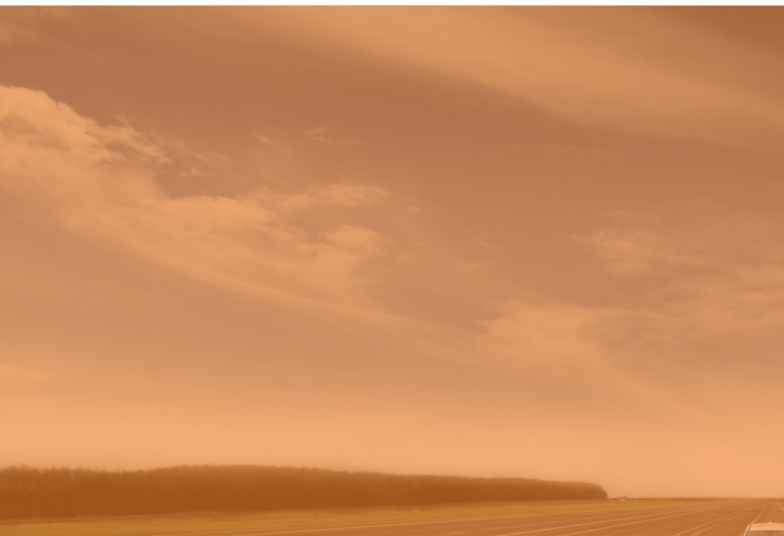
Regulatory Impact Statement
Franchise relationships between car manufacturers and new car dealers

11 February 2019



About VACC

The **Victorian Automobile Chamber of Commerce (VACC)** is Victoria's peak automotive industry association, representing the interests of more than 5,300 members in over 20 retail automotive sectors that employ over 50,000 Victorians.

VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), and automotive dismantlers and recyclers.

VACC is also an active member of the Motor Trades Association of Australia (MTAA) and contributes significantly to the national policy debate through Australia's peak national automotive association.

About the Victorian Automobile Dealers Association (VADA)

The **Victorian Automobile Dealers Association (VADA)** is the new car dealer division of VACC and represents the interest of approximately 640 Victorian-based new car franchise locations in Victoria.

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Executive Summary

The Victorian Automobile Chamber of Commerce (VACC) and its new car dealer's division, the Victorian Automobile Dealers Association (VADA) welcomes the Department of Industry, Innovation and Science inquiry into the relationship between car manufacturers and new car franchised motor vehicle dealers. The release of the Draft Regulatory Impact Statement (RIS) is a watershed moment in VACC's pursuit of achieving a specific automotive industry franchise code for the automotive retail sector.

VACC would like to stipulate that VADA members have no intention of conflicting with manufacturers. Instead, VADA members seek a harmonious and profitable collaboration with their respective manufacturers. Unsurprisingly, market leading manufacturers have happier, more profitable businesses in their dealership networks. They work well with their dealer networks and arrive at decisions via collaboration and trust. This was confirmed by two dealer surveys undertaken by VACC in 2018[1]. The consumer value prospect is also heightened through better business practices and expedient product issues resolution that make for a greater customer experience. These leading manufacturers are do not participate in cyber car practices[2] and support their dealership and consumer network when faced with warranty or Australian Consumer Law (ACL) claims.

Since 2010, VACC has lobbied Federal Government on the ineffectiveness of the Franchising Code of Conduct (the Code) for new car dealers. The current Code is not fit-for-purpose when applied to new car dealerships. This is highlighted by the imbalance experienced by new car dealers when operating under, negotiating, or renewing a franchise agreement. In the 2013 *Wein Review of the Franchising Code*, Recommendation 18 put forward that the Code be amended to make the policy intent of the provisions of the Code clearer, remove ambiguities, and improve consistency and certainty of industry practice[3]. The sophisticated business models, capital outlays, tooling requirements, and the fact that all vehicle manufacturer operations are controlled by their overseas parent companies, dictates that a separate, transparent and automotive industry specific Code be introduced for new car dealers. A Code that has specific legislation and punitive measures for breaches must be developed.

VACC supports Recommendation 16 of the 2013 Wein Review, which called for an analysis of the impact of a minimum term and standard contractual terms[i] for motor vehicle agreements to be undertaken prior to a future review of the Code. It is pleasing that this RIS goes some way to permitting industry to put forward its views on Recommendation 16. VACC has long lobbied for, and will continue to strive for, the introduction of a minimum five-year initial term and minimum renewals

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[1] VACC Cyber car survey & VACC Franchise and Oil Code Survey 2018.
[2] Cyber cars are cars reported as presold to boos a dealer and manufacturer monthly sales figures.
[3] Wein Review 2013 *Review of The Franchising Code of Conduct* Recommendation 18 Pg. xi

of five years, to be legislated in a new Automotive Industry Franchise Code.

The power imbalance in current dealership agreements manifests itself in several ways. Manufacturers' place pressure on dealers to report cars as 'pre-sold'. These cars are referred to by industry as 'cyber cars', 'called cars', or 'RDA Cars'[4]. A 2018 VACC survey revealed that 28.9% of new cars sold nationally were pre-recorded sales. This practice has serious implications for dealers who participate in this type of reporting. At the end of an agreement, dealers can be placed in a difficult position when it comes to retailing or transferring residual stock, pre-recorded as sold. Cyber cars already counted as sold, can sit in stock for months and in some cases, carry into the following year. This can lead to a distressed marketing situation for dealers, that may be left with old model stock at the point of termination of a dealer agreement. This issue must be addressed as an imperative by the RIS, ideally through supportive legislation that outlaws this practice.

VACC is appreciative that several courageous VADA members, both current and ex-dealers, have provided sworn testimony to several government inquiries, including the ACCC Market Study into New Car Retailing and the Joint Parliamentary Committee Inquiry into the effectiveness of the Franchising Code. Such members have also helped inform this submission.

To further inform the RIS, VACC has surveyed its VADA members in January 2019 regarding the contents of the RIS. The survey reaffirmed that there was a mood of dealer discontent regarding how powerless dealers are under the current Code. This was reinforced via stories from former franchisees who were not sufficiently resourced to test their contracts against a well-resourced and informed manufacturer, and ultimately could not renew. It is within those stories that VACC has the impetus to aggressively pursue change.

Over the past five years, VACC has increased its communications with members to gather valuable insights and now has strong evidence to support the ineffectiveness of the current Code as it applies to new car dealers. Those insights have allowed VACC to address different facets of the current dealer environment under the Code. The Department indicates in the RIS discussion paper that '*only the arrangements between new car dealers and manufacturers are being considered in this Regulation Impact Statement (RIS)'*.[5]

VACC and its national body, the Motor Car Trades Association (MTAA), are united in our view that while the concerns of new car retailers are of critical importance and should be addressed as a matter of priority, that any solutions must equally apply to commercial vehicle, motorcycle, car rental, automotive repairers, outdoor power-equipment and farm machinery franchised retailers who invariably experience the same concerns, albeit with some subtle differences[ii]. VACC will further pursue the issues facing other franchise automotive industry participants in another forum.

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[4] VACC *New Car Dealer Cyber Car Survey* 2018

[5] Regulation Impact Statement - Franchise relationships between car manufacturers and new car dealers

For the purposes of this response, VACC will focus on the issues requested within the Terms of Reference.

