

VACC's response to The Treasury's Automotive Franchising: Discussion Paper, August 2021

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About the Victorian automotive franchise dealer members represented by VACC

The Victorian Automotive Chamber of Commerce (VACC) is the peak industry body representing automotive franchise dealers in Victoria. They include the new car, commercial vehicle, motorcycle, car rental, outdoor power-equipment, farm, and industrial machinery sectors.

VACC provides Secretariat services to the following VACC franchise dealer related Executive Committees:

- Victorian Automobile Dealers Association (VADA)
- Farm and Industrial Dealer Machinery Association (FIMDA)¹
- VACC Motorcycle Industry Division (MID)
- Commercial Vehicle Industry Association of Victoria (CVIA)

The membership of VACC's franchise dealer Executive Committees is diverse. They span from single franchise operators through to family run entities and listed companies. Franchisors, distributors or Original Equipment Manufacturers (OEM) are not represented on VACC's franchise dealer Executive Committees. Franchise dealer policy is created by franchise dealers actively engaged with VACC and other industry committees. It is VACC's view that franchise dealers provide direct and meaningful insights into key regulatory and policy challenges facing the industry and it is their views expressed and represented in this submission.²

VACC works closely with its national body, the Motor Trades Association of Australia (MTAA) in developing its state and national industry policy positions.



¹ FIMDA also counts amongst its membership participants of the Outdoor Power and Equipment sector.

² VACC , Committees, Boards & Governance (2021)<<https://vacc.com.au/About-us/Committees-Boards-Governance>> [1].

1. Executive Summary

VACC, and its franchise dealer divisions, welcomes the opportunity to respond to the Treasury's *Automotive Franchising: Discussion Paper August 2021* ('discussion paper'). The VACC franchise dealer divisions have reviewed the paper and provided the imprimatur for VACC's commentary for the consideration of Treasury. VACC seeks strengthened franchising protections on behalf of its 1,141 motor vehicle dealer members.³

VACC considers the release of the Treasury's discussion paper as a milestone in VACC and MTAA's longstanding advocacy for specific automotive industry franchise protections, applied to the entire automotive retail franchise sector.

VACC is indebted to several courageous franchise dealer members – both current and ex-dealers – from across all franchise sectors who have provided sworn, in camera testimony to many government inquiries, including the Australian Competition and Consumer Commission's (ACCC) *New Car Retailing Market Study 2017, Fairness in Franchising* and the *Joint Parliamentary Committee Inquiry into the effectiveness of the Franchising Code*.

VACC franchise dealers wish to advise Treasury that most franchise dealers have no intention, nor desire, to escalate conflicts with their franchisor. VACC franchise dealer members seek harmonious and constructive interactions with their respective franchisors.

It is no surprise, and no accident, that market leading franchisors have more profitable, and often more content businesses in their dealership networks. Such franchisors work collaboratively with their dealer networks to reach business decisions based on trust. This was confirmed by two dealer surveys undertaken by VACC in 2018.⁴ The consumer value prospect is also heightened through better business franchisor-franchisee practices that focus on expedient product issues resolution that contributes to a greater customer experience.

VACC and MTAA reiterate their united policy positions in their respective responses to the 2019 Department of Industry, Innovation and Science review: *'Regulatory Impact Statement: Franchise relationships between car manufacturers and new car dealers'*. That position was, and remains, that commercial vehicle, motorcycle, farm, and industrial machinery franchise dealers⁵ must be afforded the same legislative protections as new car dealers.⁶

The evidence shows very little difference between the issues faced by new vehicle dealerships (culminated in the creation of the new car dealer specific Part 5 to the Franchise Code) and those issues faced by farm machinery, motorcycle and commercial vehicle dealerships. This is highlighted in six examples detailed in subsequent sections of this submission.

The sophisticated business models, capital outlays, tooling requirements, and the fact all vehicle manufacturer operations are controlled by overseas parent companies, dictates that the separate, transparent and automotive industry specific schedule that became operational from 1 July 2021 must apply to all automotive franchise dealer sectors. The most recent schedule (Parts 5 and Parts 6) include definitive terms that must be revisited to include dealerships from the commercial vehicle, motorcycle, farm and industrial machinery franchised dealer sectors.

There are no quantifiable, nor qualifiable differences to suggest those operating commercial vehicle, motorcycle, farm and industrial machinery franchised dealerships are impacted to a lesser degree by franchisor transgressions of the Code. The impacts on business, the community and consumers are the same. These impacts are amplified in rural Australia where those same dealers are often the largest employer, biggest contributors to community groups and employers of new apprentices.

³ Approximate number of VACC member sites who are either new car, truck, farm machinery and motorcycle franchise dealers.

⁴ VACC Cyber car survey & VACC Franchise and Oil Code Survey (2018).

⁵ VACC, Regulatory Impact Statement: Franchise relationships between car manufacturers and new car dealers, (2019), 5 [5].

⁶ MTAA, Regulatory Impact Statement: Franchise relationships between car manufacturers and new car dealers, (2019) https://www.mtaa.com.au/images/docs/submissions/2019/MTAA_Dealer_Manufacturer_RIS_Submission.pdf 3 [5].

