OUT19/1860

Aparna Reddy
Policy Lead, Automotive Franchising
Department of Industry, Innovation and Science
By email: AutomotiveFranchising@industry.gov.au

Dear Ms Reddy

FRANCHISE RELATIONSHIPS BETWEEN DISTRIBUTORS AND NEW CAR DEALERS – REGULATION IMPACT STATEMENT

The Office of the NSW Small Business Commissioner (OSBC) is focused on supporting and improving the operating environment for small businesses throughout NSW. The OSBC advocates on behalf of small businesses, provides mediation and dispute resolution services, speaks up for small business within government, and makes it easier to do business through policy harmonisation and reform.

The Regulation Impact Statement (RIS) comes at a time of particular significance for franchising in Australia. The Parliamentary inquiry into the operation and effectiveness of the Franchising Code of Conduct has shone a particularly harsh light on inequitable and at times exploitative practices in franchisor-franchisee relations. Across industries, franchisees – overwhelmingly small businesses of modest resources1 - have been made to bear the brunt of a power imbalance in their foundational business relationship with the franchisor.2 There is a ‘natural tension between cooperation and conflict’ in franchising relationships3 – with the parties seeking both mutual and separate profit.4

The overarching issues that the RIS intends to address all occupy prominent place in the recent history of Australian franchising discourse. As the RIS itself states, its direction is heavily informed by the findings of Mr Alan Wein’s 2013 review of the Franchising Code of Conduct (the Code), and the ACCC’s 2017 new car retailing study. However, the genesis of the problems it explores can be traced as far back as the 1990’s.5

On our part, the OSBC’s own consultations with new car franchisees strongly reflect the concerns conveyed in the RIS, and we have been active as a voice for new car

1 Spencer, E. (2009), ‘Consequences of the Interaction of Standard Form and Relational Contracting in Franchising’, Franchise Law Journal, vol 29, p. 31
5 Regulation Impact Statement, p. 18
retailers over a number of years. In particular, we have long supported regulatory reform to deliver equitable franchisor-franchisee dealings in relation to capital expenditure and end of term arrangements; the Commissioner’s opening statement to the ongoing Parliamentary Inquiry into franchising having highlighted precisely those issues.\textsuperscript{6}

We therefore welcome the RIS as a considered and timely contribution to the ongoing franchising debate on the part of the Department of Industry, Innovation and Science (the Department). We are strongly supportive of its overarching direction, and are pleased to provide the following comments and recommendations regarding the options for reform it considers.

**Summary of OSBC positions on reform options**

**Option 2A - Require manufacturers to provide at least 12 months’ notice when not renewing a dealer agreement:** The supported proposal should be enacted without amendment.

**Option 2B - Require manufacturers to provide a statement of reasons to a dealer whose agreement is not being renewed:** The supported proposal should be enacted without amendment.

**Option 2C - Require manufacturers buy back stock when an agreement is not renewed:**

- A motor vehicle manufacturer should be required to buy back a retailer franchisee’s stock, after making a decision not to renew its agreement with that retailer.
- The regulation should provide that, where a manufacturer and retailer cannot agree on a price for buy back, it is determined by an independent valuer appointed by agreement between the parties.

**Option 2D - Require pre-contractual disclosure of significant capital expenditure with greater specificity:** The supported proposal should be enacted without amendment.

**Option 2E - Require minimum five year terms with a franchisee right of renewal:** A motor vehicle manufacturer should be required to provide a new car retailer franchisee with a franchise agreement of minimum five years’ duration, with a franchise right of renewal for an additional period of three years.

**Option 2F - Enact reform to enable multi-party franchise mediation:** The supported proposal should be enacted without amendment.

\textsuperscript{6} Australian Senate (2018), ‘Official Committee Hansard – Parliamentary Joint Committee on Corporations and Financial Services – Operation and effectiveness of the Franchising Code of Conduct, Tuesday 16 October 2018’, p. 9
Implementation:

- Options 2A, 2B, 2F, and 2D should be implemented within the Franchising Code of Conduct, as provisions applying to all franchisors.
- Options 2C and 2E could be implemented within the Franchising Code of Conduct, as provisions applying to new car retailing franchises specifically.
- The Commonwealth should immediately commence development of a dedicated and mandatory industry code of conduct for new vehicle retailing, for implementation within 12 months.
- This code should include provisions to the effect of Options 2A through 2F - though its scope should be sufficiently broad as to address the full breadth of issues facing the industry.

