



Friday, 4 May 2018

Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
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Canberra ACT 2600

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Dear Committee Secretary

### **Operation and effectiveness of the Franchising Code of Conduct**

#### **1. Introduction**

1.1 The Motor Trades Association Queensland (MTA Queensland or the Association) responds to the Parliamentary Joint Committee on Corporations and Financial Services' (the Committee) invitation for submissions to its inquiry into the operation and effectiveness of the Franchising Code of Conduct (the Code). The MTA Queensland's comments are submitted on behalf of its constituent divisions and are confined to issues which relate to the interest of Queensland's automotive value chain.

#### **2. Context**

2.1 The MTA Queensland has followed the evolution of the Code with considerable interest for the past decade. The 'franchise marketing business model' has performed an important role in the development of the model in the automotive value chain in Queensland and Australia.

2.2 The Association has been motivated to contribute to the Committee's deliberations through its various submissions to advance the efficacy of the 'Statutory Code' that regulates the commercial behaviour of parties that enter into 'franchising agreements'.

2.3 During the last decade the MTA Queensland has followed the development of the Code. Over that period the Association formed a view that the seminal issue required to ensure the 'appropriate behaviour' of all stakeholders in a franchising arrangement is a statutory definition of the obligation for all parties to an agreement to 'act in good faith' (the definition). The Code does not define what good faith means or implies, however it does state that the obligation to act in good faith is to reflect common law. This situation is constantly evolving, making it difficult to accurately define the term with a reasonable degree of certainty.

#### **3. Submission**

3.1 The MTA Queensland recognises that the achievement of such a definition constitutes a challenging documentation and would take considerable resources, intellectual capital and a great deal of effort and time to develop and involve some number of iterations to arrive at a working living document defining 'good faith'.

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3.2 The definition would need to have a broad competence to modulate and mitigate stakeholder behaviour by imposing good faith obligations across the broad range of franchising models that are used in marketing goods and services in Australia's modern economy. It would need the ability to deal with bi-lateral franchising models which involve direct supplier and retailer agreements mainly for immediate consumption of goods and services. It should also be competent to shape the frameworks of tripartite or multilateral models which apply to 'consumer durables' or hard commodities and assets which involve the manufacturer, retailer and consumer in respect of product recourse if product warranties and statutory guarantees are invoked.

3.3 The definition ideally would have an ability to apply and be relevant across the entire competition and consumer framework; and be capable of evaluating stakeholder behaviour against common statutory criteria.

3.4 The definition would apply to phases of a franchise agreement recognised in the Code including:

- (a) During the pre-agreement phase when the due diligence is being conducted on both the franchisor and the franchisee and the evaluation of the franchising business model is being undertaken, a good faith definition would demand a comprehensive product disclosure statement; a comprehensive revelation of all and any financial intelligence and business performance achieved by any and all related matter by the franchisors. The franchisee similarly would be bound to disclose financial capacity, experience, prior relevant learning and business and technical capabilities.
- (b) The 'good faith' definition would mandate the 'Franchise Agreement' to be a balanced document that does not result in an imbalance of financial or market power to either party but recognises the interests of all participants and facilitates the achievement of mutually beneficial outcomes by all stakeholders. The 'Parties to the Agreement' would be prevented from seeking an unfair advantage or imposing onerous obligations through unfair provisions in the franchise documentation. The Code already has a number of provisions in this regard. A 'good faith' definition would reinforce these and bring the relevant provisions of the entire consumer and competition statutory framework into play (e.g. the unfair contract terms).
- (c) During the operational phase of a franchising agreement, a 'good faith' definition would ensure that the behaviour of all stakeholders was equitable and appropriate in achieving a mutually beneficial outcome from the business arrangement.

The manufacturer, supplier or national or regional distributor would be required to properly support the retailer and provide continuous product or services disclosure that is of mutual interest. In particular, the supplier would be required to honour any warranty claim and fully support the product or service retailed under the franchising agreement.

The retailer (franchisee) would be required to perform the agreement and to report market developments and undertake all reasonable efforts to widen and deepen the market for the supplier's product or services.

- (d) In respect of the third phase of the agreement, the Code has obligations that apply in respect of the renewal and termination of franchising arrangements. The 'good faith' definition would reinforce these provisions by requiring parties to declare their intentions in respect of the future any Agreement in a timely manner. This would allow all stakeholders to protect their positions, but not to take unfair advantage of any circumstances.

3.5 The Code is a generic instrument intended to have a general competence that can apply to the many diverse franchising business models. The automotive value chain particularly has a number of franchising models that reflect the special circumstances that pertain to individual product markets. In the case of 'franchised car dealers' the arrangements are in most cases specialised with provisions unique to the individual manufacturers and their marketing modus operandi. In these cases, it would appear that the definition of 'good faith' may need to be extended to ensure that a fair and equitable balance is established and maintained between the franchisee and the franchisor.

3.6 The MTA Queensland acknowledges that the achievement of an effective statutory definition of the 'obligation to act in good faith' will be challenging. Among these challenges will be the need to carefully balance the policy touch in respect of the enforcement provisions with the real compliance costs. While the definition needs to be 'fitted for purpose', the enforcement regime must not create onerous obligations that mean franchising is no longer a business model of choice for sectors such as the automotive value chain.

3.7 The enforcement regime for a breach of 'good faith obligations' should be severe enough to act as a deterrent but should not be such that the franchising marketing model is disadvantaged or made unpopular.

3.8 We would be please to provide further comment on any matters in our submission that may require clarification or amplification.

#### **4 Background**

4.1 The MTA Queensland is the peak organisation in the State representing the specific interests of businesses in the retail, repair and service sector of Queensland's automotive industry located in the State. There are some 15,500 automotive value chain businesses employing approximately 88,500 persons generating in excess of \$20 billion annually. It is an industrial association of employers incorporated pursuant to the *Fair Work Act* 2009. The Association represents and promotes issues of relevance to the automotive industries to all levels of Government and within Queensland's economic structure.

4.2 The Association is the leading automotive training provider in Queensland offering nationally recognised training, covering technical, retail and the aftermarket phases of the motor trades industry through the MTA Institute - a registered training organisation. It is the largest automotive apprentice trainer in Queensland employing trainers geographically dispersed from Cairns to the Gold Coast and Toowoomba and Emerald. The MTA Institute last financial year accredited courses to in excess of 1,600 apprentices and trainees.

Yours sincerely



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MTA Queensland