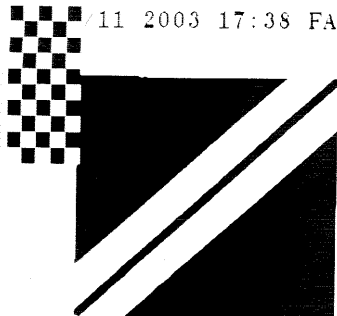
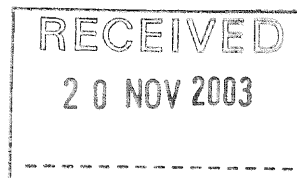


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Motor Trades Association of Australia

Senator Ursula Stephens
 Chair
 Economics References Committee
 The Senate
 Parliament House
 CANBERRA ACT 2600



Dear Senator Stephens

Further Submission – Response to matters submitted by the Federal Chamber of Automotive Industries

I write in relation your Committee's inquiry into the Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business. The Committee has received a submission from the Federal Chamber of Automotive Industries which makes a number of claims about the business relationships between vehicle manufacturers, distributors and franchised dealers. A number of these matters are factually incorrect and MTAA, on behalf of its Member the Australian Automobile Dealers Association (AADA) seeks to have these matters corrected on the public record. The FCAI submission also contains a number of contentious assertions which while presented as fact are merely opinion and as well raises issues that are not within the Committee's Terms of Reference.

The matters requiring comment are set out in the table below.

FCAI submission	MTAA response
<p>VFACTS statistics reveal that:</p> <p>(a) for the 2001 calendar year, there were 773,000 retail sales of new motor vehicles representing approximately \$23 billion of revenue for dealers; and</p> <p>for the 2002 calendar year, there were 824,310 retail sales of new motor vehicles representing approximately \$25 billion of revenue for dealers.(3.20)</p>	<p>Dealers do not sell all of these vehicles. Factories sell large numbers direct to business and fleet customers and usually at prices below that at which they will sell to their dealers.</p> <p>The assertion that the revenue from all these sales passes through dealerships is fallacious.</p>
<p>FCAI submits that the committee should reject assertions by dealer representative groups, such as the Motor Traders</p>	<p>The more important question facing the Committee is not a simplistic characterisation of big business versus small business it the</p>

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<i>Association of New South Wales (MTA), that motor vehicle dealers represent small business. This is clearly unsustainable (3.25)</i>	capacity of suppliers and franchisors to misuse market power.
<i>...the relationship between distributors and dealers does not have the orthodox characteristics of a small business franchise...Significantly, distributors do not charge a franchise fee to dealers. By contrast with other franchises that require the franchisee to purchase good will and branding from the franchisor (and often to pay significant 'transfer fees' upon a sale of the franchised business), the only investment made by a dealer will generally be in the land and facilities on which to run their franchise(3.31 & 3.32)</i>	It is deceptive to suggest that the "only investment made by a dealer will generally be in the land and facilities". Such an investment can represent millions of dollars tied to the success or otherwise of a brand. That investment will be personally guaranteed by the Dealer and his family. In any case dealers must finance the whole of their stock in trade both new and used vehicles plus mandatory levels of spare parts.
<i>...most distributors contribute significant funds to assist dealers with their business (eg facility upgrade assistance, IT infrastructure, advertising etc). In some instances, distributors wholly fund these costs. <u>In almost all other situations distributors heavily subsidise the investments made by dealers...</u>The economic impact of this is a level of support from distributors, <u>and in some cases associated finance companies</u>, that enables dealers to enter and compete in the motor vehicle sales industry in circumstances where that opportunity might not otherwise be available. (3.33, 3.34 & 3.35)</i>	These are ridiculous claims written by people seemingly without any knowledge of motor vehicle franchising and retail operations. They are totally at odds with actual experience and completely untrue. Financial arrangements with Finance Companies are based on arms length, market-based competitive agreements and do not involve subsidy.
<i>It could not be argued that a lack of proceedings [under s.51AC of the Trade Practices Act] is due to a lack of resources available to bring proceedings. Dealers are typically large enough to be self funded litigants, the Motor Trades Association of Australia (MTAA) has a 'fighting fund' and the ACCC has a 'war chest' to bring proceedings under section 51AC.(5.16)</i>	MTAA does not and has never had a 'fighting fund'. The assertion of an ACCC 'war chest' is, similarly, an utterly inappropriate description of the funds that the ACCC has been provided by Government in order to fund litigation.
<i>Termination only occurs where there are sound commercial reasons for doing so. It is not in the interests of distributors to have no product representatives of to change them for no reason.(5.18)</i>	Experience does not bear this out. The most recent example of this experience is the result of Subaru's termination of its Melbourne dealer network. This has been followed by a significant loss of market share in that city.
<i>Despite suggestions by some dealer representatives, FCAI submits that the USA model of regulation of distributor/dealer</i>	The question of state based franchise legislation similar to that which exists in all states in the USA is surely not relevant to the

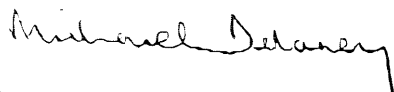
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<p><i>relationships is not particularly helpful. In the USA, the Federal anti-trust legislation contains similar provisions to section 46 of the TPA relating to the abuse of market power.(7.14)</i></p>	<p>deliberations of the Committee. However, it is worthy of note that in the face of efforts made by USA franchisors over decades, there is now franchise legislation in all US states and in a majority of them manufacturers and importers are precluded from competing against dealers for sales by opening up company operated sales outlets.</p>
<p><i>Dealer agreements do not allow distributors to unilaterally vary material terms or the primary structure of the dealer agreement itself. It would be inconsistent with standard contract law and probably the existing law of unconscionable conduct for a party to unilaterally vary the obligations of the other party under an agreement.(8.27)</i></p> <p><i>Rather, some dealer agreements include classes that allow distributors to notify dealers of revised procedures or processes that they are required to comply with (eg warranty procedures). Many of these processes and procedures are required to be responsive to consumer requirements or sentiments, or to a changing regulatory environment (eg the introduction of Privacy legislation).(8.28)</i></p>	<p>Whoops. What are we saying here? "There is no unilateral variation" but wait, watch out for "revised procedures or processes".</p> <p>In fact, all such dealer agreements <u>are</u> able to be unilaterally varied by the franchisor by the simple expedient of altering the Operations Manual or issuing Dealer Bulletins to further govern the dealings between the franchisor and the dealer.</p>
<p><i>Only two of our members surveyed require exclusivity and one of those has granted a significant notice period to dealers as part of introducing exclusivity.(8.32)</i></p>	<p>In 1974, the ACCC issued a decision which banned solus trading in the retail vehicle trade. FCAI should be asked to identify those engaging in it or proposing to engage in it and should notify such anti-competitive agreements to the ACCC</p>

I would appreciate you drawing the attention of the Committee to these matters and would be happy to discuss any of the issues they raise with you and the Senate Committee.

Yours sincerely



MICHAEL DELANEY
Executive Director

19 November 2003