Option 2A: Require manufacturers to provide at least 12 months’ notice when not renewing a dealer agreement

In the OSBC’s submission, the inability of many new car retailers to recoup capital investment in their business – an expense typically measured in the millions\(^7\) – due to improper manufacturer conduct is the most debilitating regulatory issue facing the industry. This is reflected in both OSBC’s engagement with retailers, as well as positions advanced by the Motor Trades Association of Australia\(^8\) and Australian Automotive Dealer Association.\(^9\) It is also a focus of the Wein review.\(^10\) Franchise agreements are standard form contracts offered by the franchisor on a ‘take it or leave it’ basis.\(^11\) The Code does prescribe that these contracts include a measure of disclosure around franchisee investments. But it affords franchisors ample leeway to be imprecise, including in relation to the quantum required.\(^12\)

As the RIS reflects, manufacturers take advantage of this shortcoming by disclosing a range of potential investment required that is so broad as to be meaningless.\(^13\) Retailers are also unable to access information around whole-of-network matters which influence manufacturers’ decision-making in relation to franchise investment.\(^14\)

The absence of effective disclosure requirements allows manufactures to make unreasonable investment demands of retailers during the agreement, which cannot be recouped, without prior notice. In our view, a regulatory framework that ensures that dealers are not inequitably denied the opportunity to realise their substantial

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\(^8\) Motor Trades Association of Australia (2018), ‘Submission by the Motor Trades Association of Australia Limited for the Senate inquiry into the operation and effectiveness of the Franchising Code of Conduct’, pp. 1, 13

\(^9\) Australian Automotive Dealer Association (2018), ‘Inquiry into the operation & effectiveness of the Franchising Code of Conduct’, p. 10


\(^12\) Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth), Schedule 1, Cl 30

\(^13\) Regulation Impact Statement, p. 16

\(^14\) Regulation Impact Statement, p. 18
investments requires reform, to provide certainty around both the term of franchise agreements and the investments required of franchisees.

We therefore welcome the proposal to require a manufacturer to provide at least 12 months’ notice, when it chooses not to renew franchise agreement, as one positive step towards this ideal. The proposed extension of the minimal notice requirements prescribed in the present Code\textsuperscript{15} should afford dealerships a measure of assistance in managing unreasonable demands to provide capital late in the term of the agreement. Given the franchisee is unlikely to recoup any significant investment it makes at this time, the demand to make it risks contravening the obligation that franchisors act in good faith in dealing with franchisees.\textsuperscript{16} But as the franchisee will have received advance notice of the non-renewal, it may refer to the impending expiration of its agreement to resist the demand. A franchisee might also rely on protections in the \textit{Australian Consumer Law} to similar effect.\textsuperscript{17}

The OSBC’s engagements further suggest that non-renewal of a franchise agreement according to current notice requirements imparts a burden on car retailers in and of itself. The practice engenders stress and uncertainty - necessitating a major professional transition in precious little time. We therefore support the RIS’ position that the proposed measure would also afford dealers the appropriate time and certainty to rearrange their professional affairs.\textsuperscript{18} But in this respect, the reform would also afford valuable clarity not only to new car retailers, but all franchisees. Though the characteristics of franchised businesses vary across industries, non-renewal of the agreement is inherently a major obstacle in the working life of any franchisee.

As regards the particular notice period prescribed, twelve months would appear to represent a suitable balance between realisation of the benefits the reform would impart to franchisees, and not unreasonably restricting the franchisor.