VACC views the exclusion of commercial vehicle, farm machinery and motorcycle dealers from the full suite of franchise protections as being illogical and discriminatory against what amounts to half of the entire motor vehicle retail sector.⁷

With regard to further obligations such as pre-contractual arbitration, VACC fully supports this notion. The parameters for resolving disputes related to unfair contract terms, contracts taken under a take-it-or-leave approach and/or breaches of the Franchising Code continue to be too high and resource intensive for dealers to take action on with their offshore, multinational franchisor.⁸ This is a whole of automotive franchise dealer issue. VACC believes mandated binding pre-contractual arbitration would act a deterrent to franchisors seeking to exert unfair power over their franchisees.

Key responses to Treasury's discussion paper:

1. The single most crucial outcome for VACC members is the inclusion of other automotive industry franchisee sectors. Motorcycle, commercial vehicles and agricultural machinery franchisee dealers should be appropriately recognised and included in automotive dealer specific reforms already enacted. The following submission reflects this priority.
2. VACC does not believe there is currently a need for a specific standalone automotive code of conduct. However, if there are failures in reforms and remedies, or other substantial matters, including unforeseen conduct or behaviour, VACC reserves the right to call for a specific automotive code or other legislated solutions.
3. VACC believes the reformed Franchising Code, including Part 5 and the governance processes underpinning it, now provides the opportunity to address unintended consequences of the reformed Code and the failure of existing remedies and reforms to be actioned in a timely manner.
4. VACC supports Option 1, as outlined in the discussion paper to *'Amend the Franchising Code and its automotive-specific provisions when required.'*
5. VACC acknowledges the significant contributions and work undertaken in developing complementary policy and regulation – including the class exemption for collective bargaining, upcoming changes to Unfair Contract Terms (UCT) and a revised, more meaningful Franchising Code penalty regime. All franchisees should qualify for UCT protections.
6. VACC supports reforms that underpin dealer rights to an uninterrupted and single franchise or agency agreement that includes the provision of all elements that a typical franchise dealer supports (e.g., new and used sales, finance, service and parts). A move to an agency agreement should not see a franchisee relinquish any of those operational elements or result in multiple agreements running concurrently nor permit franchisors to use an agency agreement to segregate those elements via ancillary agreements.
7. VACC supports amendments to the Franchising Code that will see the definition of a new vehicle dealership, and a new motor vehicle, being consistent with State based legislation, the *Road Standards Act 2018* (Cth) and the *Franchising Code 2014* (Cth) itself.
8. VACC supports the inclusion of mandatory binding pre-contractual arbitration.

2. Previous franchising code reviews

VACC and MTAA have called for a strengthening of the Franchise Code for the whole automotive franchise sector since 1998 and responded to all inquiries and reviews announced by government. It is a sad reality that some of the actual, and proposed, changes to the Franchising Code have arrived too late for some dealers, resulting in catastrophic losses as a consequence of a weak regulatory environment.

⁷ MTAA Directions in Australia's Automotive Industry (2021) 20.

⁸ AADA, Government Response to the Fairness in Franchising Report (Media release 21 August 2020) [3].

When the Franchising Code was initially introduced in 1998, the aim of the regulation included “... addressing the power imbalance between all franchisors and franchisees” and raising the standards of conduct in the franchising sector without endangering the vitality and growth of franchising.” Subsequent amendments to the Franchising Code have attempted to improve the Code with this in mind. Further, it is VACC’s position that the inclusion of the obligation to ‘act in good faith’ should be a continuance of achieving the Codes stated objectives.⁹

The Franchising Code, to some extent, was amended with between 2008 and 2010 with the intention to address the power imbalance between franchisee and franchisor. During this period, seeking protections under the Code was often viewed “David facing off against a group of Goliaths”.¹⁰

In its 2013 submission to the Wein Review, MTAA displayed tremendous initiative in developing a draft version of an updated Franchising Code – providing copies to the then Department of Industry, Innovation, Science, Research and Tertiary Education for its review and comment.¹¹ Many of the key recommendations contained in the draft code have been adopted in the 2020 Franchising Code amendments. However, a key omission is coverage and protections for all motor vehicle dealer franchises, as amended by the *Competition and Consumer (Industry Codes-Franchising) Amendment (New Vehicle Dealership Agreements) Regulation 2020*.

Identical to new car dealers, many franchise dealers from the commercial vehicle, motorcycle and farm and industrial machinery sectors will carry many millions of dollars’ worth of parts in stock and inventory. These are parts that are needed in stock for: counter sales to members of the public, account sales (to other, independent, workshops and collision repairers, freight companies and farmers for example), and, as workshop/service ‘consumables. Many of the large dealership groups will have much larger inventory and can be parts suppliers themselves to other, smaller dealerships and to other agri businesses.¹² That investment in inventory must be protected.

3. The Value of Automotive Imports in Australia

Data sourced from the Department of Foreign Affairs and Trade indicates that approximately half of new vehicles / machinery imported to Australia is retailed by franchises from the commercial vehicle, motorcycle and farm machinery sectors.

