

15 September 2021

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Small and Family Business Division
The Treasury
c/o GPO Box 2013
Canberra ACT 2601

via email: smallbusinessfranchising@treasury.gov.au

Dear Mr Arnold

Automotive Franchising Code of Conduct

Thank you for the opportunity to comment on the proposal to create a separate Automotive Franchising Code of Conduct. General franchising issues have generated over 1,600 enquiries and requests for assistance to this office since the start of 2019. However, we handle very few disputes regarding automotive franchises despite many of the parties meeting our Acts definition of a small business. As such, we offer the below comments based on our experience with the Franchising Code of Conduct (the Code) and the sector:

Separate automotive code

There have been many recent changes to the Code, a number of which directly impact new car franchise agreements. We therefore suggest that it may be appropriate to delay further changes, which could create uncertainty and disruption as parties update systems; consult with lawyers and trusted advisers; and, change their processes. This is particularly pertinent when the current system is yet to be appropriately tested.

Further, were two codes with similar intent to be created there would be a risk of divergence between the codes where changes are applied to one but not the other. This would create further work, uncertainty and red tape for franchisees, franchisors and regulators. As such, we suggest addressing this matter during the next Code review before the Code sunsets.

If the decision is to progress with a separate Code, it should incorporate specific provisions and additional tools to address long-standing concerns outside the reach of the current Code. These include: an inclusive definition of 'vehicle' to include farm equipment, motorcycles and trucks; reasonable opportunity to recover capital expenditure; handling site relocation; 'territory' delineation; the introduction and use of franchisor and Original Equipment Manufacturer (OEM) channels to market; new retail models such as OEM-owned points of presence; new model/stock release strategies; parts and servicing; and end of term goodwill arrangements.

It is open to Government to raise the areas of 'additional utility' that could be included in a separate automotive code with OEMs and to acknowledge that the new existing Code provisions are yet to be fully tested. However, there is still a need for some tangible progress to address the areas of ongoing concerns identified above. Rather than delay action while consultation is undertaken on a potential new Code and/or specific new provisions, the Government could offer the alternative path of seeking

OEM pre-agreement to the arbitration mechanisms recently incorporated in the existing Code. This would, by OEM affirmation (similar to the opt-in mechanism in the Food and Grocery Code), effectively create a mandatory arbitration mechanism for participants in automotive franchise arrangements.

Cover for other vehicle types and agreements

New car franchise agreements typically involve engaging with large multinational manufacturers; high upfront capital investments including specific and expensive fit-outs; geographical territories; and, longer term after-sales interactions with customers. These features can also be found in franchise arrangements in the agricultural machinery, motorcycle and truck markets.

The common element across franchising in these vehicle markets is the power imbalance between the much larger manufacturers and the dealers. As such, we support dealerships in other automotive sectors who face similar power imbalances, high capital investments and longer term after-sales interactions, benefitting from the protections to new car vehicle dealership agreements.

Further, as you would be aware, the automotive market is currently shifting to new models, such as agencies. Amendments to the Code to include more automotive markets should also ensure segmented agency models, for example, where a separate agency agreement is created for the parts or services functions, are captured under the Code.

Arbitration and dispute resolution

Given there have been recent addition of voluntary arbitration to the Code, it would be worthwhile to allow time for this system to be tested before adding extra regulation. Further, in order to have an effective, efficient and well-rounded dispute resolution system, it is important to explore additional options for franchisees to seek to remedy their disputes.

As such, we suggest the creation of a Small Business and Franchising List in the Federal Circuit and Family Court. This would create streamlined processes for small businesses and allow regulators to focus on egregious and systematic breaches of Codes and laws.

The Court List should be a determinative and more timely 'smaller claims' type List in the Federal Circuit and Family Court to handle small business, franchising and industry code related disputes and ACCC enforcement cases where the penalty being sought is commensurate with the jurisdiction. It should be priced to be accessible for all parties, with each party responsible for their own costs, including a filing fee. The Court Book of evidence should be limited and the rules of evidence simplified. The cases should be timed so that they are resolved within one month, ensuring it is an efficient process that adds value and is worth the time and effort of all parties.

This Federal Circuit and Family Court List option should be an alternative to the current method, providing an effective resolution much faster, with stream-lined evidentiary rules and producing a more affordable access to justice than is currently available through the Federal Court of Australia. It will grant greater access to justice by allowing small businesses and franchisees to pursue and defend their own commercial interests, reduce the reliance on ACCC litigation and free the smaller party of the 'cost order gorilla'. This measure would also encourage the ACCC to pursue more responsive litigation with significant, but not the greatest available penalty as the enforcement goal, supporting stronger and more consistent Code compliance activity by the regulator.

The determinative nature of this process would also benefit disputes that our Office administers through mediation, conciliation and arbitration. This is due to the creation of a viable and accessible option for escalation for both parties, which will further incentivise remediation through the Codes dispute resolution process. The creation of such a list within the Federal Circuit and Family Court of Australia would benefit all Commonwealth Industry Codes and small business disputes by strengthening and aligning resolution pathways across different sectors.

It would also help to address the *'gaps in the assistance and dispute resolution ecosystem for Australian small businesses'* highlighted in the McGregor Independent Review of ASBFEO (June 2021). It is a substantial and strategic access to justice reform initiative worthy of support, with benefits across the whole franchising landscape.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Mr Luke Collins [REDACTED]

Yours sincerely

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The Hon. Bruce Billson

Australian Small Business and Family Enterprise Ombudsman