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\textbf{OSBC position:} The supported proposed reform should be enacted without amendment.
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\textbf{Option 2B: require manufacturers to provide a statement of reasons to a dealer whose agreement is not being renewed}

The OSBC strongly supports the position, advanced in the RIS, that the proposal to require manufacturers to provide motor dealers with a statement of reasons for not

\begin{thebibliography}{99}
\bibitem{15} \textit{Competition and Consumer (Industry Codes – Franchising) Regulation 2014} (Cth), Schedule 1, Cl 18
\bibitem{16} \textit{Competition and Consumer (Industry Codes – Franchising) Regulation 2014} (Cth), Schedule 1, Cl 6
\bibitem{17} For example, the prohibitions on unconscionable conduct, or misleading and deceptive conduct; \textit{Competition and Consumer Act 2010} (Cth), Volume 3, Schedule 2, Cl 18, 21
\bibitem{18} Regulation Impact Statement, p. 21
\end{thebibliography}
renewing a franchise agreement would be consistent with the Code’s ‘good faith’ provisions.\textsuperscript{19}

While good faith, at law, remains an evolving concept,\textsuperscript{20} honesty, genuineness, and open dialogue are recurring themes in its construction.\textsuperscript{21} A requirement that a franchisor explain its reasons for not renewing a franchise agreement would simply compel it to act in a manner consistent with these standards in relation to that particular decision. An explanation is also likely to be of considerable importance to the affected franchisee, especially those in new car retailing. Both the OSBC’s industry engagements and the advocacy of industry associations reflect genuine consternation around non-renewal.

We further support the suggestion that the proposal would assist franchisees engaging in dispute resolution.\textsuperscript{22} If the statement of reasons suggest a defective process of decision making on the part of the franchisor, this may enable the franchisee to pursue some form of dispute resolution - for example, with reliance on the good faith requirement. Indeed, the Wein review provides that some manufacturers rely on non-renewal rather than termination of the agreement for the very purpose of avoiding risk of a dispute.\textsuperscript{23}

\textbf{OSBC position:} The supported proposed reform should be enacted without amendment.

\textbf{Option 2C: Require manufacturers buy back stock when an agreement is not renewed}

Requiring manufacturers to buy back stock from new car retailers, following a decision not to renew the franchise agreement, would address a considerable inequity in many end of term arrangements. The need for such reform is plain, and may be observed largely by reference to evidence collated in the RIS itself.

Buyback provisions are not included in all existing new car retailing agreements,\textsuperscript{24} or may be exercisable only at the manufacturer’s discretion.\textsuperscript{25} But for retailers, realising the value of stock is far from a low-order concern. A dealership’s inventory, and the specialist equipment required to maintain it, may be comfortably valued in the millions.\textsuperscript{26} In the absence of any buyback requirement, a dealer is highly vulnerable

\textsuperscript{19} Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth), Schedule 1, Cl 6; Regulation Impact Statement, p. 22
\textsuperscript{22} Regulation Impact Statement, p. 22
\textsuperscript{24} Australian Automotive Dealer Association (2018), ‘Inquiry into the operation & effectiveness of the Franchising Code of Conduct’, p. 6; Motor Trades Association of Australia (2018), ‘Submission by the Motor Trades Association of Australia Limited for the Senate inquiry into the operation and effectiveness of the Franchising Code of Conduct’, p. 18
\textsuperscript{25} Regulation Impact Statement, p. 24
\textsuperscript{26} Regulation Impact Statement, p. 25; Motor Trades Association of Australia (2018), ‘Submission by the Motor Trades Association of Australia Limited for the Senate inquiry into the operation and effectiveness of the Franchising Code of Conduct’, p. 18
to being left with stranded assets; vehicles and tools but no effective forum in which to realise their value.

However, if a manufacturer were required to purchase back an affected retailer’s stock, it would not be so burdened. Manufacturers are strongly positioned to simply re-sell stock at full value. Any cost imposed on manufacturers by mandatory buyback is therefore likely to be purely administrative. Given both the incidental nature of this cost, and the stature of manufacturers as well-resourced multinationals, this represents a triviality compared to the cost to dealerships of stranded assets. As manufacturers’ capacity to offset the cost of buyback is twice acknowledged in the RIS, it is unclear why this has not been accounted for in its consideration of the net benefits of Option 2C.

A retailer might be expected to run down its inventory following receipt of the manufacturer’s notice of intent not to renew the agreement. However, the franchising agreement will commonly prevent the franchisee from taking any such action. Manufacturers typically require retailers to maintain stock levels, as well as specialist equipment, over the life of the agreement. As such, mandated buyback is necessary, irrespective of any provision of notice by the franchisor.

