitration. Whether through an amendment to the existing Code or a standalone framework, MTAA advocates for this model. Similar provisions have been successfully implemented in other sectors, such as the sugar and dairy industries.

Mandatory binding arbitration would enable either party to bring a dispute before an independent third party for a decision, with both parties bound by the outcome. This represents a significant benefit for franchisees, as currently, arbitration is only available if both parties agree to it. Franchise dealers are often not equipped to pursue lengthy and costly legal battles. Additionally, the existing legal system does not level the playing field in franchisee-franchisor disputes, as demonstrated by General Motors' refusal to attend arbitration with Holden dealers despite a request from then Minister for Industry, Senator the Hon Michaelia Cash.

10. Do you think there is meaningful engagement and communication between franchisors and franchisees where changes under consideration impact the franchise system?

In the automotive sector, meaningful engagement and communication between franchisors and franchisees regarding changes that impact the franchise system is often limited. While some franchisors may engage in consultations or provide information about proposed changes, this communication is frequently one-sided and lacks sufficient transparency or genuine collaboration.

Franchisees are often presented with decisions or changes—such as transitioning to agency models or adjusting performance targets—without adequate input or the opportunity for negotiation. In many cases, these changes are imposed unilaterally, leaving franchisees with little choice but to accept terms that may not align with their business interests or financial stability.

Moreover, the rapid pace of change in the automotive industry, particularly with the introduction of new technologies, emission standards, and shifting consumer preferences, means that franchisees are often left struggling to adapt without sufficient support or clear guidance from franchisors. This creates an imbalance in the relationship, where franchisees bear much of the risk and responsibility without meaningful dialogue or collaboration in decision-making processes.

11. Are there existing internal change management systems that are effective in reducing future disputes that may be beneficial to the sector? Provide examples where possible.

In the Australian automotive sector, some franchisors have internal change management systems in place, but their effectiveness in preventing future disputes varies. Larger, more established franchisors tend to have structured systems for managing changes and maintaining communication with franchisees. These systems often involve regular meetings, clear communication channels, and consultation processes for changes such as new models, pricing adjustments, or marketing strategies.

However, these systems are not always consistently applied, particularly by smaller or less proactive franchisors, which can lead to potential conflicts. In some cases, franchisors have implemented regional dealer councils, providing franchisees with a platform to voice concerns, contribute input, and stay informed about upcoming changes. These mechanisms may help to some degree in reducing disputes by allowing for open communication and greater transparency. However, it should be noted that some manufacturers do not support the creation of dealer councils.

Disclosure of information

12. Excluding access for reporting purposes, for what purpose would you access data contained in the FDR?

Excluding access for reporting purposes, MTAA expects that data contained in the FDR could be accessed by dealerships for several purposes:

- Due diligence – Franchisees may use the FDR to assess the financial health, operational history, and legal standing of franchisors before entering into an agreement. This helps in evaluating the risks involved in joining a particular franchise.
- Compliance monitoring – Franchisees may access the FDR to ensure that franchisors are adhering to the Code and fulfilling their disclosure obligations. This could help identify discrepancies or non-compliance with the Code.
- Market research – Businesses looking to expand or invest in automotive dealerships may use the FDR to analyse trends, track the performance of competitors, or identify potential opportunities for growth.
- Benchmarking – Franchisees could use the data to compare their franchise's performance, terms, and conditions against others in the same sector, enabling them to assess their position in the market.
- Dispute resolution – Data from the FDR may be useful in resolving disputes between franchisors and franchisees, particularly if there are concerns about the franchisor's obligations or actions in the lead-up to or during the term of the franchise agreement.

13. What changes could occur to the FDR to improve its functionality as a disclosure portal?

The MTAA does not have a recommendation in regard to this question.

14. Should data collected through the FDR be used to automatically generate information documents? For example, to generate clearly presented plain language comparison documents.

Using FDR data to automatically generate plain language comparison documents would be beneficial for franchisees. It is expected it would increase transparency, simplify decision-making, and improve accessibility by providing clear, standardised comparisons of franchise opportunities. This would help potential franchisees better understand key terms and obligations, reduce information gaps and save time and costs for both franchisors and franchisees. However the value of any such comparison document would depend on the quality of the information being inputted in the first instance, so it is important that there is a required level of consistency across responses on the FDR.

