13 September 2021

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

Via email: smallbusinessfranchising@treasury.gov.au

Attn: Small and Family Business Division

FORD AUSTRALIA COMMENTS ON THE AUTOMOTIVE FRANCHISING DISCUSSION PAPER (AUGUST 2021)

Ford Motor Company of Australia Pty Ltd ('Ford Australia') welcomes the opportunity to respond to the Australian Treasury's recently released Automotive Franchising Discussion Paper (August 2021) ('Discussion Paper'), which invites comment from interested parties regarding further regulatory reform in the area of automotive franchising, including whether there is merit in the establishment of a standalone automotive franchising industry code.

Ford Australia further notes this Discussion Paper has been released following recent wide-reaching and significant amendments to the provisions of the Franchising Code of Conduct (the 'Franchising Code') as they relate to automotive franchising relations, effective 1 July 2021, which required substantial amendments to franchise agreements and disclosure documents (in addition to drafting the newly mandated key facts sheet).

KEY TAKEOUT

Ford Australia's view is that there is no merit in further regulation in the area of automotive franchising. A comprehensive suite of legislative changes and accompanying penalty regimes adopted in recent years has sufficiently addressed the issues raised during the recent inquiries into automotive franchising, as well as franchising more broadly.

Ford Australia considers it important that time be given to better gauge and understand the impacts of the new regulation given its very recent implementation. It is entirely appropriate and responsible to pause before the already-scheduled reviews planned for mid-2023 and 2025 which provide the appropriate points to consider whether further reform should be contemplated or is in fact required at all.

1. FORD AUSTRALIA — BACKGROUND

Ford Australia is a subsidiary of Ford Motor Company, founded in Geelong, Victoria, in 1925. The company has operated continuously in Australia for nearly one hundred years. The company designs, engineers, and imports award-winning and best-selling cars, SUVs, light trucks and commercial vans, and carries on the business of marketing, sale and service of these vehicles by way of a network of independent authorised dealers in every State and Territory.

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Australia is a key product development hub for Ford Motor Company, with investment of more than $2.5 billion in research and development in Australia between 2016-2020. More than $500 million will be invested in Ford Australia operations in 2021.

Ford Australia is Australia's largest automotive employer, with a team of more than 2,500 engineers, designers, technical, automotive and other specialists working across the country, including at five key locations in Victoria. Australia-based engineers and designers lead the development of award-winning vehicles sold in more than 180 markets globally, such as the Ford Ranger pickup truck and Ford Everest SUV.

2. THE MARKET FOR NEW VEHICLES IN AUSTRALIA

The Australian new motor vehicle market is widely acknowledged as one of the most competitive in the world with around 55 brands selling nearly 400 models, providing Australian consumers with a wide choice of products to meet their personal and corporate mobility needs. A feature of the market, and one that facilitates innovation, is the relatively few barriers to entry. The relative openness of the domestic market has seen the recent arrival of such global brands as electric vehicle specialists Tesla and Polestar (due later this year) and new brands from China and India – GVM/Haval, LDV and Mahindra (2022). This has been to the great benefit of Australian consumers.

A significant part of Ford Australia's success stems from the respectful, positive and mature relationship we have established and nurtured with our network of dealers. Over time, the composition and characteristics of Ford Australia's dealer network have evolved from small, standalone single-franchise sites traditionally run by a local family to multi-franchise, multi-site enterprises owned by ASX-listed corporations and large dealer groups generating multi-billion dollar revenues and resultant profits for their shareholders and owners. Nearly 60% of Ford's annual new vehicle volume in Australia is now sold by these large dealer groups and is forecast to increase.

In Ford Australia's submission to last year's Senate Inquiry, we observed that:

- 90% of Ford dealership owners (159 dealers) operate dealerships that are multi-franchise (more than one brand). 91% of Ford dealership owners in metropolitan areas and 89% in rural/regional areas are multi-franchise operations.
- Only 18 Ford dealers are a standalone, single (Ford) franchise. Five of these are in metropolitan areas and 13 are in rural/regional areas.

The trend towards larger dealer groups and public company ownership is reflected more broadly across the entire automotive vehicle retailing sector as consolidation, buy-outs and takeovers have grown, rendering the view held by some of the small, traditionally family-run, local dealership no longer reflective of the broader operating environment.

