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Dear Mr Wein

## **2013 REVIEW OF THE FRANCHISING CODE OF CONDUCT**

The Federal Chamber of Automotive Industries (FCAI) is the peak industry body representing the interests of Australian manufacturers and importers of new passenger vehicles, light commercials, four wheel drives and motorcycles. Our industry is a prominent participant in agreements subject to the provisions of the Franchising Code of Conduct.

We have attached a short submission which addresses key areas of interest for our membership. Where these interests correspond closely to particular areas of the Government's discussion paper we have referenced that section.

While there are specific areas of the Code that we have commented upon it is fair to say that in general we do not believe significant amendment is necessary. Importantly from an overall business perspective for both franchisees and franchisors, FCAI believes the inquiry should take the opportunity to firmly entrench the value of a national system of enforcement and guidance. Clearly the National Franchise Code provides this consistent national base for all those engaged in the industry. However, we note that the apparent intentions of some state governments are aimed at state based regulation that will not improve the overall system nor will they develop the most efficient national business model. We would recommend the review takes the opportunity to again reinforce the clear benefits of a national approach to both the related parties and the broader functioning of the economy.

It is also worth noting that there are always outcomes on the extreme of any regulatory system but the key test of the policy is to keep the balance within the broader system in the face of these outliers. We believe that the 2008 and 2010 changes have in general led to improved outcomes. FCAI is of the view that there is no evidence for any significant change in direction or focus necessary to maintain a robust National Franchising Code. Importantly, this view is based on the reach of the existing Competition and Consumer Act provisions, including those relating to unconscionable conduct, and the overarching reach of the common law on issues such as good faith.

We would welcome any request for expansion or clarification of the attached as you continue your review process. Please contact me on 02 6229 8212 if I can be of any further assistance.

Regards

Tony Weber  
Chief Executive

## FCAI SUBMISSIONS

### 1. Introduction

The Federal Chamber of Automotive Industries (**FCAI**) welcomes the opportunity to provide submissions to the review of the Franchising Code of Conduct (**Code**).

In providing our submissions, we have not responded to all discussion questions. However, where our submissions relate directly to a discussion question, we have noted this.

#### Executive Summary

The starting point for any proposed amendments to the Code should be to assess whether they would be consistent with the Commonwealth Government's policy relating to industry codes. None of the potential amendments considered in the review would be consistent with this policy for the reasons set out in section 3 below.

The FCAI is particularly concerned with 3 of the issues discussed in the review. These are:

- (a) the allegation of 'inappropriate conduct' at the end of terms of franchise agreements;
- (b) the inclusion of a good faith obligation in the Code; and
- (c) the suggestion that penalties or other criminal sanctions should be imposed for breaches of the Code.

The FCAI is of the view that:

- (a) any instances of 'inappropriate conduct' at the ends of terms of franchise agreements can be properly and adequately dealt with under the existing legal regime;
- (b) including in the Code a general obligation to act in good faith would add nothing to the existing obligations imposed on franchisors and franchisees. On the other hand, a detailed definition of good faith would be restrictive and limiting and has so far eluded the judiciary because of its subjective nature; and
- (c) entities which breach the Code already face a significant range of sanctions which are a more than adequate deterrent.

### 2. Background

#### 2.1 The automotive industry

The automotive industry has distinctive characteristics which make it different to most other franchises. Notwithstanding these differences, the matters referred to in the Discussion Paper: Review of the Franchising Code of Conduct<sup>1</sup> (**Discussion Paper**) are very relevant and of concern to the industry. These differences do, however, inform the submissions made by the industry and as such it is worth briefly discussing the major differences.

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<sup>1</sup> Department of Industry, Innovation, Science, Research and Tertiary Education (Cth) *Discussion Paper: Review of the Franchising Code of Conduct* (2013) 5.

### *The size and expertise of franchisees*

Franchisees in the automotive industry are often large companies, sometimes listed on the ASX, with a range of legal and business advisors. For example, Automotive Holdings Group Limited, the largest automotive dealer in Australia, generated a total revenue of nearly \$4 billion in the 2011/2012 financial year.<sup>2</sup> This exceeds the total revenues of a number of franchisors.

Many automotive franchisees have multiple franchises across different brands, with ancillary operations as well – such as used cars and servicing, as well as arranging finance and insurance. This means that operating and running a motor vehicle dealership is a complex, multi-faceted business which requires significant financial and business acumen and experience.