Moreover, the contention, made in the RIS, that the potential reform would contradict the Code’s existing policy framework, by imposing ‘commercial terms’, appears open to challenge on multiple fronts. Principally, the Code already includes provisions that restrict freedom of contract on matters of direct commercial significance. Notably, it regulates franchising parties’ conduct in relation to use of marketing and advertising funds, requirements for capital expenditure, restraint of trade, cost liability in relation to disputes, and the assignment of rights to third parties. Nor should these provisions be considered incongruous. The Code’s purpose, per the regulation itself, is simply “to regulate the conduct of participants in franchising towards other participants in franchising.” Plainly, such a wide remit does not exclude regulation that impinges on unfettered freedom of contract. In any case, given that franchise agreements are standard form agreements offered by franchisors without scope for negotiation, any suggestion of genuine contractual freedom is essentially illusory.

But even if the Code, as the principal regulation governing Australian franchising, were to be interpreted as not prescribing ‘commercial terms’, its record hardly precludes an alternate policy direction. Franchising policy is plagued with poor franchisee outcomes; the ongoing Parliamentary Inquiry is at least the sixth to have

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27 Regulation Impact Statement, p. 25
28 Regulation Impact Statement, pp. 25-26
29 Regulation Impact Statement, pp. 26
30 “Given the ongoing concerns associated with stock buy backs, it appears that car dealers are unable to run down stock when an agreement is not being renewed, even if notice is given.”, Regulation Impact Statement, p. 24
31 Motor Trades Association of Australia (2018), ‘Submission by the Motor Trades Association of Australia Limited for the Senate inquiry into the operation and effectiveness of the Franchising Code of Conduct’, p. 18
32 Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth), Schedule 1, Cl 31
33 Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth), Schedule 1, Cl 30
34 Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth), Schedule 1, Cl 23
35 Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth), Schedule 1, Cl 20, 22
36 Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth), Schedule 1, Cl 24-25
37 Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth), Schedule 1, Cl 2
taken place in recent years. 39 Likewise, Parliament’s ‘Towards fair trading in Australia’ Inquiry, concluded as far back as 1997, turns up issues around stock buyback for motor dealers specifically.40

For these reasons, OSBC supports the enactment of Option 2C, as a reasonable and effective means of addressing an important issue faced by new car retailers made to transition out of their franchise agreement. For the avoidance of any doubt, this requirement should extend to repurchase of all stock – including vehicles themselves, as well as spare parts, accessories, and specialist tools.

As regards the terms upon which buyback would occur, we support the suggestion made in the RIS that an independent valuer determine the price of the stock to be repurchased, when the parties cannot reach an agreement.41 The valuer should be appointed by way of agreement between the franchisee and franchisor. This would provide that the parties negotiate freely as well as fairly - with the surety of resolution by an independent party, in the absence of agreement on terms to which both parties genuinely agree.

OSBC position:

- A motor vehicle manufacturer should be required to buy back a retailer franchisee’s stock, after making a decision not to renew its agreement with that retailer.
- The regulation should provide that, where a manufacturer and retailer cannot agree on a price for buy back, it is determined by an independent valuer appointed by agreement between the parties.

**Option 2D: Require pre-contractual disclosure of significant capital expenditure with greater specificity**

As we conveyed in relation to Option 2A, an inability to recoup capital investments due to improper manufacturer conduct is the predominant regulatory issue facing new car retailers. While satisfactorily addressing this issue requires reforms that address insecurity around the duration of franchise agreements, the Franchising Code is especially deficient in relation to pre-contract disclosure of capital expenditure requirements. The vagaries of these requirements allow manufacturers to make disclosures with so little specificity as to be meaningless.

Effective reform in this space must require manufacturers to provide retailers with specific information as to the size, as well as the timing, of significant capital expenditure that will be required of them during the agreement. As Option 2D proposes to enact regulation to precisely this effect, the OSBC strongly supports its implementation. It will require manufacturers to be upfront and open about

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41 Regulation Impact Statement, pp. 23-24
investments required. Where those requirements are patently unreasonable, a potential franchisee can walk way without making any misguided commitment.