3. WHAT IS THE PERCEIVED PROBLEM TO BE ADDRESSED BY A STANDALONE AUTOMOTIVE FRANCHISING CODE?

As the Discussion Paper has indicated, the Senate Inquiry considered the following areas of potential concern (described in the Discussion Paper as 'problems') in relation to the treatment of dealers by manufacturers:

1. opportunity for recoupment of capital investments;
2. elimination of unfair contract terms from franchise agreements;
3. adequate reimbursement of dealers for warranty and recall work; and

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4. provision of fair and reasonable compensation where dealership agreements are terminated or not renewed.

It is Ford Australia's firm and sincere view that these areas considered by the Senate Inquiry have been sufficiently and proportionately addressed by existing regulation as outlined in our submission below.

a. <u>OPPORTUNITY FOR RECOUPMENT OF CAPITAL INVESTMENTS</u>

The June 2020 amendments to the Franchising Code provide for greater specificity of franchisor-required capital investments with augmented requirements for more detailed disclosure of capital expenditure requirements for Dealers prior to entering into, renewing or extending the term or scope of a franchise agreement, therefore ensuring the prospective automotive franchisees are provided with adequate information to make an informed decision as to capital expenditure costs prior to entering into the binding franchise agreement.

Where the expenditure is required on the basis of it being disclosed in the disclosure document, further obligations exist around discussing the ability to recoup such expenditure. In these circumstances, the franchisor must 'include in the disclosure document as much information as practicable about the expenditure' and must discuss the expenditure with the franchisee. Such discussions deal with recoupment of the expenditure. This is set out in clause 30A of the Franchising Code. Therefore, franchisees are already able to make well informed decisions about capital expenditure and are put in a position appropriately to plan and budget for such expenditure.

Furthermore, the Franchising Code amendments effective from July 2021 explicitly include a clause requiring franchise agreements to provide franchisees with a reasonable opportunity to make a return during the term of the agreement on any investment required by the franchisor as part of entering into, or under, the franchise agreement (see new clause 46B of the Franchising Code).

The practical effect of these amendments is greater transparency of required capital expenditure for the prospective franchisees, along with the confidence that the franchisor has to offer a franchise agreement term that will provide an opportunity to the franchisee for a return on required investments. This puts the onus on the manufacturer to have properly considered the required time period to provide the dealer with an opportunity to make a return (noting that this new clause of the Franchising Code is a penalty provision – and further noting that penalties under the Franchising Code are soon to be subject to significant increase with the recent passing of the Treasury Laws Amendment (2021 Measures No. 6) Bill 2021).

Any additional, significant capital expenditure proposed by the franchisor (ie not in disclosed in the disclosure document before entering, renewing or extending the term or scope of the franchise agreement) within the term of the present franchise agreement can only be implemented where there is agreement by the franchisee. The franchisor no longer has the ability to require significant capital expenditure during the term of the agreement on the basis that it considers it necessary as capital investment in the franchised business, justified by a written statement given to each affected franchisee as was previously allowed. This shows the further tightening that has already occurred of franchisors' ability to impose capital expenditure.

A further point is that where the early termination of a franchise agreement due to manufacturer-initiated Australian market withdrawal, rationalisation or distribution model change does not provide

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for the opportunity for return on required investments, terminated dealers will nonetheless be protected under the compensation provided for under the new Franchising Code clause 46A.

Further, by virtue of the new clause 6(3A) of the Franchising Code, automotive franchisors will need to provide for 'fair and reasonable' provisions in regard to significant capital expenditure to comply with their good faith obligation. Not to do so would risk the imposition of such capital expenditure being considered bad faith and a breach of the Franchising Code. This is an automotive franchise specific provision.

The reforms of June 2020 and July 2021 combine both to enhance transparency surrounding franchisor-required capital expenditure prior to entering into a franchise agreement and to provide for the reasonable opportunity for the franchisee to make a return on required investments, with franchise agreement terms linked to this opportunity. Given that it is to be assumed that franchisors will comply with these new amendments, by definition, dealers will have adequate information regarding required capital expenditure and will have a franchise agreement of sufficient duration to have a reasonable opportunity to make a return on those required investments. Accordingly, the only motor vehicle dealers that could possibly **require** further assistance to recoup capital investments are those that have failed to take advantage of the opportunity that must be afforded to them by the manufacturer. Such dealers do not deserve compensation or additional assistance to recover manufacturer required investments in Ford Australia's view because they had the opportunity and have simply failed to take advantage of that. Equally, the dealers who **have** made a return on manufacturer required investments do not need compensation for the simple fact that they have already made their return on those investments. In Ford Australia's view, further protection to dealers for recovery of investments required by the manufacturer shifts risk to manufacturers to an unfair extent and can only be to protect poor performing dealers. This does not represent an efficient or fair allocation of risk as between manufacturers and dealers and cannot be said to address any market failure.