VACC is also pleased to note the acknowledgement by government (as stated in the RIS) that a power imbalance between manufacturer and franchisee is causing detriment to the automotive industry, necessitating potential regulatory intervention. VACC observes the RIS defines the power imbalance according to three categories:

End of term arrangements – dealers are provided insufficient time to prepare when an agreement is not renewed.

Capital expenditure – dealers are not provided meaningful or precise disclosure or ability to recoup. Capital expenditure must be linked to a term.

Dispute resolution – it can be difficult for car dealers to undertake multi-party dispute resolution. The process must be improved with an obligation of good faith to all disputes.

It is the strong view of dealers that a voluntary code is not the answer.

A key issue of concern for dealers is that manufacturers are not meeting their legislated obligations under supplier indemnification provisions as required under the Australian Consumer Law (ACL). Unfortunately, the RIS has **not** considered the specifics of warranty issues or consumer ACL claims that are often left for the dealer to solve nor the unfair way that manufacturers recompense dealers for warranty work. These issues have been subject to VACC, MTAA and VADA making representations and submissions to the ACCC.

VACC and members of the VADA Executive Committee are readily available to the Department to provide case studies highlighting the issues surrounding the current code. It is our strong belief that such evidence would make clear the issues and challenges facing automotive dealers in relation to the Code and assist government with their review.

Clarification of some assumptions contained in the RIS

VACC seeks further explanation regarding several assumptions made by the RIS authors.

The RIS includes two statements, presented as fact (attributed to the Federated Chamber of Automotive Industries) which VACC disputes.

Those statements are discussed below.

a. *'New car dealers do not pay fees or royalties to car manufacturers for the use of their brand. The only payments that car dealers typically make to manufacturers are contributions to co-operative marketing funds and payments for purchasing vehicles, parts, accessories and tools.* [6]

VACC respectfully advises that this statement is contradictory and shows a complete lack of knowledge by the writer regarding the complexity and sophisticated nature of dealer business models. VACC does not agree with such a broad statement and considers it to be inappropriate to be included in this RIS. VACC suggests the following items be considered as ongoing and extraordinary fees or royalties as part of the RIS. These include exorbitantly high monthly fees demanded by the manufacturer to cover costs outside the original agreement(s). These include:

- signage
- training
- access to manufacturer portal and CRM
- customer amenities such as coffee, newspapers, internet facilities
- access to repair and service information
- mandatory participation in unprofitable service programs
- tooling, and
- other fees that are conveniently not included in a non-disclosure document and forced upon a dealer via Factory Bulletins for inclusion in the Dealership Operations Manual.

It is not a case of the manufacturer handing over the keys to a dealer and permitting the dealer to run the business as they see fit. Whilst some of these elements can be interpreted as legitimate business costs, VACC cannot accept the assertion that franchisee costs are confined to marketing funds (and these can be significant, up to 13.5% royalty). Further, excessive prices for the purchase of vehicles, parts, accessories, tools, infrastructure development and planogram requirements are often experienced and a result of the manufacturer dictating prices from a supplier they have appointed.

[6] DIIS RIS December 2018 Pg. 10, citing FCAI 2018, p. 3 (Ibid footnote **Error! Bookmark not defined.**).

b. '*New car dealers typically control the location of the franchise and many own the land on which the dealership is located. In other franchise systems, it is more common for the franchisor to control the location of the franchisee'*[7].

It is a broad assumption to state new car dealers 'typically' own the land on which the dealership is located. Regardless of whether the dealer owns the land, it is the manufacturer who controls the location of the franchise. This is evidenced by the many dealership agreements VACC has reviewed – from new car and motorcycle dealers, to car rental companies. This can have substantial implications for defined territory or Prime Market Areas (PMA).

VACC would like it noted that it does not agree with the above statements and that they should be disregarded as part of this RIS.

Departmental Consultation Questions

1. Status Quo

Under no circumstance is the status quo option acceptable to VADA members. The notion of retaining the status quo will not address the issues clearly identified by new car dealers.

2. Regulatory Intervention

VACC contends that regulatory intervention is the only solution. The only satisfactory position for our industry's long-term viability is for an independent, legislated, industry specific, automotive industry franchising code of conduct.

3. Voluntary Code

VACC does not believe a voluntary code can work in the automotive franchise sector. The sheer disparity in size, material inequality and influence of the code signatories makes the notion of a voluntary code unworkable. The fear of reprisals by stealth makes a voluntary code unworkable for dealers.

VACC cites the example of the Australian Food and Grocery Council, who launched two voluntary codes in 2009. Signatories to that code were not meeting their obligations. The voluntary codes appeared to have failed because of big business using its size to take advantage of small business. The NSW Anti-Cancer Council stated that "*For almost eight years now junk food companies have*

[7] DIIS RIS December 2018 Pg. 11, citing FCAI 2018, p.4 (Ibid footnote **Error! Bookmark not defined.**).

been able to take advantage of these weak, self-defined codes because there has been nothing to stop them from doing so."[8]

Similarly, in the automotive industry, the *Motor Vehicle Insurance and Repair Industry Code of Conduct*, a voluntary code for insurers and vehicle body repairers, was designed to create a fairer working relationship between vehicle body repairers and motor vehicle insurers. The sheer size and scale of the motor vehicle insurers meant that any attempt to use the code to remedy disputes with insurers, took significant time, energy and resources from small businesses, often to their detriment. This is another example of a failed voluntary code.

The only position VACC and VADA will support is a mandated, legislatively based, specific automotive industry franchise code of conduct. To this end we cannot support a voluntary code.

4. Option 2A – 12 months' notice periods

VACC and VADA members' support the introduction of a mandated, 12-month non-renewal or termination notice period for both parties. The 12-month period can be negotiated to a lesser term with agreement of both parties.

[8] Esther Han, 15 February 2017***. Food*** industry's voluntary codes failing to reduce junk food ads viewed by children***.*** Retrieved 26 January 2019 from https://www.smh.com.au/business/consumer-affairs/food-industrys-voluntary-codes-failing-to-reduce-junk-food-ads-viewed-by-children-20170214-gucm4c.html

Questions for stakeholders - Regulatory Intervention

N.B For the purposes of answering the questions tabled within the RIS, VACC has used the Department's terminology of 'non-renewal.' It is VACC's view that non-renewal is adopted by the manufacturer as terminology used to disguise a 'termination'.

Q 1. What is standard industry practice for non-renewal, is it longer than the minimum six months required under the Franchising Code?

This depends on who is executing the non-renewal. The standard dealer notification to advise the manufacturer that they would not be renewing is six months, in line with the Code. Whilst most manufacturers also use the six-month criteria, there are instances where this is not happening.

The peak body representing the automotive retail industry in Australia, the Motor Trades Association of Australia (MTAA) has called for a notification period for non-renewal/ termination to be a minimum of 12 months in advance[9]. There are instances where manufacturers have negotiated a 12 month notice of non-renewal or termination. This is of course based on the premise of a mutual decision to enforce the non-renewal.

VACC notes that in one specific Dealership Agreement, it is stated that the dealer has the obligation to advise the manufacturer at a minimum of seven to nine months of the dealer's intention to seek extension.