While the need for reform is especially pressing in new car retailing, it could also serve to require an equitable approach to investment disclosure across the franchising sector.

Similarly, the OSBC has previously expressed serious reservations regarding Code provision 30(2)(e). This provides that a franchisor may require significant investment during the term of the agreement, solely on the basis that it has prepared a document assessing and explaining that decision. It therefore supports franchisors to avoid pre-contract disclosure obligations entirely. Our submission to the ongoing Parliamentary Inquiry recommended reforms to fundamentally alter this franchisor get-out clause.42 However, the RIS' proposal that the provision be abolished entirely, for consistency with Option 2D, represents a more appropriate outcome still.

We note also the RIS' contention that the reform would necessitate more rigorous planning on the part of manufacturers.43 However, given 'significant capital investment' invariably requires major expenditure,44 any additional planning required would only be that which is prudent and proportionate to the scale of the investment required of franchisees.

We therefore support the conclusion of the RIS that the proposal would impart a significant net benefit,45 and should be enacted.

**OSBC position:** The supported proposed reform should be enacted without amendment.

**Option 2E: Require minimum five year terms with a franchisee right of renewal**

The OSBC supports reform to prescribe minimum terms for new car retailer franchisees. As we have explored in our submissions concerning Options 2A and 2D, addressing the inability of many new car retailers to recoup their investment requires reforms that address insecurity around the duration of franchise agreements, as well as disclosure of capital expenditure requirements. Indeed, our engagements with dealerships suggest the duration of franchising agreements is a key issue. The OSBC supports the RIS' findings that longer franchise terms would better position dealers to recoup significant investments, and make informed decisions around investments required by franchisors.46 Reform to this effect, in conjunction with measures to strengthen disclosure requirements around significant

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43 Regulation Impact Statement, p. 28
45 Regulation Impact Statement, p. 28
46 Regulation Impact Statement, p. 30
capital expenditure, is necessary to satisfactorily address the acute vulnerability of franchisees in relation to capital investment.

We note also that such a requirement is not unprecedented in commercial regulation. For example, it is prescribed in Western Australian law concerning retail tenancies.47

The OSBC queries the RIS’ contention that minimum terms may place retailers at a disadvantage, by forcing them to continue to sell a brand of declining popularity.48 Most manufacturers offer a highly diverse range of vehicles over multiple classes. Thus, the success or failure of particular models are unlikely to affect the viability of a brand as a whole. Further, any such risk must be assessed against the gravity of retailers’ inability to recoup investments – an issue that has weighed heavily on franchisees over decades.

However, the OSBC concedes that, in requiring a five year term as well as a retailer right of renewal for an additional five years, Option 3D may curtail manufacturers’ ability to manage dealership networks.49 We acknowledge that the new car retailing business faces disruption on multiple, intersecting fronts. These include emerging business models and mobility services that may alter the role or status of dealerships50 – in conjunction with the increasing prominence of technologies such as electric vehicles,51 connected vehicles, and automated vehicles.52

We therefore suggest a reform to require minimum five year terms, with a franchisee right of renewal for a reduced period of three years. This would represent a reform that enhances the legitimate interests of retailers while preserving that of manufacturers. Indeed, both the RIS and the Federal Chamber of Automotive Industries suggest that this revised position would support retention of manufacturers’ network agility - given many voluntarily offer agreements over periods including and greater than five years already.53

OSBC position: A motor vehicle manufacturer should be required to provide a new car retailer franchisee with a franchise agreement of minimum five years’ duration, with a franchise right of renewal for an additional period of three years.