### *Control of the location*

Most franchisors in 'traditional' franchising systems control the location of their franchises. However, a key feature of the automotive industry is that the franchisee usually controls the dealership property, not the franchisor. This gives significant power to the franchisee, especially where, as in most of capital cities, motor vehicle dealerships are concentrated in a range of key locations.<sup>3</sup> This means that there are often limited opportunities for a franchisor to acquire replacement facilities.

### *No franchise fee*

Finally, unlike in most franchises, a passenger motor vehicle franchisor does not generally receive either an up-front fee, renewal fees or any ongoing franchise fees/royalties from the franchisee. Other than contributions to co-operative marketing funds, the only payments made by an automotive franchisee to the franchisor tend to be for the purchasing of vehicles, parts, accessories and tools.

## **2.2 The automotive industry and the Code**

The rationale for the Code and its subsequent amendments is to address an *'inherent and necessary imbalance of power in franchise agreements in favour of the franchisor'*.<sup>4</sup> As set out in the Explanatory Memorandum to the Code, the aim of the Code is to regulate the conduct of participants in franchising towards other participants in franchising by addressing the imbalance of power between franchisees and franchisors.<sup>5</sup>

This imbalance of power might well exist in many franchising relationships. However, for a range of reasons including those set out above, it does not exist to the same extent – if at all – in the automotive industry.

As Chief Justice Warren said in the Victorian decision of *Meridian Retail Pty Limited v Australian Unity Retail Network Pty Limited*

The interests of certainty in contractual activity should be interfered with only when the relationship between the parties is unbalanced and one party is at a substantial disadvantage, or is particularly vulnerable in the prevailing context. Where commercial leviathans are contractually engaged, it is difficult to see that a duty of good faith will arise, leaving aside duties that might arise in a fiduciary relationship.

<sup>2</sup>IBISWorld, *Australian Company Reports – Automotive Holdings Group Limited* <<http://clients1.ibisworld.com.au/reports/au/enterprisepremium/financials.aspx?entid=6194>>.

<sup>3</sup>such as the Nepean Highway in Melbourne and Parramatta Road in Sydney.

<sup>4</sup>Parliamentary Joint Committee on Corporations and Financial Services, Commonwealth, Parliament of Australia *Opportunity not opportunism: improving conduct in Australian franchising*, December 2008, 101.

<sup>5</sup>Explanatory Statement, Trade Practices (Industry Codes – Franchising) Regulations 1998 (Cth) 2.

In our submissions to the Inquiry into the Franchising Code of Conduct, held by the Parliamentary Joint Committee on Corporations and Financial Services in 2008, we submitted that:

There is a legitimate case for the Code to exclude franchisees who are substantial, well-resourced enterprises ....from all requirements under the Code or those requirements that are directed towards the protection of small business franchisees.<sup>6</sup>

For the purposes of this submission, we simply reiterate this and make the point that franchisors in the automotive industry are required to comply with standards in the Code which are aimed at addressing an issue which does not affect the automotive industry to a significant extent (if at all).

### 2.3 'Sophisticated Investor'

We also make the point that when considering amendments to the Code, regard should be had to the diversity of participants in the franchising industry. The review of the Code should not be limited by the misconception that all franchisees are vulnerable parties requiring high levels of protection. In fact, the FCAI is of the view that there would be benefits in including in the Code the notion of a “sophisticated investor” as is the case in the United States. The FCAI suggests that, for the purposes of the Code, a franchisee would be a 'sophisticated investor' if it was a listed public company or part of one, have the characteristics of a large proprietary company as defined by the *Corporations Act*, or have a turnover or working capital above a particular threshold.

The concept is that those provisions of the Code that are aimed at redressing the power imbalance between franchises and franchisors would not apply to sophisticated investors. This approach has numerous benefits: in particular it would ensure that resources are not devoted by large commercial franchisees and franchisors to comply with obligations which are not necessarily of relevance.

### 3. Any amendments to the Code should be consistent with policy.

Any potential amendments to the Code should be assessed against the purpose for which Industry Codes are promulgated, as determined by the Commonwealth Government. This is set out in the Policy Guidelines on Prescribing Industry Codes under Part IVB of the Competition and Consumer Act<sup>7</sup> (**Policy Guidelines**) which provide that Codes should :

- (a) reduce complexity that industry participants or consumers are required to deal with;
- (b) reduce risks;
- (c) ensure that industry participants are afforded some measure of fairness in their dealing with other industry participants; and
- (d) increase the aggregate output from a particular industry.<sup>8</sup>

The Policy Guidelines note that Industry Codes are not '*designed to address circumstances in which smaller participants in an industry experience competitive pressures*'.<sup>9</sup>

<sup>6</sup> Federal Chamber of Automotive Industries, Submission to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Franchising Code of Conduct*, 2008, 3.

