

## Explanatory notes: Australian Competition and Consumer Commission (ACCC)

### Anti-competitive behavior

<https://www.accc.gov.au/business/anti-competitive-behaviour>

The ACCC provides advice to industry on illegal anti-competitive business behaviour. Illegal anti-competitive business behaviour is outlined in the *Competition and Consumer Act (2010)* (CCA).

MTAA assists Government to develop and amend the CCA to better address the concerns of the automotive industry through its activities on ACCC's Small Business and Franchising Consultative Committee and through its networks on Government contacts.

The Australian Consumer and Competition Commission (ACCC) consider the following examples as illegal uncompetitive activities.

- **Uncompetitive agreements** (<https://www.accc.gov.au/business/anti-competitive-behaviour/anti-competitive-agreements>): Uncompetitive agreements are deliberate business agreements that aim to prevent competition within a market place.
- **Cartels** (<https://www.accc.gov.au/business/anti-competitive-behaviour/cartels>): A cartel exists when businesses agree to act together instead of competing with each other. Cartels attempt to drive up the profits of cartel members while maintaining the illusion of competition. Anti-competitive cartel conduct include:
  - *Price fixing*: When competitors agree on a pricing structure rather than competing against each other. For example, if petrol suppliers fix prices of fuel provided to fuel retailers.
  - *Sharing markets*: When competitors agree to divide a market so participants are sheltered from competition. For example, if insurers divvy up geographical areas where only they can conduct business.
  - *Rigging bids*: When suppliers communicate before lodging their bids and agree among themselves who will win and at what price.
  - *Controlling the output or limiting the amount of goods and services available to buyers*. For example, a manufacturer limiting the amount of repair information available to an independent automotive repairer.
- **Collective bargaining and boycotts** (<https://www.accc.gov.au/business/anti-competitive-behaviour/collective-bargaining-boycotts>): Collective bargaining is not necessarily illegal if an exemption is given by the ACCC. For example, when an automotive industry association (i.e. the MTAA) facilitates a collective buying agreement on behalf of a number of small independent smash repairers to achieve a better deal from a paint supplier. This buying agreement aims to make their purchasing power comparable to that of larger smash repairers who already can negotiate better deals from paint suppliers due to their size.

- **Exclusive dealing** (<https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>): This includes third line forcing and other types of exclusive dealing. For example, if an automotive manufacturer refuses to provide equipment if the dealer does not use a particular petroleum product from a third company.
- **Imposing minimum resale prices** (<https://www.accc.gov.au/business/anti-competitive-behaviour/imposing-minimum-resale-prices>): For example, if an automotive manufacturer makes restrictions (such as refusing to provide vehicles) for special deals used by a dealer to clear stock or promote patronage.
- **Misuse of market power** (<https://www.accc.gov.au/business/anti-competitive-behaviour/misuse-of-market-power>): For example, if an automotive manufacturer forces unreasonable franchising arrangements on a dealer knowing that the dealer needs the franchise to remain in business. Another example is Predatory pricing which may involve a large chain of fuel retailers who provide fuel at below market value to consumers for a sustained period of time in order to force smaller independent fuel retailers from the market.
- **Refusal to provide products or services** (<https://www.accc.gov.au/business/anti-competitive-behaviour/refusal-to-supply-products-or-services>): For example, when a manufacturer refuses to provide certain repair information to an independent repairer on unreasonable grounds.
- **Unconscionable conduct** (<https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>): Unconscionable conduct is generally understood to mean conduct which is so harsh that it goes against good conscience. For example, if an insurance company exploits an independent smash a repairer's lack of legal knowledge and imposes unreasonable contractual terms.

## Franchising arrangements and the franchising code of conduct

Through its involvement in ACCC's Small Business and Franchising Consultative Committee and through collaboration with Government, in 2015 MTA secured significant changes to the Franchising Code of Conduct (the code) to better protect member rights when entering into, involved in or exiting from franchising agreements.

Key changes to the code introduced in 2015 include:

- Franchisors to provide disclosure requirements and documentation.
- Participants being required to act in good faith towards each other.
- A dispute resolution mechanism so that disagreements can be legally settled.
- A cooling-off period for potential franchisees to determine whether to proceed with the franchise agreement.
- Fairer procedures for ending a franchise agreement.

The significance of these changes cannot be understated as franchising arrangements are common within automotive industry. For example, they often take the form of legally enforced business agreements between *manufacturers* of automotive equipment (i.e. passenger cars, commercial vehicles, motorcycles, motorboat and construction and farming equipment) and automotive *dealers* who retail

and/or service manufacturers equipment. Sometimes a dealer has franchising agreements with multiple manufacturers.

### What is a franchising agreement?

A franchise agreement requires:

1. One party (the franchisor) to grant another party (the franchisee) the right to carry on a business supplying goods or services under a specific system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor.
2. The business is associated with a particular trademark, advertising or a commercial symbol owned, used, licensed or specified by the franchisor or its associate.
3. The franchisee is required to pay, or agree to pay an amount to the franchisor before starting or continuing the business (there are some exceptions).

Note: A motor vehicle dealership agreement (including a motor boat dealership agreement) is taken to be a franchise agreement even if the above definition has not been met.

