FEDERAL COURT OF AUSTRALIA

AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd [2023] FCA 1022

File number:	VID 604 of 2021
Judgment of:	**BEACH J**
Date of judgment:	30 August 2023
Catchwords:	**CONTRACT** – contractual power of non-renewal – scope, ambit and purpose of contractual power – "evergreen" agreements – termination of dealership agreement – issue of non-renewal notices – transition to agency business model – repudiation – whether non-renewal power was exercised for an improper purpose – whether MBAuP has appropriated the dealerships' goodwill – compensation for loss of goodwill – nature of goodwill – difference between legal and accounting concepts – legal concept of goodwill involving property, sources and value – relevance of contractual entitlement or licence from franchisor to carry on business – relevance of franchisor's intellectual property rights to concept of goodwill **ECONOMIC DURESS** – prior economic investment by dealers – whether agency model was imposed on dealers by MBAuP – whether dealers freely consented to business model – whether agency model has provided a worse financial return for dealers than existed under the prior dealership model – so-called "lawful act" duress **FRANCHISOR AND FRANCHISEE** – *Franchising Code* – duty of good faith – unfair terms – franchisor opportunism – whether there was a shift of profits from dealers to MBAuP – whether MBAuP acted in accordance with the direction of its parent company – whether MBAuP misled dealers in consulting on proposed business model **UNCONSCIONABLE CONDUCT** – whether conduct unconscionable in contravention of s 21 of the *Australian Consumer Law* – whether MBAuP sought to exploit superior bargaining position to extract best financial return at expense of dealers – whether appropriation of dealers' goodwill
Legislation:	*Competition and Consumer Act 2010* (Cth) ss 51ACB,

51AE; Schedule 2 ss 21, 22

Evidence Act 1995 (Cth) s 140

Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth) Schedule 1 cl 6

Cases cited:

Ali v Australian Competition and Consumer Commission (2021) 394 ALR 227

Australia and New Zealand Banking Group v Karam (2005) 64 NSWLR 149

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51

Australian Competition and Consumer Commission v Geowash Pty Ltd (No 3) (2019) 368 ALR 441

Australian Competition and Consumer Commission v Medibank Private Ltd (2018) 267 FCR 544

Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3) (2020) 275 FCR 57

Australian Securities and Investments Commission v Kobelt (2019) 267 CLR 1

Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) (2018) 127 ACSR 110

Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus) (2022) 407 ALR 1

Bhasin v Hrynew [2014] 3 SCR 494

Bond Brewing (NSW) Ltd v Refell Party Ice Supplies Pty Ltd (unreported, Supreme Court of New South Wales, 17 August 1987)

Box v Commissioner of Taxation (1952) 86 CLR 387

Brambles Holdings Ltd v Carey (1976) 15 SASR 270

Briginshaw v Briginshaw (1938) 60 CLR 336 at 361

Burger King Corporation v Hungry Jack's Pty Ltd [2001] NSWCA 187; 69 NSWLR 558

Coles Myer Ltd v Commissioner of State Revenue (Vic) (1998) 147 FLR 191

Commissioner of State Revenue (WA) v Placer Dome (2018) 265 CLR 585

Commonwealth v Sterling Nicholas Duty Free Pty Ltd (1972) 126 CLR 297

Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40

Dialogue Consulting Pty Ltd v Instagram, Inc (2020) 291 FCR 155

DPN Solutions Pty Ltd v Tridant Pty Ltd [2014] VSC 511

DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640

Far Horizons Pty Ltd v McDonald's Australia Ltd [2000] VSC 310

Favotto Family Restaurants Pty Ltd v Chief Commissioner of State Revenue (2020) 111 ATR 283

Federal Commissioner of Taxation v Murry (1998) 193 CLR 605

Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd (2003) 134 FCR 522

Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486

Foxeden Pty Ltd v IOOF Building Society Ltd [2003] VSC 356

GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd (2003) 128 FCR 1

Inland Revenue Commissioners v Muller & Co's Margarine Ltd [1901] AC 217

Jones v Dunkel (1959) 101 CLR 298

JT International SA v Commonwealth (2012) 250 CLR 1

Kakavas v Crown Melbourne (2013) 250 CLR 392

Krakowski v Eurolynx Properties Pty Ltd (1995) 183 CLR 563

Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361

Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623

Legione v Hateley (1983) 152 CLR 406

Master Education Services Pty Ltd v Ketchell (2008) 236 CLR 101

McDonald's Australia Holdings Ltd v Commissioner of State Revenue (2004) 57 ATR 395

Metropolitan Life Insurance Co v RPR Nabisco Inc, 716 F Supp 1504 (SDNY, 1989)

Metz Holdings Pty Ltd v Simmac Pty Ltd (No 2) (2011) 216 IR 116

Overlook Management BV v Foxtel Management Pty Ltd [2002] NSWSC 17

Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199

Ranoa Pty Ltd v BP Oil Distribution Ltd (1989) 91 ALR 251

Reda v Flag Ltd (Bermuda) [2002] IRLR 747; UKPC 38

	Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 *Spittles v Michael's Appliance Services Pty Ltd* (2008) 71 NSWLR 115 *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409 *Symes v Stewart* (1920) 28 CLR 386 *Thorne v Kennedy* (2017) 263 CLR 85 *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2021] 3 WLR 727 *TSG Building Services PLC v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) *Virk Pty Ltd (in liq) v Yum Restaurants Australia Pty Ltd* [2017] FCAFC 190 *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Number of paragraphs:	3752
Date of last submissions:	20 December 2022
Date of hearing:	2 to 5, 8 to 12, 15 to 19, 22 to 26 August 2022, 29 August to 2 September 2022, 12 to 16 September 2022, 3 to 6, 26 to 28, 31 October 2022
Counsel for the Applicants:	Mr T.D. Castle SC, Dr C. Parkinson KC, Ms D. Levi, Mr M. Thomas, Ms A. Elizabeth, Mr J.W. Grant, Mr S.R. Cromb, Mr O. Cook, Mr M. Collins, Mr E.L Olivier and Ms J. Mee
Solicitor for the Applicants:	HWL Ebsworth
Counsel for the Respondent:	Mr R.G. Craig KC, Ms K.E. Foley SC, Ms T.L. Jonker, Mr A.N. McRobert, Ms S.E. Kearney and Mr C. O'Bryan
Solicitor for the Respondent:	Maddocks Lawyers
Counsel for Mercedes-Benz Group Aktiengesellschaft	Mr C. Archibald KC and Ms A. Gaber

Solicitor for Mercedes-Benz Group Aktiengesellschaft	Maddocks Lawyers

ORDERS

VID 604 of 2021

BETWEEN:	**AHG WA (2015) PTY LTD ACN 603 598 750 T/A MERCEDES-BENZ PERTH & WESTPOINT STAR MERCEDES-BENZ** First Applicant
	ANDREW MIEDECKE MOTORS PTY LTD ACN 002 582 621 T/A ANDREW MIEDECKE MOTORS (MB PORT MACQUARIE) Second Applicant
	B.E.A. MOTORS PTY. LTD. ACN 007 559 757 T/A MERCEDES-BENZ ADELAIDE AND MERCEDES-BENZ UNLEY (and others named in the schedule) Third Applicant
AND:	**MERCEDES-BENZ AUSTRALIA/PACIFIC PTY LTD ACN 004 411 410** Respondent

ORDER MADE BY:	**BEACH J**
DATE OF ORDER:	**30 AUGUST 2023**

THE COURT ORDERS THAT:

1. The parties on or before 21 September 2023 file and serve proposed minutes of orders to give effect to these reasons.
2. There be a further case management hearing on a date to be fixed to deal with confidentiality issues.
3. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 Mercedes-Benz dealers have brought the present proceeding asserting that the agency model as implemented in Australia by Mercedes-Benz Australia/Pacific Pty Ltd (MBAuP) has involved the appropriation of their goodwill and customer relationships for no or inadequate compensation. It is said that this agency model has provided a worse financial return to the dealers than existed under the prior dealership model.