<sup>7</sup>The Treasury (Cth), *Policy Guidelines on Prescribing Industry Regulations (under part IVB of the Competition and Consumer Act 2010)*, May 2011.

<sup>8</sup>The Treasury (Cth), *Policy Guidelines on Prescribing Industry Regulations (under part IVB of the Competition and Consumer Act 2010)*, May 2011, 6.

Turning to the Code itself, the limitations of the Code are referred to in the Regulatory Impact Statement for the Franchising Code of Conduct.<sup>10</sup> In particular, the Regulatory Impact Statement provides that whilst the Code sets minimum standards of disclosure and conduct *'it is not intended to replace the need for franchisees to seek independent legal, business or other advice before entering into a franchise agreement'*.<sup>11</sup>

The Regulatory Impact Statement also makes it clear that the Code should *'not prohibit both parties from pursuing their own individual interests'* or *'prohibit normal hard commercial dealings which may be perceived as 'unfair' by one party'*.<sup>12</sup>

The constraints on Industry Codes in general, as set out in the Policy Guidelines and the specific limitations of the Code articulated in the Regulatory Impact Statement provide the framework within which any proposed amendments to the Code must be considered. When the amendments to the Code which are proposed by some franchisees are considered within this framework, it is clear that these amendments should not be made.

#### **4. End of term of franchise agreements**

*Discussion question 23 – Have the amendment regarding end of term arrangements and renewal notices been effective in addressing concerns about inappropriate conduct at the end of the term of the franchise agreements? Why or why not?*

The amendments regarding end of term arrangements and renewal notices have been effective in addressing 'inappropriate conduct'. FCAI is strongly opposed to any moves to amend the current arrangements where agreements are not renewed. The underlying commercial arrangement, when considered with the extensive disclosure requirements under the Code even apart from the normal due diligence applied in any major commercial transaction, quickly and clearly indicate the arrangements that will apply. Neither the market nor the competition are static features of the automotive industry and end of term arrangements are essential elements of dynamic operations, allowing franchisors to respond to changes in trends and deliver the most appropriate brand response to the environment with full disclosure of that possibility.

##### **4.1 Inappropriate conduct**

The first issue to address is what exactly is meant by 'inappropriate conduct'. As we understand it, 'inappropriate conduct' refers to two key areas:

- (a) the allegedly unjustified appropriation of a franchisee's goodwill at the end of the franchise agreement, without appropriate compensation being paid; and
- (b) the termination of franchise agreements at a point in time before the franchisee has had the opportunity to recoup its investment – ie; the 'early' non-renewal of franchise agreements.

<sup>9</sup> Federal Chamber of Automotive Industries, Submission to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Franchising Code of Conduct*, 2008, 6.

<sup>10</sup> Department of Industry, Innovation, Science, Research and Tertiary Education (Cth), *Regulatory Impact Statement: Franchising policy reforms and the Government response to the Joint Committee on Corporations and Financial Services' report on franchising*, 2010.

<sup>11</sup> Department of Industry, Innovation, Science, Research and Tertiary Education (Cth), *Regulatory Impact Statement: Franchising policy reforms and the Government response to the Joint Committee on Corporations and Financial Services' report on franchising*, 2010, 2.

<sup>12</sup> Department of Industry, Innovation, Science, Research and Tertiary Education (Cth), *Regulatory Impact Statement: Franchising policy reforms and the Government response to the Joint Committee on Corporations and Financial Services' report on franchising*, 2010, 2.

We address this discussion question in regards to these two areas of conduct.