### Protecting your business

Although franchising agreements are often a successful business strategy, sometimes franchising arrangements benefit one party over the other.

Some dealers (franchisees) protest that manufacturers (franchisors) require excessive dealer investment and impose unreasonable conditions on the dealer to purchase a franchise. For example, the dealer may have to purchase and stock an underselling product range. Another example is that a dealer may have to commit an excessive amount of floor space to a particular brand.

Some manufacturers (franchisors) may protest that dealers are not reaching agreed upon performance objectives such as sales targets or servicing requirements.

To provide protection for both the franchisee and the franchisor the ACCC provides:

- Franchising information and guidance material. (<https://www.accc.gov.au/business/franchising/franchise-agreements>)
- Franchising Code of Conduct guidance. (<https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct>)
- The Franchisee Manual. (<https://www.accc.gov.au/publications/the-franchisee-manual>)
- The Franchisor Compliance Manual. (<https://www.accc.gov.au/publications/franchisor-compliance-manual>)
- A free franchising education program. <https://www.franchise.edu.au/home/education/for-franchisees/pre-entry-franchise-education>

MTAA urges members to inform their state delegate of unfair franchising arrangements. Armed with this information, MTAA can influence policy development and ensure that franchising law protects member's rights.

## Unfair contracts

Collaborative efforts by the MTAA and Government to protect small business have resulted in tightening law around unfair contracts. The ACCC provides advice on what are unfair contracts (<https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms>).

Automotive firms enter into various types contracts as part of business. For example, a smash repairer may enter into a contract with a paint retailer.

A contract is a legally binding or valid agreement between two or more parties (individuals, organisations and businesses). A contract is legal when it contains all of the following elements:

1. Offer and acceptance.
2. An intention between the parties to create binding relations.
3. Consideration to be paid for the promise made.
4. Legal capacity of the parties to act.
5. Genuine consent of the parties.
6. Legality of the agreement.

An agreement that lacks one or more of the elements listed above is not a valid contract. Not all contracts need to be in writing.

Contracts that outline business arrangements provide a degree of certainty to those entering into the contract.

- For example, an automotive dealer can be certain that the manufacturer will provide a steady supply of vehicles and spares to the dealer at an agreed price. Additionally, the manufacturer can expect the dealer to achieve agreed upon sales targets and levels of service.
- Another example is that a smash repairer will enter into a contract with an insurer to repair a car at an agreed upon price.

However, sometimes the terms and conditions within a contract unfairly favour one party over the other.

- For example, an automotive manufacturer may stipulate that the dealer pay the repair cost for a vehicle under warranty even if the repair is due to a manufacturing error.
- Another example is that an automotive manufacturer can vary the requirements of a dealer to change the layout of the dealership throughout the period of the contract.

The ACCC considers contracts as unfair if the contract contains:

- Terms that enable one party (but not another) to avoid or limit their obligations under the contract.
- Terms that enable one party (but not another) to terminate the contract.
- Terms that penalise one party (but not another) for breaching or terminating the contract.

- Terms that enable one party (but not another) to vary the terms of the contract.

Although the ACCC protects businesses from unfair contracts through managing the *Competition and Consumer Act 2010* (of which MTAA has a history of influencing), ultimately only a court or tribunal (not the ACCC) can decide if a term in a contract is unfair. MTAA's state and territory associations can provide advice on actions for members who are impacted by unfair contracts

## Treating customers fairly

The MTAA activity seeks protection for its members involved in business to business relationships both as sellers and consumers. (<https://www.accc.gov.au/business/treating-customers-fairly>)

All businesses (including automotive businesses) that provide goods—by selling, leasing or hiring—or services to consumers in Australia *must* comply with the consumer guarantees. Manufacturers and importers *must* also comply with certain consumer guarantees.

**Businesses** that sell goods must guarantee that those goods:

- Are of acceptable quality - the goods must be safe, lasting, have no faults, look acceptable and do all the things someone would normally expect them to do.
- Are fit for any purpose that the consumer made known to the business before buying (either expressly or by implication), or the purpose for which the business said it would be fit for.
- Have been accurately described.
- Match any sample or demonstration model.
- Satisfy any express warranty.
- Have a clear title, unless you otherwise advise the consumer before the sale.
- Come with undisturbed possession, so no one has the right to take the goods away from or to prevent the consumer from using them.
- Are free from any hidden securities or charges.
- Have spare parts and repair facilities reasonably available for a reasonable period of time, unless the consumer is advised otherwise.

**Manufacturers and importers must** guarantee that their goods:

- Are of acceptable quality.
- Have been accurately described.
- Satisfy any manufacturer's express warranty.
- Have spare parts and repair facilities reasonably available for a reasonable period of time, unless the consumer is advised otherwise.

Warranties are often used in the automotive industry to make products more attractive to consumers. There are different types of warranties that businesses can offer to customers and consumers. These warranties *do not* override or limit consumer guarantees and consumers may be entitled to a repair, replacement or refund, even if any voluntary or extended warranty has expired.

The MTAA takes actions to ensure that consumer warranties don't negatively impact members. For example, MTAA is lobbying against specified numbers of minor faults within a new automobile being considered a major defect that could potentially require the vehicle to be replaced.