The approach of the manufacturer can be varied. VACC has seen non-renewal notices of less than three months, others where the agreement to non-renewal has not had a term stated but where both parties have mutually agreed to a handover of dealership.

Q 2. How long does it take to negotiate new franchise arrangements with a different car manufacturer?

It can be a seamless transaction where the terms put forward (such as length of the contract and expenditure on infrastructure development) and can be deemed as reasonable. For those that have long negotiations it is the term of the contract that is often the point of contention.

Some volume brands seek only two-year agreements or renewal tenures. This makes it impossible for dealers to recoup their investment in such a short timeframe.

[9] MTAA LTD Submission to the Parliamentary Joint Committee on Corporations and Financial Services into the operation and effectiveness of the Franchising Code of Conduct May 2018 Pg. 19

Further difficulty arises when a reduced term is offered, a unilateral alteration of Prime Market Area (PMA) takes place or there are disputes around breaches issued during the past term or where manufacturers unreasonably withhold approval for some prospective buyer of a dealership.

VACC is not aware of any official benchmarking completed on how long it takes to negotiate a new agreement.

Negotiating a new franchise agreement with a different car manufacturer can be extremely time consuming and difficult. It has been reported to VACC that existing manufacturer manufacturers make threats to remove the franchise if the manufacturer acquires an additional franchise, or making unreasonable monetary demands related to the existing site on which the franchise is located.

Requirement to not unreasonably withhold approval of the prospective buyer of a dealership

The issue is compounded by manufacturers who use delaying tactics when renewing or selling a franchise. Under the franchise code, there is a requirement for distributors to not unreasonably withhold approval of the prospective buyer of a dealership or, more specifically, the transfer of its franchise.

A new mandatory code should consider what is a reasonable length of time to approve a purchaser.

'Quite commonly a distributor gathers details from the prospective buyer and formally subjects the applicant to an interview process and normally a decision is made at a distributors board meeting whether to issue a letter of intent which precedes formal approval of the transfer/purchase.'10

Sometimes these meetings are every 30 days if not called earlier. However, the approval process can become a timeline of 60 or 90 or more days. If the seller has two or more brands for sale, then there are two or more timelines of buyer approval independent of themselves.

Dealers advise that all buy/sell agreements have a clause subject to distributors approval and floorplan financier's approval. So, in the case of deal done first then normally some degree of confidentiality is achieved until informing the distributor to seek their approval. However, some distributors have clauses in their dealer agreement stating before contracting to sell, the dealer must seek approval for the buyer before entering into buy/sell agreement

The main concern on this aspect is that the competition to achieve maximum sale price for the seller is diminished as they are basically told by the distributor who to sell to. And in any case, the buy/sell agreement still has the clause subject to distributor approval.

Many arrangements are tabled on a 'take it or leave it' basis. The new car dealer has no choice but to agree to the deal, despite personal views or professional or legal advice suggesting it is a bad deal.

[10] VACC Survey into DIIS RIS January 2019

The dealer is rarely able to alter the agreement.[11]

In some agreement renewals, dealer councils will collectively view a franchise agreement put forward.

Many dealers trust that the manufacturer will behave ethically, responsibly and in good faith. This can be and often is the case. However, there are many times when a change in direct reporting or senior executive at the manufacturer means dealer relationships can also change, and previous 'ad-hoc' or verbally agreed arrangements are no longer recognised.

VACC Recommendation

VACC recommends an automotive dealer specific franchise code should consider what is a reasonable length of time for a manufacturer approval a prospective buyer of a dealership or, more specifically, the transfer of its franchise.

Q 3. It has been put to us that 12 months is considered to be a more adequate length of notice for non-renewal. Is this optimal or is there a more optimal period of notice for non-renewal?

VACC believes that 12 months is an optimal period of notice for non-renewal for both parties. This term can be shorter in duration upon agreement and evidence of good faith. Consideration must be given to the amount of time the dealer has to dispose of the manufacturer 's products – if not bought back at purchase price – along with any financial commitment the dealer has with the premises and infrastructure. The dealer's business should not be placed at risk due to cash flow issues resulting from a non-renewal. Any renewal is completely inadequate when it is heavily weighted against unrealistic sales targets. Until the manufacturer(s) are completely transparent with their target methodology, then dealers are in a continuously precarious position[12].

VACC Recommendation

VACC recommends that any new automotive dealer specific franchise code mandates a bilateral 12 month notice of intention to not renew an agreement.

[11] MTAA Ltd '*Submission to the ACCC New Car Retailing Industry Market Studies Issues Paper'* November 2016 Pg.9 'Dealer Agreements – an imbalanced relationship foundation.

[12] VACC Survey into DIIS RIS January 2019

Q 4. Would the benefit to car dealers of an extra six months' notice outweigh the costs to manufacturers of having to make business decisions further out than the prescribed six months? Why/Why not?

VACC believes that the answer to this question should be taken in comparative terms. It is the manufacturers that command the greater financial resources and bargaining power, and not the dealers. It is the dealers that invariably have more to lose in this arrangement.

The benefits to dealers should, at a minimum, match the benefits to manufacturers. Dealers are not as well-resourced or have the capability to appoint Tier 1 consultants who can develop overstated market projections using data that is simply not available to a dealer. This can lead to a harried response from a dealer, who has the pressure of a ticking clock to source a new franchise, develop the infrastructure for any new brand, and to maintain some form of relationship with the outgoing brand in the hope of receiving all holdback and other associated bonuses.

Manufacturers' decisions should be ethical and not leave a dealer in an insecure financial situation. Manufacturers who are dissatisfied with a dealer's performance should have documented the reasons why and provided the dealer with the opportunity to improve. The inability for the dealer to perform will ultimately result in the dealer not being offered renewal. This should not come 'out of the blue'. There would be very little impact on manufacturers in having to make business decisions further out than the prescribed six months.

VACC Recommendation

VACC recommends that manufacturers who are dissatisfied with a dealer's performance should document the reasons why and provide the dealer with a prescribed period to improve their performance.

Q 5. Would increased education and awareness of existing pre-disclosure and notice periods for non-renewal support dealers to undertake their due diligence and highlight the risks of non-renewal?

Any increased education and awareness provisions focusing on pre-disclosure or non-renewal would be of great assistance to dealers undertaking their due diligence at the point of entering an agreement or renewal.

The VACC Franchising and Oil Code Survey 2018 indicated that 36 per cent of respondents did not receive full disclosure of all contractual rights in their agreement. More than half (59 per cent) of respondents reported they were not aware of their rights at termination and a further 54 per cent did not have a clear understanding of the rights and obligations of each party at the end of the franchise

term[13].

Any planned educational material should be developed in conjunction with independent dealer councils and industry bodies. It must be worded in simple terms to reduce misunderstanding and misinterpretation.

Ultimately the requirement of both parties to deal in good faith will hold sway. This is unlikely to be commonplace unless the rules of engagement are clear. Education is necessary for both parties, but in simple, easily understandable language, not over complicated legalese.

The common theme must be the manufacturer 's requirement to move products without consumer dissatisfaction and the dealer's requirement to gain adequate return on investment.