b. <u>ELIMINATION OF UNFAIR CONTRACT TERMS FROM FRANCHISE AGREEMENTS</u>

As discussed above, the make-up of automotive dealers in Australia is shifting towards sophisticated ASX-listed companies and large dealer groups, with a decreasing proportion of dealers now comprising small, local family-owned-and-operated dealerships. This move towards larger dealers looks to be a continuing trend as noted by industry observers and participants.1

Therefore, in relation to franchise agreement negotiation in the automotive space, it is appropriate to consider the different bargaining strengths of large and small dealers, and how both of these groups are protected from being disadvantaged by unfair contract terms in franchise agreements via different 'mechanisms'.

i. <u>SMALLER DEALERS</u>

The Australian Consumer Law ('ACL') has had protections in force in relation to unfair contract terms ('UCT') in defined 'small business contracts' since 2016, ie where:

- there is a standard form contract;
- the dealer is a business employing less than 20 people; and

[1] 'Mr Buckley, whose firm acts for more than 100 motor dealers, said the big ASX-listed players were buying up smaller family-owned dealerships to gain market share and keep growth-hungry share-holders happy.' The Age, 3 September 2021 https://www.theage.com.au/business/companies/big-car-yards-cash-in-as-housing-drives-up-values-20210903-p58oh6.html NB: Mr David Buckley, as quoted by this article, is a partner at advisory firm Fordham Group.

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- the upfront price payable (noting that new car dealers do not typically pay any up-front fee to enter a franchise agreement) under the contract is less than a prescribed amount .

Smaller dealers have therefore had these statutory protections for more than five years. Insofar as Ford Australia is aware, neither the ACCC nor any dealer has gone before a court using these protections to seek to have a provision of a franchise agreement voided on the grounds that it was unfair, strongly suggesting that there is in fact no problem in this area to be solved. Once again, there is no market failure requiring further regulation.

These UCT protections are set to be enhanced by amendments proposed to the ACL to further cover standard form contracts where one of the parties has less than 100 employees or has a turnover of less than $100 million in the last financial year – thereby definitively sweeping up all smaller dealers. Where under the 2016 amendments, the principal remedy of a successful challenge of a contract clause on the grounds of unfairness is voiding of the clause, under the proposed amendments, courts will be empowered to:

- void or vary part or all of a contract;
- order injunctions as to future conduct;
- impose penalties;
- issue adverse publicity orders;
- disqualify persons from managing corporations;
- prevent a term that is the same or substantially similar to a term that has already been declared as unfair from being included in any future standard form contracts by a respondent; and
- on application by the ACCC, make orders considered appropriate to prevent or reduce loss or damage that has or may be caused in relation to a term that is the same or substantially the same in effect to a term that has already been declared unfair.

Furthermore, under the July 2021 amendments to the Franchising Code, further protection is afforded to franchisees of any size under clause 31A of the Franchising Code which prohibits franchisors from varying the franchise agreement retrospectively and unilaterally. In addition, as discussed above, further protection in this regard will be provided to the franchisees on the basis that the terms of the franchise agreement will need to be 'fair and reasonable' to comply with the good faith obligations.

ii. <u>LARGER DEALERS</u>

ASX-listed companies and large dealer groups are sophisticated, experienced businesses, well-advised by internal and external lawyers, financial experts and business consultants. These large dealers are not in need of special protections in relation to the content of franchise agreements, as they are not in a position of disadvantage when negotiating. The competitive nature of the Australian car retailing market means that there are multiple opportunities for quality dealers, and it is open to such dealers to choose amongst these opportunities.