2 Now from 2018 onwards the dealers consistently opposed the introduction by MBAuP of the agency model. It is said that they did so having endured years of misrepresentations by MBAuP, threats to their ongoing business relationship, and the refusal to genuinely negotiate the terms of the agency agreements. Such conduct was said to involve the spin and dissimulation of officers of MBAuP including Mr Horst von Sanden, Mr Florian Seidler and Mr Jason Nomikos in their dealings with the dealers.

3 It is said that the implementation of the agency model and the issuing of non-renewal notices bringing to an end their relationships under the prior dealer agreements were not the product of a genuinely conducted process, and were not conducted in good faith.

4 Further, it is said that there has been an appropriation of the dealers' goodwill in the events which have occurred without compensation. Moreover, it is said that MBAuP knew or was recklessly indifferent to the fact that most if not all of the dealers would be worse off under the agency model. It is said that this model was imposed on the dealers in contumelious disregard of their interests.

5 Further, in implementing the agency model the applicants say that MBAuP was little more than the cat's paw of its ultimate holding company, Mercedes-Benz AG (MBAG). It is said that MBAuP acted in accordance with the directions of MBAG, through the latter's formal decision-making structure with key decision-makers including Mr Matthias Lührs, Ms Britta Seeger, Mr Peter Schymon, Mr Harald Wilhelm and Mr Ola Källenius.

6 It is said that various reporting lines converged at the MBAG Board of Management level, which was the real decision-making body so far as the agency model in Australia was concerned. I will discuss these matters in detail later, including the role and conduct of Region Overseas (RO) personnel.

7 It is said that MBAG not only made all the critical strategic and timing decisions for the rollout of agency in Australia, but set the guardrails for the operational decisions. It is said that MBAG collaborated closely with the MBAuP project team in relation to operational issues, but that the Finance and Controlling staff including Messrs Wilhelm, Schymon, Jörg Wolf, and Tobias Freienstein had the final say in relation to the setting of dealer commissions.

8 More generally it is said that no decision of any significance about the agency model in Australia was made by MBAuP.

9 Now these proceedings were commenced on 18 October 2021 by 38 of the then 49 dealers operating Mercedes-Benz (MB) dealerships in Australia. I will refer to Mercedes-Benz and MB inter-changeably throughout these reasons.

10 On 12 November 2021 I ordered:

> Subject to further order, the trial of the claims of the individual applicants identified by operation of orders 2 and 3 (other than the quantification of any monetary compensation) and any other issues that the Court directs, be fixed for hearing on 2 August 2022 at 10.15am on an estimate of 4 weeks.

11 So, orders were made setting down the matter for an expedited hearing commencing on 2 August 2022 with further orders concerning the selection of four of the applicants to serve as exemplars for the purpose of that hearing, such that each of their individual claims would be dealt with. Two exemplars were nominated by the applicants, being the fourth and twenty-first applicants, and two exemplars were nominated by MBAuP, being the twenty-eighth and thirty-sixth applicants. Between them, the four exemplars represented all of the 38 applicants in relation to their dealership agreements with MBAuP.

12 The trial occurred over August to October 2022 with further written material filed up to December 2022. In addition to more than 100 folders of witness statements, annexures and other exhibits, other evidence had to be filtered and synthesised from an electronic database. The case was forensically complex although legally straight-forward for a case of this type. Notwithstanding, I have had to say a little on the concepts involved in statutory unconscionable conduct as a counterpoint to what can be described as value-laden philosophising in some of the authorities. This is a characterisation not a criticism.

13 Let me now say something further about the case and the claims made.

14 The applicants challenge the non-renewal of their dealer agreements and the imposition on them of the agency model, which they say has involved the appropriation of their goodwill.

15 The applicants say that the dealer agreements were "evergreen". By "evergreen", the applicants mean that the non-renewal power was constrained such that MBAuP could exercise the power of non-renewal only if a dealer failed to meet their targets or make mutually agreed improvements.

16 On the applicants' case, the parties made a permanent bargain. So, because a dealer made investments in their dealership, the dealer was entitled to continue to operate under the dealer model permanently, provided the dealer met their targets, made mutually agreed improvements and did not breach the agreement. They allege that by force of clause 1.2 of the dealer agreements, MBAuP gave away the right to operate any business model in Australia other than the dealer model. They say that in essence clause 1.2 was a renunciation of agency.

17 The applicants say that the non-renewal power, which could be exercised by MBAuP without cause, did not extend to permitting MBAuP to use that power to continue the existing relationship between MBAuP and each of the dealers on the basis of an agency relationship.

18 They say that the non-renewal notices (NRNs) given to them by MBAuP at the end of 2020 were invalidly issued. Now they advance such a case despite the express words of clause 8 of each dealer agreement and the fact that, correspondingly, a dealer could terminate the agreement without cause on 60 days' notice. And they advance their case despite the fact that each dealer agreement did not grant a dealer an entitlement to any particular margin or any particular level of supply, if at all, of Mercedes-Benz vehicles and MBAuP could change the dealer's prime marketing area (PMA) on three months' notice.

19 Further, the applicants say that MBAuP has appropriated the dealers' property being their goodwill. It is said that the agency model implemented in Australia involves the appropriation of the dealers' goodwill and customer relationships for no or inadequate compensation. It is said that the purpose of issuing the NRNs was to terminate the dealer agreements and force the applicants to enter into the agency agreements to achieve the purpose and effect of transferring the goodwill in each applicant's dealership to MBAuP.

20 Generally, the applicants contend that MBAuP's conduct in issuing the NRNs was motivated by a purpose which was antithetical to the dealer relationships and dealer agreements, being to take the customer relationships and the profits to be earned from the unexpired lifetime value of their customers, without paying anything to the dealers for that taking.

21 Let me at this point say something more about the NRNs. The applicants allege that MBAuP had various improper purposes in issuing the NRNs and failed to consider certain matters in issuing the NRNs.

22 First, it was said that the purpose of the NRNs was to terminate the dealer agreements and introduce the agency model so as to transfer the goodwill in each applicant's dealership to MBAuP. It was said that MBAuP misused a contractual mechanism intended for another purpose.

23 Second, it was said that the issuing of the NRNs was to give effect to directives issued by MBAG to MBAuP and to give effect to a global strategy or policy of MBAG to implement the agency model. So, it was said that MBAuP introduced a direct sales model at the behest of MBAG without exercising its own judgment.

24 The applicants allege that the proper purpose of the non-renewal power was to allow MBAuP to bring the relationship to an end where a dealer did not meet their performance targets or did not carry out mutually agreed improvements. Moreover, the applicants contend that the purpose of the power of non-renewal was to end the relationship between MBAuP and a dealer, not to continue the relationship on different terms unilaterally imposed by MBAuP.

25 The applicants allege that by engaging in the relevant conduct for an impugned purpose, each NRN was issued with the following characterisations.

26 First, the NRNs were issued in contravention of the good faith duty under clause 6 of the Franchising Code as set out in Schedule 1 to the *Competition and Consumer (Industry Codes–Franchising) Regulation 2014* (Cth) and involved a contravention of s 51ACB of the *Competition and Consumer Act 2010* (Cth) (CCA).

27 Second, the NRNs were issued in contravention of certain alleged implied duties owed by MBAuP to each of the applicants under their respective dealer agreements, such duties being a duty to cooperate to achieve the objects of each such dealer agreement and a duty to act reasonably and in good faith, having regard to the terms, purpose and object of each such dealer agreement.