## 4.2 Goodwill

The High Court of Australia defined goodwill in *Federal Commissioner of Taxation (Cth) v Murry* (1998) 155 ALR 67 as 'the attractive force that brings in custom and adds to the value of the business; it may be site, personality, service, price or habit'.<sup>13</sup>

To put it another way, goodwill arises from the reputation and relations formed with customers of the business and the nature of its location.<sup>14</sup>

The High Court in *Federal Commissioner of Taxation (Cth) v Murry* identified two fundamental premises of the law of goodwill:

- (a) that goodwill has no existence independently of the conduct of the business; and
- (b) goodwill cannot be severed from the business which created it.<sup>15</sup>

There are two types of goodwill that need to be considered separately. The first is the goodwill that attaches to the brand itself; the trademarks, the franchising system and any marketing plans or procedures. This goodwill properly belongs to the franchisor. The franchisor has invested in and developed this goodwill and the franchisee is able to utilise the benefits of this goodwill for the duration of the franchise agreement. However, the franchisee does not and cannot acquire any proprietary interest in the franchisor's goodwill. The franchisee does not 'lose' this goodwill at the end of the term because it was not ever entitled to it.

The second type of goodwill belongs to the franchisee, which it is able to build up during the term of the franchise agreement. This goodwill vests in and is owned by the franchisee. It is distinct from the franchisor's goodwill and upon the expiry of the term the franchisee retains this goodwill and the franchisor should therefore not be required to pay compensation for it.

The automotive industry is a good example (but not the only example) where a franchisee can build up its own goodwill. There are often franchisees that have multiple franchises across different franchise systems and which present themselves as a 'brand' in their own right. For example many franchisees brand themselves as specialists in 'European Cars' or 'Prestige Cars' without reference to the franchisor's brand. Many multi franchise franchisees have a name or brand which is common to all of the franchises. In these instances, goodwill vests in the franchisee's brand and it rightly belongs to the franchisee.

It is also relevant to note that in many instances in the automotive industry, the franchisee will own or otherwise control the property on which the franchise is located. As noted above, the location of a franchise in the automotive industry is often significant, as multiple franchises from different systems are commonly grouped together. At the end of the term of the franchise agreement, the franchisee retains the goodwill attached to the location and is able to utilise this goodwill for any subsequent franchise or other business.

In this context, the decision of the High Court of Australia in *Commonwealth v Reeve* [1949] ALR 561 is relevant. In that case, Justice Dixon highlighted that goodwill can attach to a location or a building, separate to the goodwill of a business. We also refer to Justice Owen's comments in *Horn v Sunderland Corporation* (1941) 2 KB 26. In that case, Justice Owen noted

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<sup>13</sup>Federal Commissioner of Taxation v Murry (1998) 155 ALR 67, 68.

<sup>14</sup> P Butt , P Nygh et al, *Encyclopaedic Australian Legal Dictionary* (LexisNexis Australia, January 2011).

<sup>15</sup>Federal Commissioner of Taxation v Murry (1998) 155 ALR 67, 36.

*'it was a goodwill based entirely or almost entirely on locality and not on personality and therefore attached to the land and not to the individual'.<sup>16</sup>*

It is for these reasons that a requirement for the franchisor to pay the franchisee compensation for goodwill at the end of term should not be introduced into the Code.

### 4.3 'Early' non-renewal

The Discussion Paper notes that a principal issue regarding end of term arrangements is franchisors allegedly terminating or refusing to renew franchise agreements when they do not have 'good cause' for doing so. Some franchisees advocate an amendment to the Code altering this. Such an amendment would mean, in effect, that franchisors could be compelled to renew their franchise agreements at the end of term, contrary to the franchisor's wishes. As some judges have commented, this could also lead to the nonsense of a perpetual franchise agreement which would then become an assignment rather than a licence. In all other legal relationships where one party uses the property of another in the course of business, such as real property and motor vehicle leases, IP licences and so on, they are for a defined period. Franchises should be no different. A landlord does not have to justify his decision to take back a property at the end of a lease no matter what the impact is on the vacating tenant's business.

Courts have often been asked to make an order, the effect of which would be to compel parties to continue to work together against the wishes of one of the parties. In such cases, it is well established that Courts are very reluctant to grant specific performance of an agreement providing for the provision of services or requiring the maintenance of an ongoing co-operative relationship. By way of example, we refer to *J C Williamson v Lukey*(1931) 45 CLR 282 where Justice Dixon held that specific performance is *'not a form of relief which can be granted if the contract involves the performance by one party of services to the other or requires their continual cooperation'*.<sup>17</sup>

The reluctance of the Courts to order parties to continue to deal with each other is heightened when the interactions between the parties requires mutual trust and co-operation. As noted in our 2008 submissions, a franchise agreement is a 'relational contract', which depends for its success on a mutually trusting relationship between the parties.<sup>18</sup> Given the significance of the relationship between the parties to a franchise agreement, any amendment to the Code that would require a franchisor to enter into a further term of the franchise agreement against its will would be in conflict with this established common law position. Furthermore, it would create difficulties, inefficiencies and likely disputes which would require continual recourse to the Courts to resolve.