VACC Recommendation

VACC recommends that the government, industry groups and manufacturers develop educational material written in plain language, that will help all parties to understand disclosure agreements and disseminate this information via national seminars in key metropolitan and regional areas. VACC could underwrite these seminars in Victoria and Tasmania.

Option 2 B -Franchisors to provide reasons for non-renewal

Q 6. Is it common practice for car manufacturers to explain to dealers why their agreements are not being renewed?

It is common practice for car manufacturers to **not** explain adequately why a dealer's agreement is not being renewed. For example, a recent ex-dealer provided evidence to VACC demonstrating that their agreement was not being renewed because of a 'dealer network footprint review'[14]. When the manufacturer was challenged to explain what this meant, no explanation was provided. Further, the lack of written explanation for dealers is higher in regional communities where a dealer's personal reputation in the community is heavily linked with a particular brand. This was evident when a 150-year, one brand dealer was served with a non-renewal without reason[15]. VACC has evidence of car manufacturers advising dealers of feeble one or two-line excuses that the non-renewal is taking effect because of 're-structuring'[16]. When you consider what is at stake, this is unacceptable.

Non-renewal notices are issued to dealers regardless if dealers have met or exceeded targets, and

[13] VACC Submission to *Parliamentary Inquiry into the operation and effectiveness of the Franchising Code of Conduct,* 4 May 2018. Pg. 7

[14] VACC Survey into DIIS RIS January 2019, Dealer non-renewed 2017

[15] Deniliquin Pastoral Times, 'Closed after 150 years, Zoe McMaugh 20 October 2017

[16] Notice of non-renewal of Dealership 2018. Available upon request.

when dealers have not breached their Dealer Agreement[17]. Manufacturers have been known to performance manage dealers out by setting unrealistic targets. VADA members have also been threatened with non-renewal if the dealer wishes to diversify and share showroom space with another brand[18].

VACC has been informed that there are many instances where a manufacturer has used the dealership Customer Satisfaction Survey (CSI) results as a reason to put that dealer on notice and begin the process of non-renewal. It should be noted that industry benchmarking reveals that CSI scores generally require 80% as a pass mark, which is ludicrous.

The common opinion amongst new car dealers is that manufacturers will use 'non-renewal' as a more cost-effective dislocation method above citing termination.

Results from the VACC Franchising and Oil Code survey showed that manufacturers use their size and resources to appoint Tier 1 law firms to create a franchise agreement that is blatantly one-sided. Manufacturers seek legal advice from Tier 1 lawyers related to any non-renewal or termination. In such events the manufacturer is advised by their law firm to make no comment and they rely wholly on the terms of the Franchise Agreement, which the dealer has signed.

VACC Recommendation

VACC recommends that any new specific automotive franchise code stipulates that reasons for non-renewal or termination of any agreement be advised in writing, including what efforts the manufacturer has made to allay the decision within the prescribed time frame.

Option 2C- Stock buy-backs

Q 7. Are car dealers able to run down their stock when they know an agreement is not being renewed?

Dealers are in a precarious situation regarding running down stock. A recent non-renewed dealer advised, "*In the best of cases, dealers are given a six-month non-renewal notice and are expected to maintain stocking levels, anything from 45-60 days of stock, to be eligible for bonus programs".*

A customer base that requires servicing and repairs dictates that stock levels must be kept at adequate levels. A recent dealer who exited the dealership network commented:
'if I knew I wasn't being renewed then I could have gone off 'auto release' from my finance company to 'manual release' so I wouldn't have to take any stock without an order on it'[19]

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[17] AADA submission *Inquiry into the operation and effectiveness of the Franchising Code of Conduct* May 2018. Pg. 6 Non-Renewal Notices
[18] VACC Survey into DIIS RIS January 2019
[19] Ex dealer interview VACC January 2019

Dealers can be in the difficult position of having negotiated a deal close to when the non-renewal term expires, only to not have that vehicle delivered or counted to be delivered, as part of its sales target. In one Dealer Agreement viewed by VACC, it is stated that it is at the manufacturer's discretion to fulfil any orders placed by the dealer. It is further stated that the dealer must reimburse the manufacturer if any loss is incurred because of a sale to a third party[20]. If that position was accepted, it would result in the dealer missing on sales bonuses and other incentives. Dealers also have customer bases of independent repairers who rely on genuine parts to facilitate the service of their customers.

There may also be the downward pressure of pre-reporting cars sold ('cyber cars'). The practice is incentivised and directed by manufacturers and causes unnecessary expense and red-tape for dealers. It is a practice many dealers do not want to apply, but for reasons including pressure from the manufacturer, the need to achieve unreasonable sales targets and financial incentives, many dealers feel pressured into doing so. Many dealers have advised VACC if they do not participate they fear non-renewal or termination.

Dealers must register these cars with the local road's authority (e.g. VicRoads, Roads and Maritime Services) to be counted as being included in VFACTS and manufacturer reporting to overseas head offices. Dealers are then required to retail these vehicles as a used motor vehicle. The hidden costs associated with this practice greatly impacts the dealer's bottom line. Research conducted by VACC in 2018 indicates that 28.9 per cent of all cars sold nationally are 'cyber cars. Based on this figure, it the estimated that 95,433 cyber cars existed in Victoria from October 2017 to October 2018. These cars must then be sold as used cars, which means a certificate of roadworthiness must be completed at the point of retail sale to a consumer. VACC benchmarking shows the average cost for each individual roadworthy to be $233.33 and costs the Victorian new car franchise sector an estimated $22.2 million per annum[21].

This practice causes dealers who are voluntarily non-renewing or have negotiated a sale of their franchise immense financial loss and distress marketing occurs as result. This is not a good outcome for the dealer, consumer or industry.

VACC has conducted research into this practice, which we believe would be of use to the review panel of this RIS.

VACC Recommendation
VACC recommends that any new automotive specific franchising code is clear in its edict that the pre-reporting of sold cars (cyber cars, RDA Cars, called cars) is prohibited, and that any influence or pressure applied by the manufacturer constitutes a clear breach of the Code.

[20] Dealer Agreement available upon request

[21] VACC Research 'A case for removing roadworthy certification for new, low kilometre, dealer -owned cars' October 2018

Q 8. How much stock would a dealer typically have remaining when an agreement is not renewed?

Ideally stock or inventory would be at a minimal level. The requirement to hold 45-60 days stock, however, leaves dealers in an unenviable position. At any one-time, dealers can have millions of dollars of stock holdings, this includes vehicles, parts, tools and the coffee machine in the customer waiting area.

The reality is that dealers and manufacturers still have a responsibility to their shared customer base and obligations under the ACL to maintain adequate parts supply. These vehicles and parts should be easily transferable to other dealers who will assume that brand presence within that area or back to manufacturer for redistribution to other dealers of that network.

Q 9. In what circumstances do buy-back arrangements generally apply in current agreements (for example, at non-renewal, termination by agreement)?

The response to this question would generally depend upon the state of the relationship between the manufacturer and the dealer, and the circumstances that have led to the non-renewal. The AADA supplementary submission to the ACCC New Car Retail Market Study corroborates VADA members' view that it is typically the manufacturer's discretion as to whether it exercises 'Buy Back' rights from the dealer[22].