28 Third, the NRNs were issued for a purpose foreign to the power of non-renewal contained in each of the three different forms of the dealer agreements, being the 2002 dealer agreement term provision, the 2015 dealer agreement term provision and the Wollongong dealer agreement term provision.

29 Fourth, in respect of applicants with a 2002 dealer agreement, it was said at the outset of the trial that the NRNs were not issued during 2021, and so were spent by automatic renewal of those dealer agreements on 1 January 2021 in accordance with the 2002 term provision. But by the end of the trial it appeared that the spent notices claim was no longer pressed by the applicants. But even if it had been persisted in, in my view it was meritless.

30 Now the applicants say that if one or more of these grounds are established, then each of the NRNs should be set aside or is void and of no effect. And the applicants say that if the NRNs are set aside or are void, then each of the applicants is entitled to have their dealer agreements automatically continued on and from 1 January 2022.

31 But I should say now that I have rejected the applicants' case on this aspect.

32 The very purpose of the non-renewal power is to bring the existing contractual bargain to an end. And the content of MBAuP's obligation pursuant to any duty of good faith and to act with fidelity to the bargain between the parties is necessarily informed by the nature of the power which is to bring that bargain to an end.

33 So, the proper inquiry is directed to MBAuP's non-renewal of each dealer agreement and whether the non-renewal was faithful to that contractual bargain. It was. MBAuP exercised the non-renewal power for the purpose for which it was created, being to bring each dealer agreement to an end.

34 Moreover, the applicants' position fails to recognise that it will be difficult to discern a want of good faith in the exercise of a power which can serve only the interests of the party upon whom the power is conferred.

35 Further, once it is appreciated that the commercial bargain struck by the dealer agreements was not a permanent bargain, the proper analysis of the NRNs claim is to evaluate whether the exercise of the non-renewal power was faithful to that bargain. On the NRNs claim, the inquiry is not whether the introduction of the agency model, at large, was in good faith or faithful to the bargain struck under the dealer agreements. However, and in any event, even if that were the proper inquiry, the evidence demonstrates that MBAuP introduced the agency model in good faith.

36 Let me turn to some other matters concerning the applicants' case.

37 First, the applicants have brought a claim asserting that they were subject to economic duress. They say that they did not have the opportunity to give their consent freely to enter into any of the agency agreements, by reason of MBAuP's pressure or threat to treat the dealers' relationships with MBAuP and the MB brand as ceasing on 31 December 2021 if the applicants did not sign and return to MBAuP each of those agreements. They allege that the pressure exerted and the threats made upon each of the applicants to sign the agency agreements was illegitimate, thereby amounting to economic duress. They seek orders setting aside and/or rescinding the agreements. But for the reasons that I have set out later, such a claim is not made out.

38 Second, the applicants allege that other conduct of MBAuP was a contravention of its obligation of good faith under clause 6 of the Franchising Code. The applicants say that MBAuP contravened the good faith duty under the Franchising Code in relation to the negotiation of the agency agreements, the service and parts agreements and the agency related agreements, and also by imposing unfair terms. But again, such claims have not been made out.

39 Third, the applicants allege that MBAuP engaged in unconscionable conduct in contravention of s 21 of the *Australian Consumer Law* (ACL), as set out in Schedule 2 to the CCA, in three principal respects.

40 The first principal respect was said to be by purporting to bring to an end the dealer model by not renewing each of the applicants' dealer agreements.

41 The second principal respect was said to be by imposing the agency agreements, service and parts agreements, and agency related agreements on each of the applicants as the basis for continuing to operate their dealerships.

42 The third principal respect was said to be by failing to compensate each of the applicants for the value of their dealerships, including the loss of the value of their goodwill, as a result of the termination of the dealer model, and the implementation of the agency model under the agency agreements, service and parts agreements, and agency related agreements.

43 Generally, the applicants allege that MBAuP has engaged in the unjustifiable pursuit of its self-interest by appropriating the substantial value of the assets and/or goodwill of the Mercedes-Benz dealership businesses, undermining the basis of the commercial bargain and relationship between itself and the applicants under the dealer model, implementing terms in the agency

agreements to allow MBAuP to rationalise its network and implementing a global directive, strategy or policy of MBAG.

44 But I agree with MBAuP that the applicants in essence seek to rewrite the contractual bargain struck by the dealer agreements into one which better suits their commercial interests. They seek to convert the commercial judgment they made when they entered into those agreements into a guarantee of permanent tenure (subject to certain qualifications that it is convenient for them to concede) and a fetter on the exercise by MBAuP of its legitimate business judgment as to how best to adapt to a changing marketplace concerning the Mercedes-Benz brand in Australia. In essence, the commercial judgment made by each dealer was that MBAuP would not issue a notice of non-renewal if the dealer performed well, because it was assumed that it would be in MBAuP's commercial interest and the dealer's interest for that agreement to continue. No doubt that was a sensible commercial assumption to make. But it was not the contractual bargain that was struck. The NRNs could be given without cause.

45 Moreover, the applicants do not allege that the agency agreements have not provided them with a reasonable opportunity to make a return on their investments during the term of those agreements, that being a statutory requirement under clause 46B of the Franchising Code which provides that:

> A franchisor must not enter into a franchise agreement unless the agreement provides the franchisee with a reasonable opportunity to make a return, during the term of the agreement, on any investment required by the franchisor as part of entering into, or under, the agreement.

46 Instead, the applicants' case proceeds on the basis of a "better off/worse off" analysis of Mr Terence Potter, the applicants' financial expert witness. I will return to this later in my reasons. But in any event, it does not follow that MBAuP has acted unconscionably or failed to act in good faith because a dealer is financially worse off under the agency model as compared to the dealer model.

47 Moreover, the applicants have neither run a case nor sought to establish that the remuneration under the agency model ought to have been set at a particular level or to generate a particular return on sales (RoS).

48 In summary, I would reject the applicants' unconscionable conduct case although I must say that it had greater merit than the applicants' other claims and has involved a harder judgment call on my part.

49 Now the principal remedy sought by the applicants is the setting aside of the NRNs and damages for the losses suffered by the applicants as a result of the implementation of the agency model in 2022, with alternative or other relief.

50 The applicants' relief is framed by reference to provisions of the CCA and the ACL as well as under the common law and in equity.

51 First, they seek declarations that MBAuP has contravened s 51ACB of the CCA by breaching clause 6 of the Franchising Code and engaging in conduct that was unconscionable in contravention of s 21 of the ACL. Section 51ACB, which is in Division 2 of Part IVB, provides that a corporation must not contravene an applicable industry code. Relevantly, the Franchising Code is an industry code prescribed by the regulations.

52 Second, they seek declarations pursuant to ss 80 and 87 of the CCA, ss 232 and 237 of the ACL and at law and in equity declaring the NRNs issued to the applicants to be void, declaring the agency agreements and the service and parts agreements entered into with the applicants to be void ab initio, and declaring that the dealership agreements of the applicants continue to have their full force and effect after 31 December 2021. They also seek orders that MBAuP specifically perform and carry into effect the dealer agreements of the applicants or other orders or relief as will restore the applicants to the full enjoyment of their rights under their respective dealer agreements as if they had continued to have full force and effect after 31 December 2021.

53 Third, alternatively, the applicants seek orders pursuant to ss 80 and 87 of the CCA and ss 232 and 237 of the ACL and at law and in equity declaring relevant terms of the agency agreements and/or the service and parts agreements of the applicants to be void ab initio either in whole or to the extent that those terms are not fair and reasonable, or varying such terms as and from the commencement of the agency agreements and/or the service and parts agreements.

54 Fourth, the applicants seek damages and/or orders for compensation pursuant to ss 82(1)(a) and 87(1) of the CCA, ss 236 and 237 of the ACL and at law or in equity.