Category	2019/20 (\$000)	2018/19 (\$000)	Percentage change
Agricultural machinery (excl tractors) & parts	1,341,835	1,315,470	2.0
Tractors	689,510	808,795	-14.7
Passenger motor vehicles	19,093,022	21,573,858	-11.5
Goods vehicles	8,074,974	10,571,717	-23.6
Other road motor vehicles (incl bus, truck)	438,708	746,721	-41.2
Vehicle parts & accessories	2,956,019	3,244,092	-8.9
Motorcycles & cycles	1,220,785	1,186,084	2.9
Trailers & semi-trailers	931,834	1,017,777	-8.4
TOTAL	34,746,686	40,464,514	-14.1 ¹³

4. The importance of fairer franchising reforms for farm machinery, industrial machinery, motorcycle, and truck franchise sectors

Since 1998 VACC has lobbied the Australian Government on the ineffectiveness of the Franchising Code of Conduct (the Code) for all its franchise dealer members.

A new automotive section, Parts 5 of the Franchising Code of Conduct (Franchising Code) 2014 came into effect on 1 June 2020.¹⁴ Part 5, and Part 6 of the Franchising Code is specific to new car

¹⁰ Ibid 12 [2].

¹¹ Ibid 17 [5].

¹² Ibid 16 [6].

¹³ MTAA (n 7) 20.

¹⁴ Competition and Consumer (Industry Codes—Franchising) Regulation 2014.

dealers only, and addresses many longstanding concerns of multiple automotive industries.¹⁵ As previously mentioned, the new regulations do not apply to all franchise motor vehicle dealerships,¹⁶ but only those who fall within a new definition of a "new vehicle dealership agreement".¹⁷ Using the definitions of the franchising code, this is taken to mean that a vehicle dealership agreement relates to a dealership that predominantly deals in new passenger vehicles or new light goods vehicles (or both). VACC refers to this further on in this document.

VACC and MTAAs have never understood why the commercial vehicle, motorcycle, farm, and industrial machinery franchised retailers were never considered to be included in this amendment despite these sectors experiencing the same issues as new car dealers with regard to their franchisee-franchisor relationship.¹⁸

In relative terms these groups experience the same concerns and business pressures, albeit with some subtle differences.¹⁹ The reason for this policy distinction is not clear, and the insertion of the word "predominantly" in the schedules' definitions is likely to be closely scrutinised by those franchisors seeking to avoid the application of the new regulations.²⁰

In 2019, the ACCC's submission *Regulation Impact Statement – franchise relationships between car manufacturers and new car dealers* reported that during the research phase of its market study a number of systemic problems were brought to light that provided valuable insights into the automotive franchise sector.²¹ Those issues are analogous with what transpires across the entire automotive retail franchise sector.

Not the least were issues that contributed to imbalances in bargaining power relating to:

- Dealers being offered contracts on a 'take-it-or-leave-it' basis.²²
- Significant upfront capital investment involved in establishing new dealership facilities, with estimates provided in the range of \$6 to \$20 million,²³ depending on the metropolitan or regional location of the dealership.



15 MTAAs submission to Treasury 2021.

16 Minister for Industry, Science and Technology for the Treasurer, Explanatory statement Competition and Consumer (Industry Codes—Franchising) Amendment (New Vehicle Dealership Agreements) Regulations 2020 (legislation.gov.au) (2020) s1 Part 5 [46].

17 Competition and Consumer Code Division 2 s 4.

18 VACC reply to the 'Regulatory Impact Statement Franchise relationships between car manufacturers and new car dealers' (2019) 5 [5].

19 MTAAs Submission to the 'Regulation Impact Statement on dealing with Franchise relationships between car manufacturers and new car dealers' (2019) 4 [4].

20 Stephen Giles et al 'Motor vehicle changes to Franchise Code effective now' (2020)

<https://www.nortonrosefulbright.com/en-au/knowledge/publications/6e4172aa/motor-vehicle-changes-to-franchise-code> [3].

21 ACCC, 'Regulation Impact Statement – franchise relationships between car manufacturers and new car dealers' ACCC submission (2019) 1 [4].

22 NSW Small Business Commission Submission to the ACCC market study (2016) 2.

23 IBISWorld Industry Report G3911 Motor Vehicle Dealers in Australia (2017); Fennessy's submission to the ACCC market study, (2017) [2].

- The length of the initial, and subsequent, tenure of dealership agreements is typically of a short duration. In most cases it is between one to five years and often does not enable the dealer to recoup the capital they have invested before the end of the relevant term. Over time dealer franchise agreements are becoming shorter in duration, and a move to an 'agency model' will see agreements shortened even further; and down to 12 months.
- Dealers do not have security of tenure and in most cases renewal of the agreement is at the absolute discretion of the manufacturer.²⁴

It is VACC's view that the ACCC overlooked the same systemic issues that are experienced by franchise dealers in other sectors and has effectively created different franchising hierarchies for franchisors to exploit, to the detriment of franchisees.