15. Considering all available information, did you have access to sufficient information to make an informed decision before entering into a franchise agreement? If not, what further disclosure would have been beneficial?

Not applicable.

16. Are there other alternatives for reporting data about the sector that would better achieve the benefits of disclosure and increased transparency?

The MTAA does not have a recommendation in regard to this question.

Business model preconditions to franchise

17. Do you think the franchising system you operate in has performed as marketed to you?

The automotive franchising system is evolving, particularly in response to changes in the marketplace. The shift to agency agreements for instance, which is a relatively new trend, has altered the OEM-dealer relationship and, in some cases, has caught dealers off-guard.

In these circumstances, the system has failed to protect dealers, leaving them to shoulder the risks and challenges without receiving promised support and business continuity.

The adverse finding for the dealers in the Mercedes-Benz case for example demonstrates how difficult it is for dealers to be compensated for losses they suffer upon their dealerships not being renewed and being converted to an agency model.

This is even in circumstances where the Court has found that the conduct of the OEM amounted to ‘franchisor opportunism’ because it took advantage of its position after the dealers had made significant investments, and it intended to appropriate the gains in the industry margins associated with the move to the agency model.

To effectively address these issues, the Code needs to continually adapt to changes in marketing and distribution models, as well as the evolving practices of franchisors, to better support dealers and mitigate the current system's limitations.

18. How developed or mature should a business' operating model be before it can expand through a franchising model?

The MTAA does not have a recommendation in regard to this question given the size and structure of automotive franchising.

19. How would a potential franchisor demonstrate that their business model has achieved the appropriate level of maturity?

The MTAA does not have a recommendation in regard to this question given the size and structure of automotive franchising

20. Does your franchise model offer sufficient support to ensure franchisees are able to perform as expected under the franchise agreement? i.e. do you have access to appropriate training, support and guidance to ensure consistency of product and service delivery.

Not applicable.

21. Before entering a contract, should franchisors have to provide opportunities to determine whether a potential franchisor-franchisee relationship is suitable for both parties? For example, a requirement for perspective franchisees to work in an existing franchise business as an employee for a specific period before being eligible to enter into a franchise agreement.

Not applicable.

Education and resources

22. When were you first made aware of the Franchising Code of Conduct? Do you understand your obligations under the Code?

Not applicable.

23. If you are a franchisor, do you direct potential franchisees to any external information or educational resources prior to entering into or during a franchise agreement?

Not applicable.

24. If you are a franchisee, have you accessed any external information or educational resources relating to franchising? If so, what resources did you access and what prompted you to seek this information?

Not applicable.

25. Do you think the current educational resources are sufficient and provide a benefit to prospective franchisees? How could these resources improve to better inform decision making?

26. In general franchising educational resources are not sufficient and there would be potential benefit of some preliminary mandated training to ensure franchisees understand the risks and that things can go wrong. In relation to the vast majority of automotive franchisees the significant investment and nature of the business this means that mandatory training will be less important. How can the Government more effectively engage the franchise sector to inform them of changes to regulations, or future consultations that impact the sector?

We encourage the Government to partner with established industry bodies, such as MTAA, to disseminate information to its members which could improve engagement. MTAA, as the automotive retail sector peak body for example, has established communication networks that can quickly reach most of the industry.

Creating a two-way communication network through the MTAA would enable the Government to receive real-time feedback on industry challenges that may not be adequately addressed by the Code, highlighting areas where changes are necessary.

27. What do you think would be the most effective funding model to establish and maintain a licensing regime for the franchising sector?

The most effective funding model to establish and maintain a licensing regime for the franchising sector would likely involve a combination of industry contributions and government support. A user-pays system, where franchisors contribute a fee based on the size or turnover of their business, could ensure that those benefiting most from the system help fund its administration.

Government funding could be used to cover initial setup costs to ensure the system is accessible and sustainable before moving to a hybrid funding approach.

Thank you for considering our submission. MTAA looks forward to continued dialogue and collaboration on this important matter as we work toward a more equitable and sustainable franchising framework for the automotive industry.

Should you wish to discuss this response further, please do not hesitate to contact Matt Hobbs, CEO MTAA on 0419 608 845 or matt.hobbs@mtaa.com.au.



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