55 In essence, the applicants seek orders that will put them in the position that they were in prior to MBAuP's imposition, as they would describe it, of the agency model on them. In other words, the applicants seek orders which will restore the status quo ante.

56 Now MBAuP did not defer the implementation of the agency model. Instead, with knowledge of these proceedings and the nature of the relief sought by the dealers, MBAuP proceeded to implement the agency model to conform to a deadline for implementation on 1 January 2022.

57 Now the applicants have prayed in aid the philosophy manifested in *Metz Holdings Pty Ltd v Simmac Pty Ltd (No 2)* (2011) 216 IR 116 at [872] to [874]. The applicants say that I should take a similar approach in the present case. They say that to make an order for damages and not to grant relief setting aside the agency agreements would be to allow MBAuP to enjoy the fruits of its wrongful conduct and to condemn dealers to the servitude of a business arrangement to which they did not consent and had no alternative but to subject themselves to. They say that I should restore the status quo prior to the implementation of the agency model. And by restoring the applicants to their rights under the dealership model, including to their rights of automatic renewal, they say that MBAuP would be deprived of the benefits of its wrongdoing.

58 Now this is all very interesting, but it is only of hypothetical interest concerning the exemplar applicants' claims. That is because I have found against the exemplar applicants.

59 Now although this trial was in relation to the exemplar applicants, the applicants say that various issues are likely to be determined that are of general application to similarly situated dealers, and potentially all dealers. The applicants' statement of declarations and remedies, which was provided in accordance with my direction at the case management hearing on 3 June 2022, comprehensively sets out the issues arising on the claims of the applicants generally.

60 Further, the manner of disposition of the issues between the parties and the consequences for other dealers similarly situated to the exemplar applicants was the subject of an exchange with counsel at the commencement of trial. Perhaps potential extrapolation of some of my findings concerning the exemplar applicants to the broader field may be appropriate. I will hear further from the parties on these questions to the extent necessary.

61 Let me now turn to my detailed reasons for finding against the exemplar applicants.

62 It is convenient to divide my discussion into the following sections:

(a) The main themes litigated and key conclusions ([63] to [266]).

(b) The applicants generally and the exemplar applicants' lay witnesses ([267] to [353]).

(c) The NDC, DAC and Mr Jennett ([354] to [380]).

(d) MBAuP and MBAG ([381] to [469]).

(e) MBAuP's lay witnesses ([470] to [531]).

(f) The parties' *Jones v Dunkel* points ([532] to [576]).

(g) The dealership model ([577] to [652]).

(h) The dealer agreements ([653] to [747]).

(i) The dealership businesses and investments ([748] to [834]).

(j) The agency model ([835] to [848]).

(k) The agency agreements and agency overview ([849] to [904]).

(l) Other agency related agreements ([905] to [970]).

(m) Some relevant facts – the evolution and implementation of agency ([971] to [2207]).

(n) The economic expert evidence ([2208] to [2330]).

(o) The financial expert evidence ([2331] to [2375]).

(p) Business Case 2.1 update – a critique ([2376] to [2562]).

(q) The Deloitte modelling ([2563] to [2584]).

(r) Analysis of expert evidence – dealers worse off ([2585] to [2660]).

(s) Exemplar applicants – impact of agency model ([2661] to [2732]).

(t) Valuation evidence ([2733] to [2770]).

(u) Non-renewal notices and contractual claims ([2771] to [3043]).

(v) Statutory duty of good faith ([3044] to [3223]).

(w) Unfair and unreasonable terms ([3224] to [3361]).

(x) Economic duress ([3362] to [3453]).

(y) Statutory unconscionable conduct ([3454] to [3750]).

(z) Conclusion ([3751] to [3752]).

The main themes litigated and key conclusions

63 It is appropriate at this point to identify and address various sets of themes that permeated the parties' dispute before I descend into the detail of the evidence. Perhaps this is an unusual course to take, but much of the later detail in my reasons concerning financial information and the global strategy of MBAG is likely to be redacted as a result of confidentiality claims and so it is advantageous at the outset to synthesise some of the highlights of these themes and how I have resolved them for ease of comprehension for those who may only have access to the redacted version of my reasons.

64 One set of themes raised by the applicants concerns the proper construction of the dealer agreements, including the object of the agreements and nature of the commercial bargain reflected in them, the duration of those agreements and the purpose of the power of non-renewal. Let me begin with this subject matter.

The scope and purpose of the contractual power of non-renewal

65 The determination of the NRNs claim principally turns on the proper construction of clause 8 of the dealer agreements, including the ascertainment of the proper purpose of that clause.

66 The applicants allege that the object of the dealer agreements was to encourage and facilitate the investment in, establishment, operation of and/or maintenance by the dealer of an MB dealership at the premises identified in the dealer agreement, and the taking of financial risks by the dealer in relation thereto.

67 The applicants plead that the commercial bargain that MBAuP struck with each dealer was that each dealer would invest time, money, effort and entrepreneurial skill, and take financial risks, to build their MB dealerships, from which they would enjoy ongoing profits and which they could sell to reap the benefits of the goodwill they had generated.

68 The applicants submit that determining a proper purpose is a matter to be assessed in conformity with the object of the contract, which they also refer to as the nature of the bargain. That object or bargain contemplates a particular form of relationship between MBAuP and the dealer, on the faith of which the dealer has invested in its dealership to make future profits and enhance the goodwill of its dealership.

69 On that case, it is alleged that because a dealer made investments in their dealership, the dealer was entitled to continue to operate that dealership under the dealer model permanently, provided the dealer met their targets and made mutually agreed improvements. Indeed, the applicants say that is the case regardless of the quantum and timing of the investments made by a dealer.

70 On the basis of that asserted permanence of the commercial bargain, the applicants assert that MBAuP could never exercise the power of non-renewal as a precursor to a change of business model, regardless of how much notice it gave to dealers and no matter what the financial terms of that new business model were.

71 Now the applicants characterise the power by reference to what it does not empower MBAuP to do. So, it is said that the power of non-renewal granted to MBAuP is not at large and that the power of non-renewal is limited by the bargain reached between MBAuP and the dealer, and cannot be used in a manner which is antithetical to that bargain or to destroy it.

72 The applicants contend that the non-renewal power in clause 8 did not extend to permitting MBAuP to use that power to continue the existing relationship between MBAuP and each of the dealers on the basis of an agency relationship, which was contrary to clause 1.2 of the dealer agreements.

73 The applicants' case as to the purpose of the non-renewal power is that its purpose was to allow MBAuP to bring its relationship (cf the dealer agreement) with a given dealer to an end, in two circumstances.

74 The first circumstance was where that dealer had failed to meet its targets or make mutually agreed improvements.

75 The second circumstance was said to be some other purpose "consistent with the object of the dealer agreement" and relevant "business circumstances". Now the facts described as the business circumstances that inform the exercise of the non-renewal power appear to be that the dealers operated as retailers and MBAuP as a wholesaler, each applicant had invested time, money, effort, entrepreneurial skill and took financial risks to acquire, establish, build and/or maintain the businesses comprising their MB dealerships, each applicant established relationships with customers such that they created a valuable asset of and/or goodwill in the business at their MB dealership, MBAuP encouraged the dealers to make those investments and take those risks, and MBAuP represented that the dealers could build a successful long-term relationship with MBAuP and/or the Mercedes-Benz brand provided that they achieved their targets and made any mutually agreed improvements. So, the business circumstances describe aspects of the dealer model under which MBAuP and the applicants had previously operated.

76 But there is no articulation as to the justification for the constraint effected by the words "consistent with the object of the dealer agreement" and the "relevant business circumstances". I agree with MBAuP that the applicants have not explained why it would be unlawful for MBAuP to issue a non-renewal notice for some other good faith purpose, simpliciter.