5. What previous franchise dealer surveys have told us?

The most recent survey of VACC's 1,141 franchise dealers took place in 2018, with the data from that survey used to inform VACC's response to the Australian Government's *Parliamentary Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct*.²⁵

The survey reaffirmed that there was a heightened level of dealer discontent regarding how powerless franchise dealers felt under the then Code. This was reinforced via testimony from former franchisees who were not sufficiently resourced to test their contracts against a well-resourced manufacturer, and ultimately, could not renew their agreement. Franchisees have also argued that there is a strong power imbalance embedded within their agreements that is weighted heavily in favor of the franchisor.²⁶

Evidence obtained via the VACC Franchising Code of Conduct Survey is as relevant today as it was in 2018 for commercial vehicle, motorcycle, farm, and industrial machinery franchised sectors for issues relating to the disclosure of the contractual rights, termination rights, capital expenditure and geographical exclusivity. Findings from the 2018 survey revealed that:

- More than one-third (36 per cent) of respondents reported they did not receive full disclosure of all contractual rights in their agreement, and consequently were unaware of their full rights and obligations.
- More than half (59 per cent) reported that they were unaware of their rights upon termination.
- More than half (54 per cent) did not have a clear understanding of the obligations and entitlements of each party at the end of the franchise term.
- Over one quarter (26 per cent) reported that their agreements did not include statements regarding geographic exclusivity, (i.e., defined primary market areas (PMAs)).
- Of those franchisees that did have PMA statements in their agreement, 36 per cent reported that the PMA allocations had been changed without their consent or agreement, and with no compensation or consideration of key performance indicators.

The survey results indicate that the disclosure and understanding of contractual rights and obligations remains 'patchy' within agreements relating to the entire automotive industry.

Furthermore, there was a general lack of understanding of respective rights and obligations by franchisees, often due to the complexity of wording contained within agreements.

In commentary received by VACC at the time of the survey, a prominent farm machinery Dealer Council advised that in a 2016 review of their Dealer Agreements, substantive changes were made to agreements that had a watering down effect on of the dealer's rights, which adversely

²⁴ ACCC, Regulation Impact Statement – franchise relationships between car manufacturers and new car dealers ACCC submission, (2019), 1-2 [8-12].

²⁵ Steve Bletsos, VACC Submission to Parliamentary Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct (2018).

²⁶ Ibid 7 [1-9].

impacted the value of their dealerships.²⁷ That group has now been subject to a national dealer rationalisation program.

6. Should the Franchising Code and its automotive specific provisions be amended when required or a standalone automotive Franchising Code be developed?

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

VACC views the recent amendments to the Franchising Code to be a watershed moment for franchise new car dealers and thanks the Australian Government for introducing the automotive specific provisions via Part 5 and Part 6.

VACC is also of the view that the amendments should always remain flexible enough to cater for a changing business model and be open to ongoing scrutiny and review by all stakeholders. This includes the rights of those dealers who fall under an agency model as defined in Schedule 11 of the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*.

There is a reasoned argument from the commercial vehicle, motorcycle, and farm and industrial machinery franchised retailers that the new provisions do not adequately address franchise-franchisor issues as those new amendments have not captured all affected automotive retail franchisees .

6.2 Option 2: Establish a standalone automotive franchising code

It is VACC's view that whilst a standalone code would be an optimal outcome, the reality is that the new amendments must be given every opportunity to succeed. VACC welcomes the inclusion of voluntary principles as mandated requirements in the announced reforms, including reforms that allow for appropriate time to recoup significant capital expenditure, the inclusion of 'agency' type agreements, and proper compensation arrangements.

The new reforms have already achieved what a standalone code may take some time to overcome. Additionally, and the new reforms, with binding pre-contractual arbitration, will address concerns of multi-national manufacturers not following voluntary principles²⁸, as well as a streamlining of the dispute resolution framework under the Australian Small Business and Family Enterprises Ombudsman.²⁹



27 Dealer Council correspondence to Australian Franchisor. Available upon request 2016.

28 MTAA Media release Franchising reforms foster the potential for improved relationships (June 1, 2021) [4].

29 Ibid [5].

VACC stipulates that as a graduated response, if there are failures in reforms and remedies or other substantial matters, including unforeseen conduct or behavior, then it reserves the right to call for a specific automotive code or other legislated solutions. VACC anticipates any need to exercise this right will be established as part of the input to scheduled reviews into the effectiveness of reforms in approximately three years.³⁰

7. Definitions in the Franchising Code are not consistent with other Commonwealth or state-based legislation

The rights of dealers who fall under an agency model as defined in Schedule 11 of the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* must also be addressed specifically to include all elements of a dealership (e.g., new and used sales, parts, service, finance).

The definition of a new vehicle in the Franchising Code should be amended to reflect the definition as stated in Section 78 (5) of the *Road Vehicle Standards Act 2018*.

The definition of a new vehicle dealership agreement in the Franchising Code should be changed from

Current Motor Vehicle Dealership Agreement definition (Division 2, Section 4):

a motor vehicle dealership agreement relating to a motor vehicle dealership that predominantly deals in new passenger vehicles or new light goods vehicles (or both),
to

Recommended Motor Vehicle Dealership Agreement definition:

a motor vehicle dealership agreement relating to a motor vehicle dealership that predominantly deals in motor vehicles as defined in this Code, that has not been used in transport on a public road in or outside of Australia, other than for reasons legislated in Section 78 (5) (a)-(f) of the *Road Vehicle Standards Act 2018 (Cth)*.