A review of a recent Dealer Agreement advised that ………at its "*absolute discretion may within 14 business days of the Termination Date repurchase from the Dealer any or all tools or equipment designed for servicing the products purchased by the Dealer from……. [23].*" This would be advantageous for those respective dealers exiting their Franchise Agreement if that absolute discretion was applied and the manufacturer repurchased all equipment.

In what may be deemed as an equitable and fair agreement, a *Dealer Agreement*[24] *sighted by VACC* states that the manufacturer will pay the dealer a purchase price for any unused tools or parts and vehicles at landed prices (invoice price, plus unrebated duties, taxes and inland transportation costs). However, if there is a model change or vehicles are not of the current year, there is a 15 per cent difference in that purchase price, or even worse if the dealer has had excess runout models 'dumped' on them. VADA members advise that while this practice is not a standard approach, dealers can be stuck with runout models that have been supplied by the manufacturer as part of an overly ambitious sales target set by the manufacturer. Trying to offload these to other dealers of that brand is nigh on impossible if bonus payments, holdback or other incentives have already been paid.

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[22] AADA Supplementary Submission to the New Car Retail Market Study 19 October 2017 Pg.3

[23] Dealer agreement 2008, manufacturer name withheld

[24] Dealer Agreement 2017

The issue of whether a vehicle is a 'cyber car' also affects whether it would apply in any buy- back by manufacturer or incoming dealer. It is ironic that some brands encourage, incentivise or threaten their network if they do not participate in the cyber car practice yet will not assist at the end of a contract to help the dealer offload this stock.

Q 10. To what extent do dealerships trade stock with other dealership businesses to address the issue of excess stock upon cessation of a franchise agreement?

Interviews with members of VADA indicate that there is no equitable position for a dealer to trade stock to another dealer to reduce its stock holding at the point of cessation of the Franchise Agreement. One prominent VADA member advises that they have eight franchises and not one of them have a buy-back agreement[25] and that no other dealer would take the stock as they are all overstocked[26].

However, some dealers advise it would be non-advantageous to transfer the stock as the dealer may have to transfer any bonus or holdback money that came with that car[27].

VADA members contend that the receiving dealer would not qualify for secondary holdback from the manufacturer if the model is being traded. For example, this secondary holdback on a high-volume brand such as Hyundai or Holden could amount to a figure of approximately $400 per unit.[28]
Compounding this practice is the consideration that some models are an undesirable, low volume selling stock items. This would also lessen the likelihood of stock swaps.
Overall, the complex structure of margins, bonuses and holdbacks, lessen the ability for a dealer to move stock to other dealers who need to avail themselves to full margin.

Further the transferring of this stock is also impacted by manufacturer specifies within its dealer agreement how many franchises of the same brand a dealer can have. Many large groups have dealer agreements for some of their brands that limit them from purchasing more of the same brand in the same city[29]. The effect of this is a reduction in competition amongst buyers for the seller and less opportunity for the non-renewed dealer to redistribute stock to a willing acquirer.

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[25] VACC Survey into DIIS RIS January 2019
[26] VACC Survey into DIIS RIS January 2019
[27] VACC Survey into DIIS RIS January 2019
[28] Ex Victorian Dealer who was not renewed 2017
[29] VACC Survey into DIIS RIS January 2019

Q 11. To what extent do manufacturers buy-back stock upon the conclusion of a dealership agreement?

The extent to which manufacturers buy back stock upon the conclusion of a dealer agreement varies from brand to brand and the circumstances of the non-renewal or termination. It is a common theme amongst VADA members that dealers of most brands are already overstocked so would not want to take on any extra. As mentioned earlier, one dealer has eight different franchises and not one has a guaranteed buy-back clause in their agreement.

A positive reply from an ex-Hyundai dealer who had a non-renewal advises that:

"they let us run down the stock without significant competitive disadvantage and once the business was closed they facilitated the swapping of any remaining stock to other dealers[30]."

Other dealers added interesting points that also goes to issue of dealer indemnification under ACL provisions:

"*the factory doesn't want them back and they hate doing it even with a badly damaged and* repaired *vehicle from the wharf" and; "you buy, you, own".* [31]

In data collected via the VACC Franchising and Oil Code Survey, many respondents advised that the manufacturer would not re-purchase or provide compensation for parts or equipment beyond a specific age. In instances where the manufacturer agreed to repurchase the stock it was re-purchased at below cost, causing the dealer financial loss[32].

The situation is again compounded by the pressure and incentivising by manufacturers for dealers to pre-report cars as sold 'cyber cars'.

Q 12. What extent would be mandating buy-back options deter manufacturers from signing dealership agreements?

There should be no deterrent if manufacturers specified any buy-back units were in new condition, in original packaging and should be able to redirect to another dealer as a new unit. Buy-back would need to be at the dealer's original invoiced purchase price. Mandated buy-back written into any agreement would ensure manufacturers would not 'load' dealer's they intend to non-renew with stock. It would also deter some brands in participating in cyber car programs.

[30] Ex Victorian Dealer who mutually agreed to end agreement in 2015

[31] Ex Victorian dealer VACC Survey 2019

[32] VACC Submission to *Parliamentary Inquiry into the operation and effectiveness of the Franchising Code of Conduct,* 4 May 2018. Pg.12

Some dealers are of the view that any prohibitions from a manufacturer in taking back stock are inequitable for a dealer, if you consider it is usually the manufacturer's choice to not renew, therefore, they should be required to buy everything back.[33]

VACC Recommendation

VACC recommends that any new automotive specific franchise code should ensure that manufacturers are legislatively responsible to ensure the outgoing franchisee is not left with non-obsolete excess stock or parts that are of good order

Option 2D – Enhanced capital Expenditure disclosure

Q 13. Do manufacturers typically determine what significant capital expenditure will be required prior to an agreement being entered into or is this a decision that is ordinarily made during the life of the agreement?

VADA members advise that initially yes, but capital expenditure by the dealer, particularly in relation to infrastructure and facility development will continue to be at odds with corporate profile requirements that are usually dictated by the parent organisation.

VADA members advise that some brands do not mention a monetary figure, they just list the mandatory items to purchase (e.g. tooling) and corporate identity standards[34].

MTAA has reported that for dealers to invest, such capital necessitates finance via financial institutions, which is secured against the dealer's business and personal assets[35]. Whilst most dealerships can and should be expected to have security provisions attached to any finance arrangement, the exposure required when combined with the development required and lack of assured tenure stated in the agreement leaves the dealer in a precarious position.

VADA members were able to explain to the *PJC Enquiry into the Franchising Code*[36] that dealers who would have ordinarily been expected to be renewed were either terminated or not renewed.

[33] VACC RIS Survey 2019
[34] VACC RIS Survey 2019
[35] MTAA Ltd pg.20 2018 (Ibid footnote 14)
[36] MTAA report to MTAA Management Committee December 2018

Q 14. Generally, what is the monetary range for expenditure disclosed to car dealers? How common are wide expenditure ranges in disclosure documents? If wide expenditure rages are provided, why are they provided?

It is uncommon for the manufacturer to dictate the monetary value of what you need to spend. Rather they dictate the specification of the facility[37].

Manufacturers also dictate the suppliers that must be used for the supply of furniture, tiles and all corporate identity including signage and other expenditure to maintain the dealership to the manufacturers corporate image specifications.