Furthermore, and as noted above under the 'Smaller Dealers' heading, under the July 2021 amendments to the Franchising Code, further protection is afforded to franchisees of any size under clause 31A of the Franchising Code which prohibits franchisors from varying the

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franchise agreement retrospectively and unilaterally. In addition, as discussed above, further protection in this regard will be provided to the franchisees on the basis that the terms of the franchise agreement will need to be 'fair and reasonable' to comply with the good faith obligations (clause 6(3A)).

iii. FORD AUSTRALIA AND FRANCHISE AGREEMENTS

Ford Australia maintains a practice of consultation with its dealer network via the Ford Australia National Dealer Council on important and material changes proposed to the operation of the franchise, including significant changes proposed to its franchise agreement.

Ford Australia has also included a new clause in its revised franchise agreement explicitly mirroring the obligation under Franchising Code clause 31A.

Ford Australia's dealers have also availed themselves of the collective bargaining class exemption as and from 2021, which will enable then to collectively bargain to acquire goods (vehicles, parts) or services (franchise rights) from Ford Australia, which will address any perceived power imbalance that could exist between Ford Australia and an individual dealer.

c. ADEQUATE REIMBURSEMENT OF DEALERS FOR WARRANTY AND RECALL WORK

Warranty and recall work (including dealer reimbursement quantum) are a matter of contract between the dealers and the manufacturer, and accordingly all of the UCT protections detailed above (whether by law for smaller dealers, or by fact/practice for larger dealers) will apply here equally.

Furthermore, ACL section 274 provides that a manufacturer of goods is liable to indemnify the supplier of the goods to a consumer under a range of scenarios, including where such goods fail to comply with a consumer guarantee under the ACL (as would likely be the case in relation to warranty and recall work). It is open to suppliers (which includes dealers) to approach a court for relief to 'enforce' the indemnity provision against the manufacturer. Noting that a dealer has three years under the ACL to bring such an action, it is clear that dealers are properly protected from the costs of failures by a manufacturer to comply with the consumer guarantees in the ACL.

As above, Ford Australia's dealers have also availed themselves of the collective bargaining class exemption as and from 2021, which also as above will address any perceived power imbalance that could exist between Ford Australia and an individual dealer in relation to this topic.

It is also important to note that manufacturers are entitled to act in their own legitimate commercial interests and have a duty to their shareholders to do so. This includes establishing and maintaining the appropriate safeguards and responsible business practices when contracting with its authorized dealer network on the matter of warranty and recall work. Again, there is no market failure requiring additional regulation and additional regulation would constitute an unacceptable interference with the manufacturers' and dealers' freedom to contract on these matters.

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d. PROVISION OF FAIR AND REASONABLE COMPENSATION WHERE DEALERS ARE TERMINATED OR NOT RENEWED

The Franchising Code amendments effective from July 2021 include the requirement for agreements to provide for the compensation of franchisees in the event of early termination of a franchise agreement for the reason that the franchisor is:

i. withdrawing from the Australian market; or
ii. rationalising its networks in Australia; or
iii. changing its distribution models in Australia,

and requires the franchise agreement to address how the compensation is to be determined with specific reference to the following:

iv. lost profit from direct and indirect revenue;
v. unamortised capital expenditure requested by the franchisor;
vi. loss of opportunity in selling established goodwill;
vii. costs of winding up the franchised business,

and further prohibits provisions being included in the franchise agreement which purport to limit this compensation. These requirements more than adequately address the concern of the Senate Inquiry for fair and reasonable compensation where dealers have their franchise agreements terminated before they expire for the reasons stated above – and these properly exclude dealer termination before term end for dealer non-performance or dealer breach of the franchise agreement, as it would be a perverse outcome for a manufacturer to be required to compensate an at-fault dealer.

Furthermore, Ford Australia strongly rejects the proposition that there is a need to provide compensation to dealers in the circumstance where a franchise agreement is not renewed beyond its expiry. The nature of the franchise agreement is wholly contractual; a commercial arrangement wherein each party must have the flexibility to reappraise the future of the commercial relationship beyond the end of the term without significant barriers to exit. Such a requirement would impede the ability of the manufacturer to respond to evolving market factors such as changing consumer preferences or demographics, changes in market segmentation, and geographical or environmental shifts, and likely hinder innovation and flexibility in meeting these dynamics to the detriment of not only the manufacturer, but also the consumer.