We repeat our 2008 submissions in this respect:

A franchisee, with the protection of the Code and the remedies under the [*Competition and Consumer Act*] enters into a franchise agreement fully aware of these rights and it would not be fair or reasonable for a statutory provision to distort established principles of freedom of contract, to facilitate a contractual relationship on a perpetual basis or to create a mechanism that may frustrate or compromise the legitimate rights and interests of the franchisor. A contract is consensual and a franchise agreement is based on mutual trust and confidence. Any obligation in relation to renewal imposed on a franchisor would be contrary to these fundamental principles.<sup>19</sup>

<sup>16</sup>*Horn v Sunderland Corporation* (1941) 2 KB 26, 45 – 47 (Owen J).

<sup>17</sup>*J C Williamson Ltd v Lukey*(1931) 45 CLR 282, 298.

<sup>18</sup>See *Bobux Marketing Limited v Raynor Marketing Limited* [2001] NZCA 348 at 43 and 44.

<sup>19</sup> Federal Chamber of Automotive Industries, Submission to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Franchising Code of Conduct*, 2008, 9.

To be clear, we are not in any way suggesting that a franchisor should be allowed to terminate a franchise agreement other than in accordance with its terms and the Code. However, the converse should also be true: a franchisor (and for that matter a franchisee) should be entitled to terminate or not renew an agreement in accordance with its terms. The termination or non-renewal provisions are known to both parties prior to entering into the contract and form an important part of the bargain the parties have chosen to accept. In fairness to the parties and with respect to the sanctity of their contract, this cannot be later altered.

The real complaint is more likely to be that the franchisee:

- (a) did not know or did not realise the length of the term when the franchisee signed the agreement, or perhaps
- (b) was misled about the term by the franchisor, and/or
- (c) was encouraged to invest in the franchisee's dealership in a manner which led the franchisee to believe that the nominal term would not apply.

In all instances, the complaint has already been addressed. The first complaint is a matter of disclosure which is more than adequately dealt with in the Code. In regards to the second and third complaints, there is a vast body of law dealing with misleading and deceptive conduct and estoppel that can be availed by the franchisee.

## **5. A good faith provision should not be included in the Code.**

While the FCAI supported the inclusion in 2010 of a reference to “good faith” within the Code, this support was on the basis that there was already a sufficiently established common law duty to act in good faith implied into agreements (including franchise agreements) and that the inclusion would not cause or create any difference with the unconscionable conduct provisions of the ACL.

### **5.1 Problems with definition of "good faith"**

The FCAI maintains that an accepted definition of "good faith" that effectively covers all forms of franchising is impossible. In *Pacific Brands Sport Leisure Pty Limited v Underworks Pty Limited*, Mr Justice Finklestein said

I accept that the standard of conduct imposed by a covenant of good faith is incapable of precise definition.

### **5.2 There is already an implied obligation to act in good faith at common law.**

Justice Finklestein articulated the implied common law duty in *Garry Rogers Motors (Aust) Pty Limited v Subaru (Australia) Pty Limited* [1999] FCA 903:

Recent cases make it clear that in appropriate contracts, perhaps even in all commercial contracts, such a term [of good faith] will ordinarily be implied; not as an ad hoc term (based on the presumed intention of parties) but as a legal incident of the relationship... If such a term is implied it will require a contracting party to act in good faith and fairly, not only in relation to the performance of a contractual obligation, but also in the exercise of a power conferred by the contract. There is no reason to think, prima facie at least, that the obligation of good faith and fair dealing would not act as a restriction on a power to terminate a contract, especially if that power is in general terms.<sup>20</sup>

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<sup>20</sup>*Garry Rogers Motor (Australia) Pty Ltd v Suburu (Aust) Pty Ltd* [1999] FCA 903, 35.