The following table highlights the extreme capital expenditure for showroom update costs borne by some VADA members as dictated by manufacturer:

ITEM DICTATED BY MANUFACTURER	DEALER COMMENT
Chairs $500 per chair from France	Same chair purchased from Ikea for $100
Tiles from Italy at $100sqm	Can be purchased locally for $40sqm
Entry portal $38k	Now does not fit with the manufacturer Corporate Image and must be removed.
Single letter replacement on signage cost over $2k to replace.	Must use manufacturer contractor
Facility to build for three car showrooms over $1m plus $160K for CI	Must be updated every 2 years

Wide expenditure ranges are commonplace, and manufacturers can do this under the existing Franchise Code guidelines.

When reviewing non-disclosure documents provided to VACC[38] there is a broad calculation of gross profit margins. The documents examined offer estimates ranging from 1.5 per cent to 5 per cent.

[37] VACC RIS Survey 2019

[38] Non-disclosure document 2016 available upon request

VACC Recommendation

VACC recommends that every franchise disclosure document that accompanies a new dealer agreement, should provide a realistic and methodology based monetary range for capital expenditure.

Q 15. What level of support and education is provided to dealers when entering into franchising agreements and during the contract, regarding capital expenditure requirements?

Some of the more responsible manufacturers go over and beyond what their current obligations are under the Franchising Code. VACC notes the distinct absence of angst from the dealerships of the top selling marques.

There are resourcing constraints for dealers in obtaining professional advice that is available on suitable commercial terms. Manufacturers' franchise agreements are created by Tier 1 law firms, many with high levels of skill within franchise law. The dealer is expected to obtain their own advice on the Franchise Agreement. To do so requires a law firm of equal standing. This is not only difficult but cost prohibitive. Many dealers struggle with the complexity of franchise agreements that are not written in layman's language. Dealers are expected to make further capital expenditure at the manufacturer's whim.

MTAA research indicates that capital expenditure and other requirements during the term of the agreement are accepted as they have been alluded to in broad definitions contained during disclosure. This is an area that must be addressed in any new code.

VACC Recommendation

VACC recommends that future disclosure documents must be direct in their intention regarding capital expenditure and provide reasonable estimates, including methodologies, for the type of expense the franchisee will incur in future capital expenditure outlay.

Q 16. Are you aware of instances where dealers have expended significant capital expenditure towards the end of a dealer agreement which is in accordance with their agreement, but which they anticipate cannot be recouped? How far out from the end of the agreement are they undertaking this capital expenditure?

VACC is aware of instances where dealers have expended significant capital expenditure towards the end of a Franchise Agreement at the instructions of the manufacturer. MTAA arranged for an ex-VACC dealer to present their case, in camera, to the Parliamentary Joint Senate Inquiry (PJC). They raised matters put to the original Franchising Code Inquiry. The ex-dealer outlined how, with the approval of the manufacturer, they built new showrooms in regional Victoria and New South Wales only to have that Franchise Agreement non-renewed. A decision that ultimately cost the now ex-dealer millions of dollars.

The following is an extract from the VACC 2019 RIS survey from a dealer affected by a decision of a manufacturer to not renew after having a business plan approved by the manufacturer:

'*Three months prior to being handed non-renewal our five-year business plan was approved, and we were specifically directed to begin construction of a new dealership on our current site. It was later claimed that the non-renewal decision was made after that, but I don't believe the slashing of 30 dealers from your network is a snap decision and that it was unconscionable of the manufacturer to ask us to start major works when non-renewal was on the cards. We were required to maintain staff training, pay for marketing materials, annual subscriptions (which we then had to fight for a six-month refund of), and were even billed for special tools that were automatically billed and arrived in days before the business closure'.*

VACC Recommendation

VACC recommends that any new automotive specific franchise code includes heavy sanctions and compensation to the dealer from any manufacturer who terminates or manufactures a non-renewal after providing a franchisee with written instruction for any capital expenditure projects relating to that brand.

Q 17. Can dealers undertake capital investments, for example build a showroom, so that it can be repurposed to suit another distributor's brand if their existing dealership agreement ends?

Generally, yes. However, this cannot happen until the original agreement has expired**.**

From the evidence gathered via face to face interviews and a review of five random Dealer Agreements[39], it is the case that dealers cannot make alterations or invest in fit-out of premises without the manufacturer's written permission during the period of the agreement – including the non-renewal period. In one Dealership Agreement viewed by VACC, it is explicitly stated that the dealer must make any alterations within 30 days to the specific area as defined within the agreement[40]. Likewise, another Dealer Agreement examined by VACC specifically states exclusivity of introduction of new brands to the dealership facility after the commencement date.

It could be a possibility if the non-renewal or termination has been mutually and amicably agreed upon. Even in these circumstances it is unlikely that a dealer would commit to more expenses, given that the industry return on investment is 1 per cent.[41]

Q 18. To what extent do the other provisions of the CCA, such as the unconscionable conduct provisions, provide remedies for dealers in situations where they have to outlay capital which cannot be recouped during the term of the dealership agreement?

The manufacturer's agreement includes 'dealer operating standards' that cover upgrades to facilities. As such, provisions within the CCA have little bearing on the recouping of money spent during the term of the agreement.

MTAA research has revealed instances where dealers are aware and have used the dispute resolution and mediation processes outlined within the Franchising Code but did so unsuccessfully. In these cases, the significant legal and financial resources of the Manufacturer, and relative power imbalance of the dealers was most apparent.

[39] Random Dealer agreements sampled, available upon request agreements n.d

[40] Random Dealer Agreement 2007

[41] VACC RIS Survey 2019

More recently, MTAA, on behalf of members and their dealer constituents, has made representation to the Regulator for investigation and potential enforcement action under various provisions of the ACL. MTAA has also acted on behalf of VACC and VADA to highlight the potential unconscionable conduct of one Manufacturer and further highlight the inability of impacted dealers to have any recourse through established mechanisms.

An extract from an MTAA report to the MTAA Management Committee states that the apparent inability to seek relief or recourse through provisions within the CCA also underpins MTAA and member calls for more specific action through regulatory intervention. It is the experience of MTAA that in some industries, and some circumstances, the necessary universal and whole of economy approach laws and regulations can provide gaps that are exploited[42].

Q 19. The Franchising Code also prohibits manufacturer -imposed capital outlays during the term of the franchising agreement unless specific conditions are satisfied. How are these provisions utilised within the industry?

Terms within agreements cover capital outlays, invariably constructed to legally conform with the Codes' requirements. Although the Code prohibits manufacturer -imposed capital outlays during the term of the agreement, the threat of non-renewal is used by manufacturers to force dealers to incur additional capital expenditure.

In the AADA Supplementary Submission to the New Car Retail Market Study October 2017, AADA state that the expenditure on capital outlay is not treated by the manufacturers as requiring prior disclosure, as the manufacturers take the position that the expenditure is for an entirely new agreement[43]. This is a statement that VADA wholeheartedly supports.

[42] MTAA report to MTAA Management Committee December 2018
[43] AADA Supplementary Submission to the New Car Retail Market Study October 2017 Pg.2

Option 2E- Minimum five-year terms with right of renewal

Q 20. How would car manufacturers respond to the introduction of minimum terms?