The notion of compensation to be made upon non-renewal after the dealer has already been afforded, via the length of their agreement, a sufficient and proportionate period in which to make a return on their capital investment, is unjustified and excessive. The concern regarding compensation often raised in relation to GM Holden's withdrawal from the Australian market centred predominantly around unrecovered investment in dealership facilities and this concern has now been addressed by the inclusion of new clause 46B to the Franchising Code (which requires automotive franchise agreements to provide the franchisee a reasonable opportunity to make a return, during the term of the agreement, on its investment required by the franchisor). In order to comply with clause 46B of the Franchising Code, the term of the agreement must be sufficiently long to allow time to make such a return. Therefore, there is no need for compensation beyond that term. There is nothing special or unique about the contractual relationship between the automotive dealer and the manufacturer that would justify or require compensation in the circumstance of non-renewal.

In addition, automotive franchisees are also afforded protection in the event of their franchises not being renewed, through the provision of extended notice requirements compared to other franchises. The new clause 47 of the Franchising Code requires notice of at least 12 months (or shorter periods in the case of agreements with terms of less than 12 months) to be given to a dealer in the event its

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dealer agreement will not be extended or renewed. Together with the strict requirements that exist in relation to significant capital expenditure, these provisions also mitigate against the concerns raised in relations to requiring dealer compensation.

No party in any other franchise agreement is entitled to compensation upon non-renewal of their contract. The precedent set by mandating this in automotive franchise agreements would likely spark a wave of demands across other sectors and in other industries for a similar requirement. It is quite simply unwarranted and would significantly impact upon investment attraction and innovation in both the automotive industry and other areas of the economy. Additional regulation of this nature does not represent an efficient or fair allocation of risk as between manufacturers and dealers and cannot be said to address any market failure.

It also raises the serious question of equity, with new entrants to the Australian market able to avoid such a requirement by implementing distribution models other than networks of dealers or agents, with its associated cost penalty that would otherwise be imposed on existing market participants because of their legacy arrangements. Put simply, it is an extraordinary notion and one which would be to the ultimate detriment of the consumer in what is a functioning, highly competitive market.

In relation to each of the above issues, it should be recalled that before entering into a dealer agreement, dealers are afforded the opportunity (in accordance with clause 10 of Franchising Code) to obtain independent legal, business and accounting advice. Thus each has the opportunity for professional advice to identify any such issues. At this point the dealers can choose to either not proceed to enter into the dealer agreement or alternatively, seek to negotiate the terms of the agreement. This provides an additional level of protection to dealers.

e. <u>CONSIDERATION OF A STANDALONE AUTOMOTIVE FRANCHISING CODE</u>

The Discussion Paper considers legislative options for future regulation of the automotive franchise relationship, including the introduction of a standalone automotive franchising code. It is Ford Australia's view that future regulatory needs would be appropriately managed through amendments to the existing Franchising Code, as has been the approach to date. Regulation specific to the automotive industry has been effectively enacted through a schedule to the existing Franchising Code. This eliminates the risk of an increasingly divergent and complex regulatory framework with high costs of compliance by requiring even more bespoke and specialised legal and accounting considerations, as would be the case if a standalone automotive franchising code were to be introduced. Further, diverging laws would mean the automotive industry misses out on the evolution of protections afforded to the rest of the franchising industry over time. If such protections were then replicated in a standalone automotive franchising code it would only serve to show that a standalone code was not needed in the first place.

Any perception that industry specific needs are not being addressed adequately can only be perceptions. That is, they cannot be based on any actual issues with the current regime because the current regime has only been in effect for a very short period of time so has not properly been tested. As is stated in the Discussion Paper, 'more time is needed to allow these recent changes to fully take effect'.

Ford Australia therefore supports the Discussion Paper's 'Option 1 – amend the Franchising Code and its automotive specific provisions when required' as the most effective and efficient method for any future regulation. This is consistent with the preference of the ACCC in its submission dated 13

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February 2019 to the Commonwealth Department of Industry's published Regulation Impact Statement – franchise relationships between car manufacturers and new car dealers2

As described above, the nature of the relationship between automotive franchisor and franchisee is not one marked by any special or unique characteristics not found in other industries that necessitate a unique regulatory arrangement or approach. The conditions to be met for bespoke regulation of this industry and this relationship by way of a standalone industry code are by no means established. Furthermore, it is considered highly unlikely to be substantiated with market-based evidence when assessed against the framework criteria for government intervention in this manner. At best, this consideration is premature as the effect of the comprehensive suite of recently introduced regulations has not yet been able to be properly and fully considered.