We also note the decision in *Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187 where the New South Wales Court of Appeal held that in a commercial contract there will 'ordinarily be implied, as a matter of law, as an incident of such a contract, terms of good faith and reasonableness, particularly in a standard form contract containing a general power of termination'.<sup>21</sup>

### *Unconscionable Conduct*

Good faith cannot be discussed without also considering the doctrine of unconscionable conduct. In the context of this submission, the type of conduct that would amount to a breach of good faith is likely to also amount to unconscionable conduct. The Regulatory Impact Statement gives a relevant example:

Where one party to a franchise agreement was of the view that the other party had engaged in opportunistic conduct, the franchisee could seek recourse to the proposed opportunistic conduct under the unconscionable conduct provisions within the [Australian Consumer Law].<sup>22</sup>

The prohibition on engaging in unconscionable conduct is contained within sections 20 and 21 of the *Australian Consumer Law*<sup>23</sup> (ACL). Section 22(1) of the ACL proscribes a list of matters the court may have regard to for the purposes of determining if unconscionable conduct has been engaged in, one of which is 'the extent to which the supplier and the customer acted in good faith'.

### **5.3 Good faith should not be defined in the Code.**

Leaving aside our doubts that a definition is actually possible, if 'good faith' was to be referred to in the Code, it could be done in two ways. The first is to simply make it clear that the common law concepts of good faith apply to franchise agreements.

The second option is to define what is meant by 'good faith' with more particularity in the Code. This is problematic for a number of reasons.

If what is envisaged is a list of general principles to be applied when considering what is meant by 'good faith', then again, this will be nothing more than what is already provided by the common law.

If a more particular and detailed definition is envisaged, then it will be impossible to cater for the inevitable variation between cases. The circumstances of each case will be many and varied, sometimes with subtle but important distinctions. It is not a case where 'one size fits all'. Assessing each case on its facts is a role the Courts have been playing for many years and are extremely well equipped to do so.

The findings in the report, *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct*,<sup>24</sup> support our view and are analogous here. The report found that statutory unconscionable conduct can be difficult for stakeholders to understand and for the courts to apply, which contributes to a lack of certainty and confidence surrounding the effects of the

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<sup>21</sup>*Burger King Corporation v Hungry Jacks Pty Ltd* [2001] NSWCA 187, 163 – 164.

<sup>22</sup>Department of Industry, Innovation, Science, Research and Tertiary Education (Cth), *Regulatory Impact Statement: Franchising policy reforms and the Government response to the Joint Committee on Corporations and Financial Services' report on franchising*, 2010, 47.

<sup>23</sup>*Competition and Consumer Act 2010* (Cth) Schedule 2 – The Australian Consumer Law.

<sup>24</sup>The Treasury and the Department of Innovation, Industry, Science and Research (Cth), *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct* (February 2010).

provision.<sup>25</sup> It is our view that the introduction of a statutory obligation of good faith would hold the same issues and lead to potential confusion particularly if “good faith” under the Franchising Code was to develop in a manner inconsistent with the unconscionable conduct provisions of the ACL or the common law doctrine of good faith. It has been noted that the impact of such an amendment may increase risk, business costs and potentially jeopardise small business financing.<sup>26</sup>

Finally, we refer to our contention, discussed above, that any proposed amendments to the Code should be considered within the framework of the Government's policy concerning Industry Codes. As stated in the policy, a key purpose of industry codes is to '*reduce complexity that industry participants or consumers are required to deal with*'.<sup>27</sup> The inclusion of a good faith clause in the Code will increase, rather than reduce, the level of complexity.

#### 5.4 A Middle Ground

The FCAI is currently further considering the issue of a reference to good faith, or more strictly a clear statement that the implied obligations to act in good faith are embedded in the Code. If such a reference can be drafted without unduly complicating a common law principle, the industry may support the reference. We reiterate that we do not support any attempt to define *Good Faith* within the Code.

### 6. There is no need for the introduction of penalties for breaches of the Code.

#### *Discussion questions*

26 – *Is the current enforcement framework adequate to deal with the conduct in the franchising industry?*

29 – *What options are available to business to address breaches of the Franchising Code, or any other adverse conduct in the franchising industry?*

#### 6.1 Breaches of the Code are already subject to penalties.

The current enforcement framework is adequate to deal with conduct in the franchising industry and, in particular for breaches of the Code. The FCAI is not aware of any evidence to indicate that the penalties and enforcement are inadequate. We note there are a broad range of remedies and penalties that are available to address such conduct.