77 But the applicants do accept that MBAG could decide in good faith to exit the Australian market and that the power of non-renewal could be exercised for this purpose. But in my view this also implies an acceptance that the power could be exercised by reference to broader network-wide considerations, rather than just individual circumstances concerning particular dealerships.

78 So in summary, the applicants allege that the proper purpose of the non-renewal power was to allow MBAuP to bring the relationship (cf the dealer agreement) to an end where a dealer did not meet their performance targets or did not carry out mutually agreed improvements, but not otherwise except in the circumstances that I have just indicated.

79 But in my view the purpose of clause 8 was to enable MBAuP to bring the term of a dealer agreement to an end. It was the only means by which MBAuP could bring a dealer agreement to an end, absent agreement of the parties or breach by the dealer. And it symmetrically matched a dealer's right to terminate the dealer agreement without cause on 60 days' notice. The only substantive constraint on its exercise was that it be exercised in good faith, which was, inter alia, an obligation imposed by clause 6 of the Franchising Code. Further, the applicants' concept of a broader bargain superimposed on the contractual framework must be rejected.

80 Three other features of this case should be noted before proceeding further.

81 First, the applicants do not allege that they were or are in a fiduciary relationship with MBAuP, let alone that there has been any breach of any fiduciary duty. This is unsurprising as any attempt to erect such a relationship would have been at odds with the relevant express contractual provisions. But some of their arguments went close to seeking to implicitly raise such a relationship, particularly when they sought to superimpose over the applicable contractual framework the suggestion of a long-term relationship between MBAuP and the dealers and to suggest somehow that the bargain struck between MBAuP and the dealers under the dealer agreements was somehow broader than the bargain enshrined in the contractual framework and provisions. Of course, some dealers in fact had contractual relations with MBAuP over an extended period. But that is a different question.

82 Second, I have also rejected the applicants' theme concerning relational contracts, except as used in the narrow sense by Finn J to which I will return later.

83 Third, the applicants have not run any broad estoppel case concerning representations that:

(a) dealer agreements would be renewed, alternatively expressed that NRNs would not be given;

(b) dealer agreements would be continued to be renewed, that is NRNs not given, until at least the capital investments of dealers was recouped;

(c) MBAuP would not over time reduce the foot-print of the dealers.

84 Now the applicants did run in the context of the Wollongong dealer agreement scenario and analogues, a narrow estoppel by convention case. But this was hopeless.

85 Let me turn then to another set of themes.

The concept of goodwill – confusion and conflation

86 Another set of themes concerns the nature of goodwill. How does the legal concept of goodwill differ from the accounting concept? What is the particular nature of goodwill under franchise agreements such as the dealer agreements? Has the change from the dealer model to the agency model effected an acquisition or appropriation of goodwill by MBAuP from the dealers generally and the exemplar applicants specifically?

87 The applicants' case is that the change from the dealer agreements to the agency agreements involved a transfer of goodwill from the dealers to MBAuP. Goodwill was defined to mean a valuable asset of and/or goodwill in the business at the dealership as a result of attracting customers, establishing customer relationships and generating customer revenue. The applicants say that MBAuP has transferred that value to itself.

88 Contrastingly, MBAuP takes a narrow view of goodwill, which it says was tethered to the dealer agreements, and was lost when the dealer agreements ended. Consequently, MBAuP says that the applicants had no goodwill that survived termination, and so there was nothing taken or transferred.

89 In summary, I have taken MBAuP's position which has the advantage of according with High Court authority. I will put to one side for the moment more informal concepts that I will discuss later. Let me turn to some of the authorities.

90 As was made plain in *Commissioner of State Revenue (WA) v Placer Dome Inc* (2018) 265 CLR 585, goodwill at law is not equivalent to a going concern valuation or an accountant's concept of goodwill. So it was said by the plurality (at [97] to [99]):

> Goodwill for legal purposes is different from, and is not to be confused with, the "going

> value" or the going concern value of a business. These terms are not separate methods of valuing the same intangible. The distinction between them is clear and, in the context of this appeal, important. As seen earlier, goodwill represents a pre-existing relationship arising from a continuous course of business – to which the "attractive force which brings in custom" is central. Without an established business, there is no goodwill because there is no custom. A collection of assets has no custom.
>
> Going concern value, on the other hand, is the ability of a business to generate income without interruption even where there has been a change in ownership. It has been recognised as a property right by the Supreme Court of the United States. In general terms, in a number of US decisions, it has been described as what differentiates an established business from one just starting; and, importantly, is present even when there is no goodwill.
>
> For present purposes, the difference is best understood in the terms identified and discussed in *Murry*. Goodwill is property in the nature of the right or privilege to conduct the business by "means which have attracted custom to the business". The courts will protect that property – those means of attracting custom to the business – irrespective of the profitability or value of the business, so far as it is legally possible to do so. Going concern value is not of that nature: it is not the right or privilege to conduct the business by means which have attracted custom to the business and, thus, going concern value does not comprise the means of attracting custom to the business which the courts will or can protect.
>
> (emphasis and footnotes removed)

91 In terms of the legally relevant context with which I am considering, a dealer holds goodwill constituting property only if the dealer holds the right or privilege that satisfies the definition of goodwill at law. As explained in *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at [23] by the majority:

> From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes "the attractive force which brings in custom". Goodwill is correctly identified as property, therefore, because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business.

92 Further, it was said at [45]:

> Once goodwill as property is recognised as the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business, it follows that a person acquires goodwill when he or she acquires that right or privilege. The sources of the goodwill of a business may change and the part that various sources play in maintaining the goodwill may vary during the life of the business. But, as long as the business remains the "same business", the goodwill acquired or created by a taxpayer is the same asset as that which is disposed of when the goodwill of the business is sold or otherwise or transferred.

93 Now in a franchise context, the fact that the legal definition of goodwill is aligned with the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it is of significance.

94 As MBAuP correctly points out, the franchise business cannot be conducted in substantially the same manner and by substantially the same means absent the rights granted to the franchisee by the franchisor. In other words, in the context before me, the continued existence of goodwill as asserted by each of the dealers before me turned upon the continued existence of a dealer agreement, which was the source of the legal right or privilege to conduct the business in substantially the same manner and by substantially the same means that had attracted custom to the particular dealer(s).

95 Now a central pillar of the applicants' case is their allegation that MBAuP has acquired or appropriated their property, being their goodwill.

96 On the NRNs claim, they allege that one purpose of MBAuP in issuing those notices was to appropriate the dealers' goodwill. The unconscionable conduct case alleges that the agency model resulted in the transferral of the goodwill in their dealership businesses to MBAuP without compensation. It proceeds on the footing that dealers' goodwill is property and that the appropriation of one person's property is objectively dishonest.

97 The applicants' case exhibits a misunderstanding of the meaning of goodwill at law. They routinely equate the accounting definition of goodwill with the legal definition of goodwill. The applicants refer to dealers having paid an amount of money described as goodwill as evidence that they have goodwill that meets the legal description of property. But as was stated in *Placer Dome* at [53], goodwill to accountants clearly means something different than goodwill to lawyers. Goodwill for accounting purposes is essentially subjective, reflecting the excess that a purchaser is willing to pay for a business or the discount a seller is willing to accept for the same. However, as a matter of law, the existence or otherwise of goodwill is objectively ascertained.

98 In *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 235, Lord Lindley stated:

> Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill

> is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own.

99 The plurality in *Box v Commissioner of Taxation* (1952) 86 CLR 387 at 397 recognised that different businesses derive their value from different considerations such as location or reputation.