4. WHAT IS THE PERCEIVED PROBLEM TO BE ADDRESSED BY MANDATORY ARBITRATION?

The Discussion Paper invites comment on the proposal for additional measures to resolve disputes between vehicle manufacturers and their dealers.

The Discussion Paper states that areas of potential concern (described in the Discussion Paper as 'problems') in relation to the treatment of dealers by manufacturers are:

1. Better dispute resolution mechanisms are required.
2. Manufacturers exploit a power imbalance through a lack of genuine negotiation.

a. DISPUTE RESOLUTION MECHANISMS

First, it is surprising that further reform is being contemplated following the very recent reforms to the dispute resolution procedures in the Franchising Code in both June 2020 and July 2021.

The reforms include:

- conciliation (in addition to mediation) as an additional avenue for dispute resolution;
- the option of voluntary binding arbitration for parties to the franchise agreement; and
- the ability for franchisees to engage in multi-franchisee dispute resolution with the franchisor.

Each of these is an effective avenue for franchisees to raise concerns and negotiate an outcome. Ford Australia's National Dealer Council is also a well-used conduit for dealers to raise any concerns with the company.

As stated in the Discussion Paper, 'the implementation of recent reforms to the Franchising Code are significant and the effect of the changes…will take time to flow through and have an impact on the ground as new franchising agreements are entered into'.

As above, Ford Australia's dealers have also availed themselves of the collective bargaining class exemption as and from 2021, which will address any perceived power imbalance that could exist between Ford Australia and an individual dealer, facilitating the consideration and resolution of common issues and areas of dispute.

Furthermore, parties to disputes that remain unresolved are able to have the matter heard and determined by the courts. This is both a well-tested and effective method for dispute resolution.

[2] https://consult.industry.gov.au/industry-growth/franchise-relationships-between-distr/consultation/view_respondent?uuId=216152947 accessed on 7 September 2021.

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b. GENUINE NEGOTIATION EXISTS BETWEEN MANUFACTURERS AND DEALERS

Ford Australia questions the apparent premise of the consideration of mandatory arbitration; that is, the existence of a perceived power imbalance between the two parties to the agreement. As noted extensively in this submission, the competitive nature of the Australian car retailing market means that there are multiple opportunities for quality dealers, and it is open to such dealers to choose amongst these opportunities. This is evidenced by the overwhelming proportion (90%) of Ford dealership owners who elect to operate as multi-franchise businesses. Similarly, single-franchise dealers are afforded sufficient protections under the recent suite of reforms and have the above-mentioned avenues available to them to resolve any disputes that may arise.

As also noted in our submission, the concept of an assumed 'negotiating disadvantage' is not supported when considered in regard to the ASX-listed companies and large dealer groups who are sophisticated, experienced businesses, well-advised by internal and external lawyers, financial experts and business consultants. These large dealers are not in need of special protections in relation to the content of franchise agreements, as they are not in a position of disadvantage when negotiating.

The Discussion Paper also points out 'in the majority of cases, franchising parties have successfully utilised mediation under the Franchising Code with a high degree of disputes resolved in good faith, facilitated through ASBFEO and state and territory small business commissioners'. This indicates that the current dispute resolution mechanisms are working effectively. Once again, there is no market failure which warrants additional regulation on this subject matter

Further, Ford Australia questions the value of imposing mandatory arbitration on parties to the franchise agreement over and above these prevailing measures and available avenues. Again, it would appear the prudent position is to allow the recent tranche of legislative requirements and provisions to be given an opportunity to be tested and their efficacy considered ahead of consideration of additional intervention.

c. CONSIDERATION OF MANDATORY BINDING PRE-CONTRACTUAL ARBITRATION

As noted in the Discussion Paper, mandatory arbitration in the context of an industry code is 'limited and can only apply in relation to future obligations' ie it would only apply in pre-contractual negotiations and would involve a third party arbiter imposing contractual terms on the parties.

There is a number of significant issues with such a proposal, which make it completely inappropriate for use in franchise agreements. These are detailed below.

i. A THIRD PARTY SETS THE TERMS OF THE FRANCHISE AGREEMENT

The idea of pre-contractual arbitration is totally anathema to the principle of freedom of contract. Parties should be free to negotiate and agree the terms of their agreement. They should not be bound by terms set by an unrelated third party.