From what VACC has witnessed over the past years, it is likely that manufacturers would generally respond negatively to the introduction of minimum terms. The arguments put forward that by having minimum terms applied could restrict the manufacturers ability to control the size and location of its dealer networks does not stack up. It would be better for all stakeholders if the alteration to the minimum terms was negotiated in a fair and reasonable way. This would avoid the non-renewals or terminations of 30 dealers at a time.

VACC would also suggest that minimum terms would be more acceptable if provision for non-renewal or termination applied to non-performance, with performance criteria being clarified prior to the agreement being formalised.

VACC agrees with the view of prominent franchising lawyer, Evan Stents, lead partner of the Automotive Industry Group at HWL Ebsworth Lawyers. Mr. Stents told a dealer gathering at the AADA Convention in 2017 that 'tenure is the single most important aspect of a dealer's business, but in recent times, tenure has decreased. Tenure is left up to the manufacturer but a lack of minimum tenure and a lack of control over the right to renew leaves tremendous uncertainty over dealers' ability to recoup significant capital expenditure,"[44] VACC would add that the 5-year renewal term should have the option of being exited upon mutual agreement of parties and evidence of good faith dealing.

VACC Recommendation

VACC recommends a minimum 5-year initial term and a 5 years renewal at the end of the original term.

[44] *Damian Cotterill: Legal expert says dealer termination rules 'not commercially justified retrieved from https://premium.goauto.com.au/overhaul-dealer-agreements/ 21/09/2017*

Q 21. Would dealers and manufacturers still have flexibility to respond to developments in technology and changing consumer preferences if agreements had minimum five-year terms?

There is no doubt that dealers and manufacturers would still have flexibility to respond to developments in technology and changing consumer preferences if agreements had minimum five-year terms.

The dealership network is currently repositioning well to changing consumer preferences. It is worth noting that changes to consumer preferences has in 2018 seen commercial vehicles register as three of the top seven selling models (E.g. Toyota Hi-Lux, Ford Ranger and Mitsubishi Triton). FCAI has noted 2018 as a year of continuing adjustment for motoring consumers, with the year seeing a further shift to SUV sales at the expense of passenger vehicles[45]. Dealers are already coping with the challenge of changing consumer preferences. There is no reason a future automotive specific code could not factor in degrees of flexibility that will allow for changes to agreements, whereby the agreement will consider the introduction of future technology, future model line-up and changes to service and repair and other requirements with commercial implications. This could only be achieved if minimum terms were introduced. VACC re-emphasises that a five by five-year option is the only way for dealers and manufacturers to take advantage of changes in technology and changes in consumer buying habits.

The inevitable increase in sales of electric, hybrid and autonomous vehicles to a manufacturers local line-up of vehicles will not cause great disruption to dealership operations or influence how a future agreement should look. The dealership network and manufacturers are currently handling the technology aspect of these vehicles, including infrastructure adaptations to be able to repair these vehicles. The real issue will come in aftermarket repair, where a lagging independent network may not be sufficiently equipped to service and repair such vehicles. It would be within the manufacturer's purview to advise in the disclosure document of the capital expenditure outlay that dealer would require to be part of the sale of these vehicles.

VACC Recommendation

VACC recommends that any new automotive specific franchise code mandates that a disclosure document must factor in changes to new vehicle technologies and an estimate of associated costs that dealers will need to outlay in order to conform.

[45] FCAI Media Release '*Sales down in challenging 2018 Environment* '4 January 2019

Q 22. What would be the public benefits or detriment of providing minimum tenure and a right of renewal? For example, to what extent might it deter manufacturers signing agreements with dealers or accelerate consolidation of dealerships regions or areas?

The public benefit would be increased employment opportunities and a consistent level of service available to local customers. In regional areas why would a consumer purchase a vehicle locally only to have that dealership as a service provider disappear?

Manufacturers' consolidation of dealerships will always be a consideration in regional areas, however this should not be a short-term decision. Instead, it should be undertaken in light of what is considered ethical behaviour and a 'do no harm' attitude. VACC has seen the direct negative impact placed on regional communities when a non-renewal or termination of a dealer has eventuated.

Manufacturers pride themselves on their market research and global knowledge of market trends and can plan accordingly. It has been noted that 360 degree turns in policy direction from manufacturers has mostly occurred when new senior management are appointed who have different ideas. In some cases, this correlates with a massive upsurge in cyber car reporting. This is always unsettling for dealers. It must be made clear to appointees of overseas manufacturers that to freight new cars from the docks of Melbourne to Brisbane is akin to driving from London to Moscow. It is not cheap.

Q 23. Would a longer notice period for non-renewal achieve a similar outcome to addressing concerns about minimum tenure and the need for franchisees to have certainty when it comes to business planning?

Yes, a longer period for non-renewal would be preferable. The object of regulatory intervention is to address issues regarding transparency, behaviours and to implement specific mechanisms. It could counteract non-informed or non-sensible management decisions made by the manufacturer, plus allow for an orderly exit, assisting any cash flow issues.

Q 24. To what extent would minimum terms or a right of renewal prevent manufacturers from responding to changing market conditions and lock the parties into the existing business model?

VACC does not believe minimum terms would negatively impact either parties in responding to changing market conditions.

Manufacturers must respond to changing market conditions if they are to survive. If the historical method of retailing vehicles is to cease, it will not occur overnight – dealers will see it coming. Both parties will need to make decisions about their future within the confines of the agreed code.

Option 2F- Multi-party dispute resolution

Q 25. Would an ability to enter multi franchise mediation make car dealers more likely to utilise mediation to resolve disputes?

Th experience of VADA members indicates that the current mediation process is of no use to dealers as the power wielded by the manufacturers is too great. This is reflected in the comments of a dealer who attempted mediation with a manufacturer:

"the manufacturer attended as required, wasted the day with insults and a complete unwillingness to consider any reasonable terms. They left with no agreement being reached in the knowledge that it is prohibitively expensive for a dealer to take the next steps in beginning legal action'[46]."

Mediation under the Code is rarely successful as dealers cannot hope to counter the manufacturers financial and legal strength, in most cases succumbing to pressure exerted through the Franchise Agreement (written by the manufacturer's tier 1 law firm to prevent any dealer successfully challenging the manufacturer).

VACC argues that collective bargaining by dealers or dealer councils for a specific brand could be successful in achieving a more balanced relationship between manufacturer and dealer**.**

However, too often we see dealer councils dominated by manufacturer representatives, whose mere presence at dealer council meetings makes open dialogue problematic**.**

[46] VACC RIS Survey 2019

Q 26. Are car dealers generally aware of the existing dispute resolution procedures in the Franchising Code?

A VACC survey of VADA members revealed a mixed understanding of the resolution processes involved under the Code. The lack of dealers willing to put forward an issue is telling. In a 2018 survey 95% of dealers have stated they would not seek to activate their rights to mediation under the current code[47].

Dealers are generally unwilling to 'go it alone' against a manufacturer because of the time, cost and stress of doing so. The fear of retribution is too high for most dealers to consider[48].

An interesting comment from an ex dealer:

"*when you sign on you are NOT thinking of how it ends!*[49]"

Voluntary Code of Conduct

Q 27. Would a voluntary code of conduct specific to the automotive industry be effective?