The definition of a new vehicle dealership in the Franchising Code should be changed from

Current Motor Vehicle Dealership definition (Division 2, Section 4):

(a) means a business of buying, selling, exchanging or leasing motor vehicles that is conducted by a person other than a person who is only involved as a credit provider, or provider of other financial services, in the purchase, sale, exchange or lease; and

(b) includes a business of selling motor vehicles that is conducted by a person (for the purposes of this code, the franchisee) who sells the motor vehicles as an agent for a principal (for the purposes of this code, the franchisor).

to

Recommended Motor Vehicle Dealership definition:

- means a business of buying, selling, exchanging or leasing motor vehicles that is conducted by a person other than a person who is only involved as a credit provider, or provider of other financial services, in the purchase, sale, exchange or lease; and
- includes a business of:
 - (i) selling motor vehicles that is conducted by a person (for the purposes of this code, the franchisee) who sells the motor vehicles as an agent for a principal (for the purposes of this code, the franchisor);
 - (ii) selling motor vehicle parts for motor vehicles sold by the business;
 - (iii) servicing and repairing motor vehicles sold by the business; or
 - (iv) offering or carrying out any other service at the direction of the franchisor.

³⁰ MTAA advice to VACC August 2021.

8. Response to key questions

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

The new *Competition and Consumer (Industry Codes-Franchising) Regulations 2014 (Cth)* was registered as a legislative instrument on 22 June 2020.

Key limitations with the reforms, from the perspective of commercial vehicle, motorcycle, farm, and industrial machinery franchised sectors, is an absence of complete protections afforded to those sectors as announced in the new regulations. The protections included have not been included for all franchise dealers, other than new car dealers. The new Code sections Part 5 and Part 6 make an announcement of greater legislative protections. The new protections in Part 5 and 6 must be made available to all commercial vehicle, motorcycle, farm, and industrial machinery franchised dealers.

They specifically are:

- **Mandatory principles for new Dealer agreements**

Addresses the concerns of franchisees whose overseas-based franchisor ignores voluntary arbitration.

- **Inclusion of Agency Agreements under the Code**

Dealers that are appointed as a manufacturer's agent for new vehicle sales are now expressly protected by the Code.³¹

- **Change in end of term obligations**

s 47 – 48 of the Code addresses the bilateral termination, terms, and renewal protocols of a franchise agreement.

s 49 (3) states that the parties must cooperate to reduce the franchisee's stock of new vehicles and spare parts over the remaining term of the agreement.

- **Change in Capital Expenditure requirements**

The new Part 5, s 50, makes the announcement that a franchisor must not require a franchisee to undertake significant capital expenditure in relation to a franchised business during the term of the franchise agreement.

- **Punitive measures for transgression**

VACC supports the increase in available penalties under the Code for those franchisors who undertake systemic breaches of the Code.

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

The magnitude of the problem is stretched across the entire VACC membership base that supports approximately 501 commercial vehicle, motorcycle, farm, and industrial machinery franchised dealers.³²

Franchise dealers in these sectors are exposed to the same inequitable risks and liabilities – from an operational and transactional perspective – as those experienced by new car dealers. Those pressures include unrealistic capital expenditure requirements, unreasonable target setting, and over or under supply of stock.

³¹ ACCC, Changes to the Franchising Code of Conduct - July 2021,(2021) < Changes to the Franchising Code of Conduct - July 2021 | ACCC>.
³² VACC (n 3).

8.2.1 Qualitative examples are provided in the five examples below:

Example 1 – see Appendix 1

In September 2020 the ACCC issued correspondence to Australian motorcycle dealers who retail quad bikes. It clearly announced that select OEMs had threatened nonrenewal of a motorcycle dealer's franchise agreement if that dealer was to take on another brand (one that complied with new safety standards).³³ Dealers have alleged that the Japanese manufacturing giant Yamaha Australia has been foremost in this issue.³⁴

It was the ACCC's view that such an approach from franchisors may constitute anti-competitive behavior, in contravention of the *Competition and Consumer Act 2010 (Cth) (CCA)* and the *Franchising Code of Conduct*.

Example 2 – see Appendix 2

In September 2018, Husqvarna Australia Pty Ltd, the Australian representative of the Swedish motorcycling giant, was subject to an enforceable undertaking by the ACCC under clause 17 (2) 'Disclosure of materially relevant facts' of the Franchising Code.³⁵

Husqvarna undertook to:

- Offer all new dealers a new agreement that complies with the Code and does not contain unfair terms.
- Provide all existing dealers a written notification, in a form approved by the ACCC, that the Code applies to their current dealer agreement, as well as the opportunity for existing dealers to transition to the new agreement.
- Not enforce any of the unfair terms in the old agreement.
- Provide all new and existing dealers a disclosure document and any other documents required by the Code, and.
- Implement and maintain an ACL training and compliance program for a period of three years.³⁶



33 ACCC Correspondence to motorcycle dealers (2020) ACCC ref CS1050020 2020 [6].

34 Peter Hunt, Yamaha threatens to (2018) cancel ATV franchises if dealers sell CF MOTO quad bikes', Weekly Times, (8 September 2020).