Section 51A of the *Competition and Consumer Act 2010* (Cth) provides that a corporation must not, in trade or commerce, contravene an applicable industry code.<sup>28</sup> A breach of the Code therefore gives rise to a wide range of penalties and remedies under the *Competition and Consumer Act*. These remedies and penalties are able to be enforced or accessed by the ACCC or by private action of a franchisee or franchisor. These remedies include:

- (a) orders and declarations (section 51AC);
- (b) public warning notices issued by the ACCC (section 51ADA);

<sup>25</sup>The Treasury and the Department of Innovation, Industry, Science and Research (Cth), *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct* (February 2010), ix.

<sup>26</sup> Department of Industry, Innovation, Science, Research and Tertiary Education (Cth), *Commonwealth Government Response to the report of the Parliamentary Joint Committee on Corporations and Financial Services – Opportunity not opportunism: improving conduct in Australian franchising* (2008) 17-18.

<sup>27</sup>The Treasury (Cth), *Policy Guidelines on Prescribing Industry Regulations (under part IVB of the Competition and Consumer Act 2010)*, May 2011, 6.

<sup>28</sup>*Competition and Consumer Act 2010* (Cth) s 51AD.

- (c) injunctions to either restrain a person from doing something or require a person to do a particular thing (section 80);
- (d) damages to compensate for loss or damage resulting from a contravention of a code (section 82);
- (e) non-punitive orders such as community service orders (section 86C);
- (f) other compensatory orders (section 87); and
- (g) court enforceable undertakings to the ACCC (section 87B).

The ACCC also had broad investigation powers under Division 5 of the *Competition and Consumer Act*.

Given the wide range of remedies and penalties outlined above, the introduction of more severe penalties for breaches of the Code would place a requirement for a higher standard of conduct on members of the franchising industry. There is no justification for this further increase in the standard of conduct given the variety of remedies and protections available to vulnerable parties in the Code, common law and the *Competition and Consumer Act*. To introduce such penalties would place the franchising industry at a disadvantage to other businesses.

## **6.2 The introduction of penalties is not in line with the government's policy for industry codes.**

The introduction of penalties for an industry code is contrary to the Commonwealth Government's stated policy on this matter. We again refer to the Policy Guidelines which provide that industry codes are to be:

- (a) complementary to general prohibitions on unfair practices that may occur in trade or commerce; and
- (b) should encourage compliance and focus on remedies rather than simply seeking to punish contraventions.<sup>29</sup>

## **7. General**

### **7.1 Foreign Franchisor Exemption**

FCAI is of the view that the removal of the Foreign Franchisor Exemption should not have occurred and that this exemption should be reinstated. The administrative and compliance burden on an overseas franchisor is significant and in our view of little if any benefit in the automotive sector. It may well be that this is the case in other sectors as well when the parties to the agreement are both significant commercial operations and are clearly sophisticated investors. Where there is a single Australian franchise or master franchise the exemption should be reinstated in particular when the Australian operation is a subsidiary of the foreign franchisor. Importantly, it is the Australian master franchisor that will remain the party responsible under the Code.

### **7.2 Unilateral Variation**

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<sup>29</sup>The Treasury (Cth), *Policy Guidelines on Prescribing Industry Regulations (under part IVB of the Competition and Consumer Act 2010)*, May 2011, 9.

The FCAI understands the concern about unilateral variations and agrees with the recent amendments in concept. However, it is concerned that the obligations are unnecessarily onerous. In our view, variations relating to products and those focused on day to day operations such as operating guidelines and procedures should be excluded as they do not relate to the underlying commercial agreement.

FCAI suggests amendment that exclude “variations to operating guidelines, general codes of conduct and the like that do not attempt to vary the fundamental commercial agreements giving rise to the relationship”.

### **7.3 Disclosure**

While in general terms the disclosure provisions seem to be meeting the aims and objectives as intended the ability of the automotive franchisor to provide information at the level of detail that is of use to franchisees is debatable. The FCAI believes that in particular the “unforeseen expenditure” criteria is inherently vague in detail as it is not possible to be definitive. As such, it adds little positive benefit to the franchisee's consideration.

## **8. Conclusion**

It is for the reasons outlined above that the FCAI submits that other than the suggested improvements above further amendments to the Code are not required. It is our view that in general the Code in its current forms adequately addresses potential issues in the franchising industry.

We again reinforce the importance of the stated Commonwealth government policy and industry codes and submit no amendment to the Code should extend beyond this.

We would welcome the opportunity to discuss our submission with you in more detail.

FCAI