VACC strongly contends that a voluntary code would have no effect whatsoever, and for all intents and purposes would be useless. Voluntary codes contain little in the way of punitive measures that will see fair outcomes for dealers. Dealers would be reluctant to challenge an issue under a voluntary code for reasons previously stated.

In the 2013 *Wein Report into the Franchising Code*, it was clearly articulated that that in 1990, a Standing Committee introduced a voluntary code of practice that included wide ranging provisions. In 1994 prominent franchising lawyer Robert Gardini reviewed the then voluntary code of practice and found that only 40 to 50 per cent of manufacturer s had registered under the Code and that standards under the Code were ineffective[50].

In the absence of improved regulatory arrangements for vehicle franchise dealers, it should be anticipated that current manufacturer/dealer conditions will deteriorate even further as the Australian new vehicle market matures and margin compression continues to dominate the dealership environment. Any hesitation in the application of a mandated franchise code for vehicle dealerships will further marginalise these businesses, and in the realisation that the existing national franchise code has failed to deliver on its promise of fair competition.

[47] VACC Franchise and Oil Code Survey 2018
[48] VACC RIS Survey 2019
[49] VACC RIS Survey 2019
[50] Wein Review 2013 *Review of The Franchising Code of Conduct* Pg.3

As evidenced in other voluntary automotive codes, big business has largely circumnavigated both the intentions and the letter of these codes. Cases in point include the voluntary code for access to vehicle service and repair information (2014), a code that took over a decade to come to fruition, after which its dismal failure followed. Except for a few vehicle manufacturers, many continued to restrict industry and consumers access to repair information, in direct contradiction to the principles of the Code.

Such was the abject failure of this voluntary code the Australian Government has since committed to the drafting of a mandated code for the accessing of vehicle repair information to ensure compliance and a commitment made by vehicle manufacturers is adhered to. There is strong and compelling evidence that many vehicle manufacturers fall short of a genuine commitment to ensuring their supply chains are provided with balanced agreements. In turn, this weakens the entire vehicle and service supply chain, which ultimately puts business and consumers at risk. Ironically, Australia is one of the world's highest per-capita markets for new vehicle sales, however, it appears to be decades behind its global counterparts when it comes to its relationships with its supply chains and the broader automotive market place in Australia.

Similarly, in the automotive industry, a voluntary code for insurers and vehicle body repairers (Motor Vehicle Insurance and Repair Industry Code of Conduct) was designed to create a fairer working relationship between vehicle body repairers and motor vehicle insurers. Again, the voluntary nature of this code has suffered the goliath effect imposed by the insurers where attempts have been made to have the code applied. While the industry has shown that the fair application of the Code can result in success for body repairers, the sheer size and scale of the motor vehicle insurers means that any attempt to use the code or remedy disputes with insurers, takes significant energy, time and commitment from small business, often resulting in a negative outcome for the small business. It has been noted to VACC by industry, that disputes with insurers and the application of the voluntary code are seen as the cost of doing business for insurers, without any real behavioural change occurring in this protracted relationship. Such has been the failure of this Code that it is now mandated in New South Wales and is in the process of being mandated in Western Australia. Discussions are currently underway with the Victorian Government with a view to having the Code mandated in Victoria.

In summary, the use of unenforceable, voluntary codes in the automotive industry have failed to remedy the very conditions that spurred their development. This is also the case in the application of the current Code and its failure to affect unfair and, at times damaging commercial relationships between vehicle manufacturers and vehicle dealerships. VACC believes the creation of a specific, mandated code, for the automotive industry will have a significant and positive effect. It will have the capacity to rebalance the relationship between vehicle manufacturers and their supply chain partners and vehicle dealerships.

VACC Recommendation

VACC, MTAA and VADA believe a voluntary code would be of no use to dealers or consumers. Instead, it is recommended that government introduce an industry specific, franchise code as soon as possible.

Q 28. Are the assumptions that underpin the regulatory costs reasonable?

- 2A yes
- 2B yes.
- 2C unsure as multiple factors may be involved
- 2D yes
- 2E yes
- 2F yes.

Q 29. What additional regulatory costs should be included?

The costs of mediation can discourage some dealers from seeking a mediated outcome. Costs associated with airfares, accommodation, venue and other reasonable travel and administrative expenses need to be clear. The intangible costs of attendance and anxiety factor heavily in decisions.

Any new code would need to apply punitive measures, including heavy penalties, if either party is vexatious in their claim, or ignores or disrupts the proceedings of the mediation.

VACC Recommendation

VACC recommends legislated punitive measures apply to any stakeholder who does not commit to mandatory mediation under a new automotive industry franchise code.

VACC offers our offices as a location for Victorian-based dealer mediations to be held.

Implementation

Q 30. If an automotive code is implemented, should it apply to a broader category of vehicles, rather than just new cars?

VACC notes that the Department indicates in the RIS discussion paper that it is intended that '*only the arrangements between new car dealers and manufacturers are being considered in this Regulation Impact Statement (RIS)'*.[51] VACC and its national body, MTAA are united in their view that while the concerns of new car retailers are of critical importance and should be addressed as a matter of priority, that any solutions must equally apply to motorcycle, car rental, automotive repairers, marine powered products, and farm machinery franchised retailers who invariably experience the same concerns, albeit with some subtle differences[iii]. VACC will further pursue the issues facing other franchise automotive industry participants in another forum. For the purposes of this RIS, VACC has solely focused on the issues requested within the TIS Terms of Reference. The issues raised during recent investigations into the new car market which impact consumers can be applied to other automotive industry sectors. Consumers will benefit from an automotive code covering all automotive sectors.

VACC would also prefer not to see an automotive industry code as a schedule to the existing Franchising Code. VACC acknowledges that whilst dealers would automatically continue to enjoy the franchising protections and any future amendments to the Code, a proposed schedule would still not be specific, or robust enough to deal with the might of the manufacturers.

VACC Recommendation

VACC and MTAA recommend that government should consult further on the development of additional enhancements to the Franchising Code to assist other industry sectors.

Q 31. Are there any practical difficulties associated with only applying an automotive code to new car dealers? For example, are there franchise agreements that cover both new cars and motorcycles?

Commercial vehicle and motorcycle franchise agreements mirror car franchise agreements. This cannot be argued by any manufacturer or stakeholder. In fact, many new car dealers have franchises that are either commercial vehicle, farm machinery or motorcycle-based businesses. Many dealers also invest in, or own, independent aftermarket repair or service franchises.

[51] Regulation Impact Statement - Franchise relationships between car manufacturers and new car dealers

Applying an automotive code for new car dealers only will create potential confusion in the retail market as consumers own multiple automotive products and have expectations that levels of service would be consistent across the automotive retail and repair industry. VACC and MTAA are well versed in issues of other sectors such as motorcycles, commercial vehicles, car rental operators and automotive repair franchises who have similar or same type of issues emerging from their agreements.

[ii] MTAA Submission to the Regulation Impact Statement on dealing with Franchise relationships between car manufacturers and new car dealers

[iii] MTAA Submission to the Regulation Impact Statement on dealing with Franchise relationships between car manufacturers and new car dealers