35 Mick Keogh, "Franchising and the ACCC" (Speech, Franchise Council of Australia Law Symposium, 2018) [36].

Husqvarna Australia is one example of many OEMs within the commercial vehicle, motorcycle and farm and industrial machinery sectors who have inadvertently or advertently included those, or similar type terms in their dealership agreement.³⁷

Example 3

Honda Australia MPE announced it would stop selling quad bikes in Australia from 10 October 2021, due to new Australian *Consumer Goods (Quad Bikes) Safety Standard 2019 (Cth)*. The new standard requires all quad bikes to be fitted with rollover protection measures at point of sale by 10 October 2021.³⁸ The manufacturers were convinced there was evidence to support negative outcomes associated with the new safety standard for quad bikes (i.e., roll over bars). Earlier in 2020, Polaris and Yamaha announced they would also stop selling quad bikes in Australia if the new regulation upheld this change, which it has.³⁹ Dealers were prepared to retail those quadbikes with factory modifications but were unsuccessful in their negotiations with the manufacture to have them fitted. Polaris has now exited the Australian market for quadbikes.

Many Victorian based Honda, Yamaha and Polaris dealer franchisees had acquired, or built, their franchises based on quad bikes significantly adding to their business model and income streams. This issue will have a profoundly negative effect on franchise dealerships in rural Victoria, where the sale of road bikes can be negligible in comparison to a metropolitan dealership.

The vehicles nominated by those franchisors to replace quad bikes, known as side-by-side vehicles,⁴⁰ do not bring a comparative amount of retail sales volume, subsequently placing the dealer at an immediate disadvantage. Further, side-by-side vehicles are more expensive, making them a cost prohibitive alternative to quad bikes.⁴¹ This coupled with breaking the generational psyche of farmers who have favoured quad bikes, to now move to side-by-side vehicles means dealers are confronted with a difficult situation with dire consequences for many dealers.

VACC understands the manufacturer's decision to no longer supply quad bikes to the Australian market. VACC also acknowledges that the manufacturer is entitled to supply to the local market whatever product/s they believe best suit the local conditions. However, a lack of adequate compensation to the dealers, by the manufacturer, regarding the immediate loss of revenue due to the product being withdrawn remains a serious issue.

Dealers have lost market share to other brands who have continued retailing quad bikes. For example, CFMoto has enjoyed record sales of their product. Dealers who had retailed, serviced, and repaired quad bikes had invested heavily in franchisor mandated training, employment and infrastructure development that supported the sales of quadbikes. Dealers were not part of the decision-making process to withdraw this type of vehicle from the Australian market; however, they suffered because of this withdrawal – both economically and in the overall value of their businesses. There was no support offered by the OEM to transition the dealership away from this product line. Instead, they were told it was a *fait accompli*, and left to manage the business fallout on their own.

Example 4

A prominent farm machinery dealer based in remote Victoria had their franchise agreement terminated by a US- based franchisor in 2016 – without explanation. The agreement with the

36 Husqvarna Group , Dealer Agreements, the Franchising Code of Conduct and our ACCC Undertaking (2018).

37 More can be supplied upon demand and in camera.

38 Honda News , Honda is set to exit the ATV Market in Australia (Media 20 April 2021 <www.motorcycle.honda.com.au>[1].

39 ABC News ,third quad bike manufacturer pulls out of Australian market due to government regulations, <<https://www.abc.net.au>> (2020) 2-3.

40 Honda News (n 39) [5-7].

41 Ibid 2-3 [20-26].

franchisor allowed for a 30-day notice of termination. The dealer had been a franchisee for almost 30 years.⁴²

The lack of 'end of term arrangements' saw the franchisor and franchisee fall into dispute regarding excess stock parts that were part of the dealer's inventory. A period of 11 days' notice was provided by the franchisor, to the franchisee to have the parts repackaged and processed for return to the franchisor. Further, the franchisee had a complex piece of farm machinery known as a 'Seeder Bar'. This piece of machinery would end up being financed by the dealer under the dealer floorplan finance as the franchisor refused to take the stock item back. This cost the dealer many thousands of dollars.

The franchisor, when requested to buy back the Seeder Bar from the dealer, advised that *this unit belongs to the franchisee so I suggest you get busy and go find a buyer, it will not be the franchisor.*⁴³

Example 5

History shows a trail of a lack of good faith shown by franchisors towards its franchisees in automotive retail franchising disputes. Well before the recent disaster that saw Holden exit the Australian market., VACC has observed many examples of where a lack of good faith between franchisor – franchisee was evident.

There is a case law precedent in the 2001 landmark car rental case of *Bamco Villa Pty Ltd v Montedeen Pty Ltd*,⁴⁴ it was found by Mandie J that a franchise agreement has an implied term of good faith and fair dealing, and that the duty of good faith is a legal incident of a franchise agreement.

Further, good faith requires a contracting party to act in good faith, not only in relation to the performance of the franchise contract, but also in the power conferred by the contract as found by Finkelstein J in *Garry Rodgers Motors (Aust) v Subaru (Aust) Pty Ltd*.⁴⁵

Example 6 – see Appendix 3

In September 2020 a Victorian Western Districts farm machinery dealer was informed of their termination after 20 years as a Goldacres Franchise by letter in the mail. This was after a phone call the advising of the letters pending arrival. The franchise was handed over to another local dealership.⁴⁶

The six examples are provided as a comparator to highlight how the issues of new car dealers are also analogous to other automotive franchise sectors. The examples provided here also highlight the approach of some franchisors to deviate from their obligation to act in good faith with their dealership network.