100 Moreover, as *Placer Dome* discussed, goodwill may have different sources depending on the facts of the case. As was said at [63]:

> …the notion of custom encompassed connections between a business identity and customers, however those connections were made. This expansion of the view of goodwill from being sourced in a *place* of business to recognising that there were other sources – such as the personality of those that ran the business or the way it was conducted – did *not* diverge from the idea that custom was central to goodwill. Custom was and remains central. What had occurred was that the law now recognised that custom could be generated by and from different sources.

101 Let me return to *Murry*. The issue was whether under the *Income Tax Assessment Act 1936* (Cth), by reason of an exempting provision, the capital gain from the disposal of a business or an interest in a business was deemed to be reduced by half because the disposal included the goodwill of the business. Goodwill was not defined in the legislation. The factual context was the disposal of a licence to operate a taxi.

102 The majority held that the taxpayer did not dispose of a business within the meaning of the exempting provision, nor did they dispose of an interest in a business which included the goodwill of the business. The majority considered the nature of goodwill, goodwill as property, the sources of goodwill, and then the value of goodwill.

103 First, they stated that the existence of goodwill (at [12]) depends upon proof that the business generates and is likely to continue to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business.

104 Second, they endorsed Lord Linley's description of goodwill in *Inland Revenue Commissioners v Muller* at 235 as:

> …whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others…

105 Third, they stated that the attraction of custom still remained central to the legal concept of goodwill. Moreover, they stated that the legal concept of goodwill has three different aspects,

namely, property, sources and value, and that what unites those aspects is the conduct of a business. But for each aspect identified in *Murry*, the attraction of custom remained the focus of and central to the legal conception of goodwill.

106 Now in seeking to identify the sources of goodwill, the starting point was custom. So it was said in *Murry* at [24] that the goodwill of a business is the product of combining and using the tangible, intangible and human assets of a business for such purposes and in such ways that custom is drawn to it. They went on to say that:

> Much goodwill, for example, derives from the use of trade marks or a particular site or from selling at competitive prices. But it makes no sense to describe goodwill in such cases as composed of trade marks, land or price, as the case may be. Furthermore, many of the matters that assisted in creating the present goodwill of a business may no longer exist. It is therefore more accurate to refer to goodwill as having sources than it is to refer to it as being composed of elements. In *Muller*, Lord Lindley referred to goodwill as adding value to a business "by reason of" situation, name and reputation, and other matters and not because goodwill was composed of such elements.

107 Goodwill has sources which are typically those that motivate service or provide competitive prices that attract customers.

108 But patronage in the sense of customers through the door is no longer the sole means of generating or adding value or earnings to a business by attracting custom.

109 Further, the sources of goodwill for a business are not static. The sources of goodwill of a business may change. Indeed, the part that various sources play in maintaining goodwill may vary during the life of a business.

110 Moreover, in some businesses, price and service may have little effect on attracting custom. The goodwill may instead derive from custom being attracted because of location, statutory monopolies including patents and trademarks and expenditure such as advertising. It was said in *Murry* (at [27]):

> Goodwill may also be the product of expenditures rather than the use of assets. Thus, money spent on advertising and promotions, although charged against annual earnings rather than capitalised, may generate brand, product or business name recognition that helps to generate revenue...

111 Further, *Murry* reinforced the idea that goodwill for legal purposes is property and that (at [29]):

> [t]o the extent that the proprietor of a business has the right or privilege to conduct the business in the manner and by the means which have attracted custom to the business, the courts will protect the sources of the goodwill of the business, so far as it is legally possible to do so…

112 The Court observed that goodwill has no existence independently of the conduct of a business and goodwill cannot be severed from the business which created it.

113 The Court noted that whilst goodwill (at [4]):

> …may derive from identifiable assets of a business … it is an indivisible item of property, and it is an asset that is legally distinct from the sources - including other assets of the business - that have created the goodwill. Because that is so, goodwill does not inhere in the identifiable assets of a business, and the sale of an asset which is a source of goodwill, separate from the business itself, does not involve any disposition of the goodwill of the business.

114 So, the sale of an asset of a business does not involve any sale of goodwill unless the asset sale is accompanied by or carries with it the right to conduct the business.

115 The Court stated that when viewed from the perspective of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. The Court stated (at [23]):

> From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes "the attractive force which brings in custom." Goodwill is correctly identified as property, therefore, because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business.
>
> (footnotes omitted)

116 The Court later stated (at [45]):

> Once goodwill as property is recognised as the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business, it follows that a person acquires goodwill when he or she acquires that right or privilege. The sources of the goodwill of a business may change and the part that various sources play in maintaining the goodwill may vary during the life of the business. But, as long as the business remains the "same business", the goodwill acquired or created by a taxpayer is the same asset as that which is disposed of when the goodwill of the business is sold or otherwise transferred.

117 As custom is central to the nature and sources of goodwill, the value of the goodwill of a business varies with the earning capacity of the business and the value of the other identifiable assets and liabilities.

118 Let me say something about the nature of goodwill under a franchise agreement.

119 As I have indicated, goodwill constitutes property because it is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it. It is an asset of a business because it is the valuable right or privilege to use the other assets of the business as a business to produce income. It is only when a person holds that right or privilege that they hold goodwill constituting property.

120 In *Murry*, it was concluded that the taxi licence was merely an item of property the value of which was not dependent on the present existence of a business, and therefore the majority held that the taxi licence contained no element of goodwill.

121 Now the fact that the legal definition of goodwill is tethered to the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it takes on particular significance in a franchise context, because the franchise business cannot be conducted in substantially the same manner and by substantially the same means absent the rights granted to the franchisee by the franchisor.

122 In the present context there was no Mercedes-Benz dealership business without the rights granted to a dealer under a dealer agreement. So, the question is not, as the applicants would have it, who owns the customer?

123 Without access to supply of Mercedes-Benz vehicles and rights to use the Mercedes-Benz brand, a dealer could not generate any future profits from the sale of Mercedes-Benz vehicles, whether that be through customer relationships or otherwise. Absent that supply and those rights, there would exist no Mercedes-Benz dealership from which they could derive future profits, nor would there be such a dealership that an applicant could transfer to a third party.

124 Without that supply and those rights, a former Mercedes-Benz dealer might deploy its physical assets, personnel and customer relationships to generate profits by operating a business as, say, a used car dealer or a servicing business, or, subject to obtaining a grant of rights from another brand, as a new car dealer for that other brand. But that would be a different business, with a different goodwill. In that circumstance the goodwill would be the right or privilege to conduct that other business.

125 Further, the absence of any right at law for a franchisee to be compensated for goodwill on non-renewal of a franchise agreement has long been recognised.

126 As Ward CJ in Eq said in *Favotto Family Restaurants Pty Ltd v Chief Commissioner of State Revenue* (2020) 111 ATR 283 at [104]:

> Second, as to the nature of the rights under a franchise agreement, reference was made to the decision of the Full Court of the Federal Court (Lockhart, Wilcox and Gummow JJ) in *Ranoa Pty Ltd v BP Oil Distribution Lt*d (1989) 91 ALR 251 (*Ranoa*), a matter involving a franchise governed by the *Petroleum Retail Marketing Franchise Act 1980* (Cth). In *Ranoa*, it was held that, on the expiry or termination of a franchise agreement, the franchisee has no right to continue operating the business and no right (in the absence of specific provision in the agreement to the contrary) to any goodwill that may have accrued to the business whilst it was operated by the franchisee. Their Honours noted (at 256) that, under the general law, "the benefit of goodwill built up by reason of a tenant carrying on a business from the leased premises enures to the benefit of the landlord at the expiration of the term" (citing Lord Coleridge CJ in *Llewellyn v Rutherford* (1875) LR 10 CP 456 at 467) and that, "in the absence of any special covenant and any other applicable statute, upon the tenancy coming to an end, the benefit of any goodwill of that character would be lost to the tenant and would enure to the benefit of the lessor" (see at 257).