If a party does not like the terms of a proposed agreement and is unable to negotiate terms with which it is comfortable, then it does not have to enter into the agreement. It is free to walk away. As such, there is no reason why a third party arbiter should be able to step in at this point and create binding rights and obligations on each party. Use of arbitration in this context is very different to how it is currently generally used - that is, to resolve disputes where there is an existing relationship.

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ii. IT MAY UNDERMINE THE FRANCHISE MODEL

Central to the franchise model is consistency across the franchise network on critical matters such as branding, performance requirements, look and feel and so on. If each new entrant can dispute each term of the proposed franchise agreement and allow a third party to set the terms, it opens up the possibility of variations between dealers as to key components of a franchise such that consumers will no longer be able to rely on a brand utilised by a dealer network as ensuring a particular level and type of service across the network.

iii. THE FRANCHISE MODEL AND AUTOMOTIVE INDUSTRY ARE NOT SUITED TO PRE-CONTRACTUAL BINDING ARBITRATION

As the Discussion Paper acknowledges, there is no precedent in the franchise industry for use of such a process. The paper explains that it is 'usually used in industries where there is a limited and manageable number of agreements and/or a limited range of issues subject to pre-contractual arbitration (e.g. remuneration)'. This is not the case for the automotive industry, which is acknowledged by the Discussion Paper – 'the automotive industry is characterised by a high number of agreements between manufacturers and dealers that may cover a vast range of commercial matters.'

The examples mentioned in the Discussion Paper do not provide a sound foundation upon which to introduce such a model into automotive industry. Under the Sugar Code and Wheat Code, pre-contractual arbitration is used for 'transactional agreements' – ie one-off transactions rather than long term agreements governing an ongoing relationship. Contrast this with the automotive industry which has long-term agreements. Under the Media Bargaining Code, pre-contractual arbitration is limited to a single issue (remuneration). Contrast this with the automotive industry where dealer agreements cover a significant number of complex issues.

Furthermore, the Discussion Paper notes that the provisions in the Media Bargaining Code are new and have not been tested. As such, it is inappropriate to use such a model which not only applies in a completely unrelated context but also has no track record to indicate whether it is successful.

iv. MANDATORY PRE-CONTRACTUAL ARBITRATION IS INCONSISTENT WITH THE FRANCHISING CODE'S DISPUTE RESOLUTION PROCEDURES

Finally, the Franchising Code's current complaint handling procedure applies to parties to a franchise agreement – i.e. it does not apply to parties who are yet to enter into a franchise agreement and are only in the process of pre-contractual negotiation. A deliberate decision has been made to limit the Franchising Code's dispute resolution processes, including mediation and conciliation, to parties who are in a franchise relationship. Those that are yet to enter into a franchise agreement cannot require the proposed counter-party to engage in those processes, which is reasonable given that, at that stage, they have no legal relationship between them. Why then should such a party be able to impose a more burdensome and binding process of arbitration on the counterparty? Not only would this create a legal absurdity, it would also result in inconsistent dispute resolution processes which apply at the pre-contract stage and during the franchise relationship.

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d. PROPOSAL FOR AN INDUSTRY DISPUTE RESOLUTION PROCESS

As discussed above, there is already a number of mandatory dispute resolution processes available through the Franchising Code. It is Ford Australia's view that, at this stage, adding a further alternative industry-led avenue is not necessary and is only likely to add duplication. Further, as stated already, the existing model should be given a chance to operate in practice. It is too soon (indeed only a few months) to assess whether or not it is achieving its intended purpose.

5. CONCLUSION

Some respondents to the Discussion Paper may seek to remove the concept of risk from their business by asking for even greater regulation of the franchise agreement. This is simply not possible, or even desirable, in a competitive market that appropriately champions the interests of consumers and celebrates innovation and entrepreneurship. Recent revisions to the governing legislation have ensured franchisees are provided a considered and reasonable opportunity to recoup their capital investments – but this is not able to be guaranteed. Establishing and sustaining a business by its very nature carries some element of risk, but also of reward.

The cumulative effect of the regulatory changes during the past several years has shifted and substantially altered the environment in which the franchise agreement is transacted and conducted. It is entirely appropriate and responsible to allow these revisions to take effect in order to gauge their impact before seeking to regulate further, if indeed at all.

Ford Australia appreciates the opportunity to provide its responses to the questions raised in this Discussion Paper. Please contact Ford Australia's Government Policy Director if you wish to discuss our submission in greater detail or require further information (contact details provided separately to this submission).

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