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

In the immediate short term, the amendments to the Franchising Code active from July 1, 2021 are the most effective. Supported by binding pre-contractual arbitration and allowing for the benefits of the Collective Bargaining process to be connected, the current amended code will be of immediate relief for new car dealers. If common sense prevails, this will also be related to commercial vehicle, motorcycle, and farm machinery dealers.

The introduction of a standalone code may require a lengthy introductory process that will see franchisees in the commercial vehicle, motorcycle, farm, and industrial machinery franchised sectors exposed to franchisors to act unconscionably. For example, ongoing communications sent by franchisors who evade their obligations under their current agreements or using dealer bulletins to unilaterally introduce changes to agreements.

42 Details of franchisee and franchisor have been redacted. Evidence available on demand.

43 Ibid.

44 [2001] VSC 192.

45 (1999) ATPR.

46 Letter from Goldacres to Franchisee advising of immediate termination (see appendix 3).

VACC has received copies of dealer bulletins issued by franchisors with misleading and unilateral statements that are favorable to the franchisor. These include:

- *“These Standard Terms and Conditions may be changed at the Company’s discretion from time to time, or may be modified by special programs applicable to particular products and are to be read in conjunction with the Company’s Dealer Agreement”*⁴⁷
- *“It is expressly understood and agreed that the xxxx reserves the right to modify the dealer manual, the Dealer Operating Parts Guide, the Warranty Manual and the Dealer standards unilaterally at its sole discretion”*.⁴⁸

It is VACC’s view that unilaterally changing terms and conditions to a dealer agreement via a dealer bulletin is unfair and obstructive to the relationship between the franchisor and franchisee.

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

8.4.1 Option 1: Pre-contractual arbitration model

VACC supports the introduction of compulsory, binding arbitration as a vital element that must be included. Whether it be via an amendment to the current Code or in a stand-alone code, VACC supports this model. This can be accommodated by industry-led agreement within the construct of provisions in the sugar and dairy Codes.

The access to mandatory binding arbitration will allow one of the parties to bring a dispute to an independent third party for a determination, and both parties are bound by the arbitrator’s decision.⁴⁹ This is a substantial gain for franchisees. Currently arbitration is permitted but can only be adopted if both parties agree to be involved.⁵⁰

Franchise dealers are not resourced to enter long, drawn out legal actions. Further, the current legal system does not create an equal playing field in franchisee-franchisor disputes. This is evidenced by General Motors refusing a request from the then Minister responsible for industry, Senator the Hon Michaelia Cash, to attend arbitration with Holden dealers.

8.4.2 Option 2: Arbitration model used in the Media Bargaining Code

As stated, VACC believes that any model can be accommodated by industry-led agreement within the construct of provisions in the sugar and dairy codes.

8.4.3 Option 3: Industry-led improvements to dispute resolution

VACC supports the theory that there may be certain types of disputes that can only, or should only, be determined or enforcement through the courts.

VACC does not support the creation of an industry-led scheme similar to the Mandatory Motor Vehicle Service and Repair Information Sharing Scheme. This is due to the possible outcomes, be they intended or not, will not result in natural justice for dealers when engaging with franchisors in a low-level dispute resolution. The hurdles and obstruction created by stakeholders who preside on the Mandatory Motor Vehicle Service and Repair Information Sharing Scheme make it an unattractive option for franchise dealers.

47 Available to the reviewer upon request.

48 Ibid.

49 Evan Stents et al , ‘HWL Ebsworth Lawyers Government releases discussion paper on Automotive Franchising’(Webpage 2021) <marketing.e-communications@hwlebsworth.com.au> [5].

50 Ibid.

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

- Terms dealing with tenure. In particular, whether the term of the agreement has sufficient tenure to allow for a return on investment.
- Terms dealing with capital expenditure. Whether any requirement for capital investment is unreasonable.⁵¹
- Terms dealing with PMA.
- Terms dealing with franchise or stock being advertised on digital selling platforms without dealer consent.
- Terms dealing with exclusion periods for individual participation in industry.
- Terms dealing with multi-branded franchise operations.

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

When a franchisor proposes a new dealer agreement, it must be mandatory that they participate in a consultation and negotiation process with dealers via their Dealer Council. This is consistent with a franchisor's obligation to act in good faith in relation to any dealing or the negotiation of a proposed agreement pursuant to section 6(2)(b) & (c) of the Franchising Code of Conduct.

Some franchisors take the view that they only need to negotiate with dealers on a 'one-on-one' basis and have no intention to collectively bargain. However, they remain unaware that the 'collective' negotiation approach is consistent with the rights conferred on franchisees to:

1. Collectively bargain over the acquisition of franchise rights under a Collective Bargaining Class Exemption Notice authorised under the *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020* issued by the ACCC.
2. Resolve disputes in the same way if two or more franchisees have the same dispute (see section 40B of the Franchising Code of Conduct).