127 Similarly, Habersberger J stated in *Foxeden Pty Ltd v IOOF Building Society Ltd* [2003] VSC 356 that a franchise merely confers a licence to participate in the franchisor's business system for a specified term. He said at [269]:

> However, Mr Hayes recognised that, generally, a franchise merely confers a licence to participate in the franchisor's business system for a specified term. During the term of the franchise, the franchisee owns the goodwill of the franchise in the relevant sense and is able to sell the goodwill (by assigning the franchise agreement). In the absence of a contractual provision providing for compensation for goodwill on expiry or termination of the franchise, the franchisee will forfeit the goodwill…

128 Habersberger J subsequently observed at [295], that:

> Whether or not the relationship between the Taylors and IOOF is correctly described as a franchise is not strictly relevant. What is important is what was actually agreed between the parties, whatever label is given to the relationship…

129 The absence of any right to compensation for goodwill on non-renewal of a franchise agreement is an issue that has long attracted the attention of those seeking to change franchising laws in Australia.

130 The *Trade Practices Act Review Committee*, which released its report in 1976, considered the issue of compensation to franchisees for the loss of goodwill upon the termination or non-renewal of their franchise agreement by the franchisor. It recommended that franchisees be given the right to just and equitable compensation.

131 In 2013, the issue was also considered in the review of the Franchising Code; see Wein A, Review of the Franchising Code of Conduct: Report to the Hon Gary Gray AO MP, Minister for Small Business, and the Hon Bernie Ripoll MP, Parliamentary Secretary for Small Business, 30 April 2013. The report of that inquiry concluded (at p107):

> Nonetheless, there should not be a general overarching right to compensation for franchisees at the end of a fixed term franchise agreement. Making such a recommendation would substantially and fundamentally change long established legal principles of property and contract law. There would also be a risk of greater cost and uncertainty in the industry and possible unintended consequences from any such change to contractual rights.
>
> While appreciating the contribution made by franchisees to the development of their franchise site or territory, a franchisee should expect that the franchise period should be no longer than the negotiated terms of the contract. Any equitable right to compensation for a franchisee whose franchise is not renewed must lie with the courts and any statutory right that may exist under the ACL.
>
> Arguably, adequate remedies already exist if a franchisor fails to renew a franchise agreement in a situation where the franchisee has complied with all the conditions for renewal. Unlawful refusal will amount to a breach of the agreement by repudiation or possibly unconscionable conduct. However, if the agreement does not provide for renewal, the franchisee knows before entering into the agreement that the franchisee's rights under the agreement will terminate on the expiry of the term. In that situation the franchisee should not be entitled to compensation.

132 Following the Wein review, amendments were made to the Franchising Code in relation to the enforceability of restraint of trade provisions where a franchise agreement is not renewed and nominal or no compensation for goodwill is given to a franchisee. But no right to compensation for goodwill, and no right to renewal, has been included in the Franchising Code. Rather, a franchisor is required to disclose "the prospective franchisee's rights relating to any goodwill generated by the franchisee (including, if the franchisee does not have a right to any goodwill, a statement to that effect)" (Franchising Code, Annexure 1 (Disclosure Document for franchisee or prospective franchisee), [18.1(fa)]).

133 Now both Ward CJ in Eq in *Favotto* and Habersberger J in *Foxeden* referred to *Ranoa Pty Ltd v BP Oil Distribution Ltd* (1989) 91 ALR 251. Let me elaborate on *Ranoa.*

134 The appellant in *Ranoa* had operated a BP service station franchise at Engadine in New South Wales for 9 years. On 30 March 1988, the second respondent (BP Australia Limited) wrote to the appellant advising that "BP intends to take back control of BP Engadine at the end of your current lease" and "BP is unable to offer renewal at that time". The proceeding concerned the construction of s 23 of the *Petroleum Retail Marketing Franchise Act 1980* (Cth). Section 23 provided that:

> (1) Where, but for this section, the operation of a provision of this Act would result in the acquisition of property from a person by another person otherwise than on just terms, there is payable to the person by that other person such reasonable amount of compensation as is agreed upon between those persons or, failing agreement, as is determined by a court.
>
> (2) In sub-section (1), 'acquisition of property' and 'just terms' have the same

respective meanings as in paragraph 51(xxxi) of the Constitution"

135 The question as framed on the appeal assumed that the respondents acquired property, namely some species of goodwill from the appellant, and that such property was acquired otherwise than on just terms. The primary judge had answered in the negative a question which had been ordered to be decided separately from and before all other questions in the proceedings. The question was:

> Upon the true construction of s.23 of the *[Petroleum Retail Marketing Franchise Act 1980]* in its setting in the Act, is the franchisee, upon the expiration of the period of nine years, provided for in ss.13 and 17B entitled to such reasonable amount of compensation as is determined by a Court upon the basis that the franchisor acquired property from the franchisee otherwise than on just terms by reason of the operation of this Act?.

136 The question before the Full Court was reformulated as:

> Upon the basis of the following assumptions, namely, that for the purpose only of the determination of this separate question, on 18 September 1989:
>
> (a) the respondents acquired property namely some species of goodwill from the Appellant and,
>
> (b) such property was acquired otherwise than on just terms,
>
> did the operation of some provision of the [*Petroleum Retail Marketing Franchise Act 1980]* result in the acquisition of this property so as to require the Respondents to pay to the Appellant compensation pursuant to s 23 of the said Act?

137 So, the issue that was posed was whether the operation of s 23 of that Act resulted in the acquisition of goodwill such as to require the respondents to pay compensation to the appellant. In passing, Lockhart, Wilcox and Gummow JJ opined on the position of a franchise under the common law and held that the legislation under consideration in that case did not alter the position at general law. So it was said (at 257):

> Upon the expiry of the term of a franchise agreement in circumstances such as those in the present case, where the franchisor is not bound to renew the agreement and does not voluntarily do so, does the legislation bring about a result as regards the goodwill which differs from that under the general law?...

138 As to the specific question in that case, their Honours held that the:

> …acquisition of goodwill upon the end of the term … was not the result of the operation of any provision of the Act so much as a consequence of what the Parliament did not provide, namely an entrenched tenure for a period greater than 9 years.

139 Their Honours noted that under the general law the benefit of goodwill built up by reason of a tenant carrying on a business from the leased premises enures to the benefit of the landlord at the expiration of the term and that in the absence of any special covenant and any other

applicable statute, upon the tenancy coming to an end, the benefit of any goodwill of the relevant character would enure to the benefit of the lessor. Their Honours stated (at 257 and 258) that:

> Where a franchisor elects to grant a new lease the franchisee has the benefit of continued exploitation of the goodwill of the site... But where a franchisor elects not to grant a new lease, the franchisee is turned from the site without compensation for any goodwill which it may have developed during its period of occupancy. A franchisee, such as the appellant, may regard this result as harsh, the harshness being exacerbated if it should be the case - we do not know whether it is so - that franchisors are more likely to decide themselves to operate sites to which substantial goodwill attaches…

140 So, the views expressed in *Ranoa* are consistent with the principle, recognised in *Murry* and *Placer Dome*, that goodwill is the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means which in the past have attracted custom to the business. The continued existence of that goodwill turns on the continued existence of that right or privilege.

141 Now I accept though that *Ranoa* concerned the "taking back" by the franchisor from a franchisee tenant of a leased service station, by a notice of non-renewal of the lease. It was against that factual background, and a general law principle that goodwill built up by a tenant from leased premises enures to the benefit of the landlord at expiration, that the Court found there was no residual goodwill in the tenant franchisee's business. The present case does not share that common factual and legal substratum.