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47 Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA), s13
48 Regulation Impact Statement, pp. 30-31
49 Regulation Impact Statement, p. 31
Option 2F: Enact reform to enable multi-party franchise mediation

As the RIS itself acknowledges, both the OSBC and industry stakeholders have long been concerned with delivering a dispute resolution framework for franchising that is genuinely accessible to new car retailers.\(^{54}\) Collective dispute resolution is a matter we considered in particular detail in our recent engagements with the ACCC consultation around collective bargaining by small businesses (including franchisees).\(^ {55}\)

The OSBC strongly supports measures to facilitate collective bargaining by small businesses with large businesses. There is considerable evidence, both quantitative and qualitative, to support the proposition that collective negotiations are an effective means for small businesses to address the power imbalance inherent in their dealings with larger operators.\(^ {56}\)

Such measures are also likely to be of particular utility to franchisees bargaining with franchisors. Given franchise agreements are standard form contracts, grievances arising from the contract are likely to be shared by multiple franchisees within a single franchising network. In addition, as many agreements prescribe geographic territory to franchisees as exclusive markets,\(^ {57}\) franchisees in the same network are less likely to be in direct competition than comparable independent businesses. Finally, the power imbalance between franchisor and franchisee may cause their dealings to take on the traits of an employer-employee relationship, rather than engagements between genuinely independent contractors.\(^ {58}\) Collective bargaining rights are well-established as an effective means of addressing employer-employee power relations.\(^ {59}\)

In our submission, there is no reason why these principles should not extend to franchisees seeking to negotiate collectively with the franchisor through the particular medium of mediation. Indeed the former Franchise Mediation Adviser recently supported precisely this reform.\(^ {60}\) The ACCC has also proposed to implement

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\(^ {60}\) Minus, A. (2018), ‘Submission to the Senate Inquiry — The Franchising and Oil Codes of Conduct’, Office of the Franchising Mediation Adviser, p. 20
reforms to support collective bargaining by small businesses, including by way of group mediation.⁶¹ These rights would extend to all franchisee-franchisor negotiations.⁶²

Furthermore, the concern that the proposed reform would bring about increased costs for franchisors⁶³ should be disregarded. Multi-party negotiation will typically be more efficient for franchisors than separate negotiations with all relevant franchisees. Moreover, given the franchisor-franchisee power imbalance, it is appropriate that regulation focus on mitigating issues arising from this dynamic in the interests of equity, rather than not weakening a more powerful actor.

It is therefore appropriate that Option 2F be implemented. The proposed reform would impart a net benefit in relation to both new car retailer franchises and franchising as a whole, and is consistent with both existing and prospective regulation.

**OSBC position:** The supported proposed reform should be enacted without amendment.

**Implementation: RIS options**

As this submission has explored, the OSBC supports the implementation of Options 2A through 2F. However, we have also provided that some options would impart a benefit to franchisees in general, in addition to new car retailers specifically. We therefore submit that these measures - Options 2A, 2B, 2F, and 2D – should be enacted as general provisions of the Franchising Code of Conduct, applying to all franchise agreements.

As Options 2C and 2E address sector-specific issues, they could be enacted in a manner which provides that they only apply to new car retailing franchises. This could take the form of a schedule to the Franchising Code.

**OSBC position:**
- Options 2A, 2B, 2F, and 2D should be implemented within the Franchising Code of Conduct, as provisions applying to all franchisors.
- Options 2C and 2E could be implemented within the Franchising Code of Conduct, as provisions applying to new car retailing franchises specifically.

**Implementation: mandatory automotive code of conduct**

The OSBC has long supported the development of a separate and mandatory code of conduct dedicated to new vehicle retailing. Our industry engagements have revealed a litany of discrete issues affecting franchises in this space.⁶⁴ The public

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⁶³ Regulation Impact Statement, p. 35
⁶⁴ Office of the NSW Small Business Commissioner (2016), *Submission: New car retailing industry marketing study*
advocacy of industry representatives reveals much the same. Among the most prominent issues, not covered in the RIS, to have arisen in our industry consultations are:

- Elimination or appropriation of retailer goodwill by the manufacturer, effected through non-renewal of the franchise agreement;
- Undue restrictions on retailers’ capacity to select the financial services and products they offer to customers;
- The improper use of ‘margin bonus’ payments - whereby manufacturers restrict retailers’ capacity to realise a profit by withholding payments related to vehicle sales unless and until key performance indicators are met;
- Inequitable practices around the warranties applied to demonstrator models – whereby a manufacturer’s warranty commence when the dealer registers a vehicle as a demonstrator, rather than when it on-sells it to the end user;
- The limited capacity of franchisees to negotiate variations on terms of the franchise agreement during the term; and, by contrast, the ease with which manufacturers may impose variations on retailers;
- Inequities around retailer territories: Many franchise agreements do not provide retailers with any guarantee of exclusivity within the franchise network through provision of a primary market area. Others afford the manufacturer discretion to amend the boundaries of the primary market area during the life of the agreement;
- Undue restrictions on retailer use of floor space. This applies especially to motorcycle retailers, which often contract with multiple manufacturers for sales within a single showroom. A retailer’s current franchisors are commonly empowered to veto a retailer’s decision to contract with a new manufacturer - even when this forces the retailer to leave floor space vacant;
- Manufacturer termination for purported non-performance – particularly where the manufacturer is not obligated to highlight concerns or afford the retailer an opportunity to amend issues prior to termination;
- Manufacturers requiring or pressuring retailers to register new vehicles, where there is no customer order, to falsely inflate brand sales figures against competitor brands.

Plainly, the issues facing motor dealer franchising go far beyond the reform options canvassed in the RIS. Precisely for this reason, any such project must represent a much larger undertaking than simply enacting those measures in the form of an automotive code. However, Options 2A to 2F RIS should ultimately be adopted within a dedicated code - once the Commonwealth has completed the broader policy work necessary to enact such regulation.

We acknowledge and welcome the very wide support for such reform. A dedicated code is, of course, a longstanding priority of industry stakeholders and the OSBC. Indeed, we have supported such reform since 2013. But the Commonwealth Small Business and Family Enterprise Ombudsman, a number of our fellow state-based

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67 Australian Small Business and Family Enterprise Ombudsman (2018), ‘Automotive industry needs enforceable code of conduct’
Small Business Commissioners, and even the principal franchisor advocate\textsuperscript{68} have also affirmed their support. Six years ago, the independent Wein review also identified the attraction and merit of a dedicated code.\textsuperscript{69}

Given the breadth and longevity of support for a dedicated code from multipartisan stakeholders, it is appropriate that the Department commence development of the code immediately. The Commonwealth, in our submission, \textbf{should aim for implementation of the code within 12 months}. We look forward to supporting the Department in its endeavours to realise this outcome.

For the avoidance of doubt, we support the finding in the RIS that implementation through any voluntary code would not represent an optimal outcome.\textsuperscript{70} Previous franchising regulations,\textsuperscript{71} as well as the law applied to other sectors with issues of power imbalance between contracting parties,\textsuperscript{72} speak to the ineffectiveness of this approach. Any such regulation would also have an uncertain and thoroughly confusing relationship with the mandatory Franchising Code of Conduct.

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\textbf{OSBC position:} \\
\textbullet\ The Commonwealth should immediately commence development of a dedicated and mandatory industry code of conduct for new vehicle retailing, for implementation within 12 months. \\
\textbullet\ This code should include provisions to the effect of Options 2A through 2F - though its scope should be sufficiently broad as to address the full breadth of issues facing the industry. \\
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\textbf{Next steps}

Helping deliver a regulatory framework that supports equitable and productive franchise relations is a matter of enduring importance for OSBC. As such, we would welcome further engagement with the Department as it proceeds with development and implementation of reforms arising out of the regulation impact statement.

To discuss this submission, please contact Thomas Mortimer, Senior Advisor, Advocacy and Strategic Projects, on (02) 8222 4196 or thomas.mortimer@smallbusiness.nsw.gov.au.

Yours sincerely

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Robyn Hobbs OAM  \\
NSW Small Business Commissioner  \\
February 2019
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\textsuperscript{68} Dr Andrew Leigh MP (2018), ‘\textit{Industry specific code for car dealers and manufacturers: third party endorsement}’

\textsuperscript{69} Wein, A. (2013), ‘\textit{Report - Review of the Franchising Code of Conduct}’, Commonwealth Department of Jobs and Small Business, p. 159

\textsuperscript{70} Regulation Impact Statement, p. 36

\textsuperscript{71} Regulation Impact Statement, p. 36

\textsuperscript{72} Office of the NSW Small Business Commissioner (2018), ‘\textit{Submission – Review of the Food and Grocery Code of Conduct}’, pp. 4-6