This proposal also ensures that the franchise agreement that is offered to dealers contains terms that are fair and reasonable. One of the recent changes to the Franchising Code of Conduct is to state that for motor vehicle dealership agreements, a court may have regard for the purpose of determining whether a party has contravened the obligation of good faith, whether the terms of the agreement are fair and reasonable (see section 3A of the Franchising Code of Conduct).⁵²

'Our experience is, in this space, that the large operators, or the people with the power, choose not to, shall we say, play or not to comply if it doesn't suit their business requirements. They simply won't comply unless it's mandatory. In fact, we get told that regularly by multinationals—that, if it's not legislation, decisions will be taken in the head office in the US, Europe or whatever. That's what they tell us.'

*Ms. Kate Carnell, Ombudsman,
Australian Small Business and Family Enterprise Ombudsman, Senate Inquiry
'Driving a fairer deal: Regulation of the relationship between car manufacturers and car dealers in Australia' (2021)*

VACC and members of the Farm and Industrial Machinery Dealers Association, Motorcycle Industry Dealers and the Commercial Vehicle Industry Association Executive Committees are readily available to provide testimony to Treasury to further highlight the issues surrounding the lack of adequate protection afforded to those sectors under the current Code.

⁵¹ Evan Stents, HWL Ebsworth Lawyers, Legal advice to VACC (2021).

⁵² Ibid.

MACHINE

Yamaha threatens to cancel ATV franchises if dealers sell CF MOTO quad bikes

Japanese manufacturing giant Yamaha is threatening to cancel dealers' ATV franchises for an extraordinary reason — if they continue to sell one particular rival brand of quad bikes. Here is what else we know.

PETER HUNT, The Weekly Times

Subscriber only | September 8, 2020 12:20pm



 No go: Yamaha has warned dealers they risk losing their franchise if they sell CF Moto quad bikes fitted with roll bars. Picture: Chloe Smith

JAPANESE motorcycle manufacturing giant Yamaha has threatened to cancel dealers' franchises if they sell CF MOTO quad bikes fitted with operator protection devices, or roll bars.

Dealers have been told they are welcome to consider selling other brands, but not CF MOTO, which to date is the only company selling quad bikes in Australia already fitted with operator protection devices.

One dealer said Yamaha had made the threat to him and several others recently, warning it would not back down on its position of opposing OPD-fitted CF MOTO quad bikes and they risked losing their franchise if they sold them.

However Yamaha franchising manager Troy Bryant said the company's opposition to CF MOTO was long standing and had "nothing to do with OPDs".

Yamaha's bid to block dealers selling OPD-fitted CF MOTO quad bikes, while allowing them to sell other brands, has been referred to the Australian Competition and Consumer Commission.

Yamaha's threat comes as US giant Polaris issued a bulletin warning its dealers not to take on any new quad bike brands, forcing them to focus instead on the company's push to sell side-by-side vehicles.

"Side x Side vehicles are similar to quad bikes and accordingly, before a dealer can take on a franchise to sell any new quad bikes, it needs to obtain Polaris' written consent (per clause 14.1 of the dealer agreement)," the bulletin states.

Appendix 2



6th September 2018

To all our Dealers

Dealer Agreements, the Franchising Code of Conduct and our ACCC Undertaking

As we have foreshadowed in our dealer meetings in recent weeks, Husqvarna Australia Pty Ltd has given an enforceable undertaking to the ACCC regarding our trading relationship.

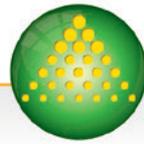
As the relationship between Husqvarna and its dealers is a franchise agreement it is subject to the protections of the Franchising Code of Conduct (FCC).

Husqvarna was notified by the ACCC that our existing agreement with our dealers contains clauses that may breach the Australian Consumer Law (ACL) and FCC.

To address the ACCC's concerns, Husqvarna provided the ACCC with an undertaking which states that, among other things, Husqvarna will:

- offer all new dealers a new agreement that complies with the FCC and does not contain these unfair terms;
- provide all existing dealers a written notification, in a form approved by the ACCC, that the FCC applies to their current dealer agreement, as well as the opportunity for existing dealers to transition to the new agreement;
- not enforce any of the unfair terms in the old agreement;
- provide all new and existing dealers a disclosure document and any other documents required by the FCC; and
- implement and maintain an ACL training and compliance program for a period of 3 years.

You will shortly receive from us a letter with more details and documents as required by the undertaking. This notification is to alert you to this and is also disclosure as required under clause 17(2) of the FCC.



GOLDACRES
Australia's World Class Sprayers

[REDACTED]

[REDACTED]

[REDACTED]

Dear [REDACTED],

In line with our strategic growth plan, Goldacres is constantly reviewing our Dealer network and operations.

Our objective is to create an Australia wide dealer network that best exemplify the Goldacres model.

Due to a recent dealer expansion, unfortunately [REDACTED] will no longer be required by Goldacres as its representative in [REDACTED]

This was not the decision of any one individual, nor was it based on your current performance.

We will keep your parts account open for a period of 3 months, to assist with any ongoing business.

Goldacres would like to thank you for your support as a dealer and wish you well in the future.

If you have any questions please don't hesitate to call me directly.

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