142 But again, to use the present case as an example, a dealer whose term has expired cannot transfer to a purchaser the essential ingredient required to conduct a Mercedes-Benz franchise, being the rights granted under the dealer agreement, including access to supply of MB vehicles and use of MB intellectual property.

143 As Chesterman J observed in *McDonald's Australia Holdings Ltd v Commissioner of State Revenue* (2004) 57 ATR 395 in discussing whether there had been a transfer of the goodwill of a McDonald's franchise (at [61]):

> It follows that the applicants cannot have become the transferee of the licensee's goodwill, or have otherwise acquired the goodwill, unless it acquired those assets which the licensees held prior to 31 January 1994 and which allowed them to carry on the business, which is said to have given rise to the goodwill. In practical terms that means the licences, or rights, to use the McDonald's System's trademarks, trade names and service names. Without these licenses the licensees would not have conducted their businesses which were McDonald's restaurants. They may have needed other things as well, but the licenses were the essential ingredient. Customers are attracted to a

> McDonald's restaurant because of the reputation of the McDonald's name and the fact that enforced compliance with the detail of the McDonald's System means that on the occasion of every visit and in every McDonald's restaurant the quality and choice of food and the quality of service and standard of fit-out will be the same. There is a uniformity of product, service and milieu in every McDonald's restaurant. This uniformity, which the public confidently expects to experience at a McDonald's restaurant, comes from the adherence by each restaurant proprietor to the McDonald's System including the use of the trademarks, trade names and service names. It is the right to use these items of intangible property which generates goodwill…

144 Similar issues arose in relation to the sale of two McDonald's restaurant businesses in *Favotto* concerning assessments for duty issued by the Chief Commissioner of State Revenue (NSW) in respect of transactions entered into by Favotto relating to those restaurants. The principal issue was whether there was dutiable property and, specifically, whether the transactions effected a transfer or agreement for the sale or transfer of the goodwill of the existing McDonald's restaurant businesses to Favotto or merely the non-dutiable grant of new franchise rights to enable Favotto to continue the operation of the existing restaurant businesses.

145 Ward CJ in Eq considered that what was revealed on a consideration of the respective transaction documents was that Favotto acquired a limited licence to use the respective premises and the "McDonald's System" for the purpose of running a McDonald's restaurant (for a limited time and on strict conditions) at each of the premises. Her Honour considered it significant that on the termination of the licence arrangement, there was no goodwill that enured to the benefit of Favotto. Favotto had the temporary enjoyment of the goodwill of the businesses but there was no transfer as such to Favotto of the goodwill in the sense that it would be free to deal with or dispose of this at the end of the licence arrangements. As her Honour stated, "in effect, Favotto's right to make use of that goodwill simply comes to an end" (at [170]). On the expiry or termination of a franchise agreement, a "franchisee has no right to continue operating the business and no right (in the absence of specific provision in the agreement to the contrary) to any goodwill that may have accrued to the business whilst it was operated by the franchisee" (at [104], citing *Ranoa)*. Moreover, in the absence of a contractual stipulation to the contrary, no compensation for any so-called loss of goodwill is payable.

146 Let me say something about two other cases that the parties before me lingered on being *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187; 69 NSWLR 558 and *Bond Brewing (NSW) Pty Ltd v Refell Party Ice Supplies Pty Ltd* (unreported, Supreme Court of NSW, Equity Division, 17 August 1987).

147 Let me deal first with *Burger King* and the scenario that it was dealing with.

148 Burger King Corp as franchisor and Hungry Jack's as franchisee entered into four agreements, one of which was a development agreement. Those agreements, together with the individual franchises for each store, governed their contractual relationship, including Hungry Jack's development rights in Australia.

149 The development agreement conferred upon Hungry Jack's the non-exclusive right to develop and to be franchised to operate Burger King restaurants in Australia. Under clause 2.1, Hungry Jack's was required either by itself or through a third-party franchisee to develop and open a minimum of four new Burger King restaurants per year in Western Australia, South Australia and Queensland. The agreement also provided for non-exclusive development rights in the other Australian states and territories. Further, there was a provision allowing termination for breach and a requirement that 30 days' notice be given in respect of any breach that was capable of cure. Clause 4.1 required Hungry Jack's to obtain individual franchises for each restaurant developed under the agreement. That required compliance with various procedures, including entering into a further agreement, which provided for conditional approval in respect of nominated sites and to have certain approvals at the time of application for a franchise agreement for a newly developed restaurant.

150 Now from 1993, Burger King Corp took a more active role in Australia with a view to reducing Hungry Jack's role in the market. In 1995, Burger King Corp took three steps that restricted Hungry Jack's ability to develop. First, it advised that it would no longer approve any further recruitment of third party franchisees. Second, it withdrew financial approval. Third, it withdrew operational approval. The effect of these actions was to impede Hungry Jack's development of new outlets. The impact of this was significant as Hungry Jack's was required under the development agreement to develop a minimum of four stores in Western Australia, South Australia and Queensland each year.

151 During 1994, the parties also entered into discussions with Shell about the feasibility of establishing Hungry Jack's outlets in Shell service stations. A test site agreement was initially proposed to assess the viability of a long-term venture. The initial discussions were conducted on the basis that if the test sites were successful, the parties would enter into a long-term tripartite venture. During the course of these discussions, Burger King Corp then commenced dealing with Shell separately. Months after Burger King Corp had decided to proceed with Shell without Hungry Jack's, Burger King Corp informed Hungry Jack's of the position.

152 Now over the relevant period Hungry Jack's was operating 148 Hungry Jack's restaurants and operating another two restaurants controlled by Shell on service station sites. 18 Hungry Jack's restaurants were operated by third party franchisees and Hungry Jack's provided training and other services to those restaurants. From November 1990 to November 1996 Hungry Jack's had paid royalties to Burger King Corp exceeding $20 million.

153 By two separate notices given in November 1996, Burger King Corp purported to terminate the development agreement for breach. The first notice particularised Hungry Jack's failure to develop new restaurants as required by clause 2.1 as the breach giving rise to the right to terminate. The second alleged various breaches relating to a sunglass promotion campaign, advertising without approval and improper trademark use. A third notice was given in September 1997, after the commencement of proceedings, against the possibility that the earlier notices were held to be invalid.

154 Hungry Jack's challenged the notices of termination and was substantially successful before the primary judge. Burger King Corp then pursued an appeal, but unsuccessfully.

155 Now it was common ground that there were implied terms of the development agreement that Burger King Corp would do all that was reasonably necessary to enable Hungry Jack's to enjoy the benefits of that agreement, that Burger King Corp would act reasonably in exercising its powers under the agreement, and that Burger King Corp would act in good faith in the exercise of its contractual powers.

156 Now as to the steps taken by Burger King Corp to reduce Hungry Jack's role in the Australian market, the Court of Appeal observed that Burger King Corp's conduct and its intentions in respect of the Australian market were to be reviewed against the fact that under the development agreement, Hungry Jack's had the prospect of expanding over a 20 year period and that the franchise agreements for each restaurant provided for a term of either 15 or 20 years with an option to renew for the same period. A detailed review of the facts is contained in a schedule to the judgment which has been omitted from the authorised report.

157 On the issue concerning the third party freeze by which Burger King Corp would not approve any further recruitment of third-party franchisees, the Court held that Burger King Corp did not seek to support the freeze on any contractual basis and that the freeze was imposed at a time when Burger King Corp had made a policy decision to, in some way, take back the Australian market. The Court was satisfied that it was clear that Burger King Corp was actively

seeking ways to at least reduce Hungry Jack's dominant role if it could not remove it from the market altogether. One of the means available to Hungry Jack's to both satisfy the development schedule and to develop generally was through third party franchisee arrangements. But it was precluded from doing so from mid-May 1995 at a time when there was active interest by prospective franchisee applicants. The Court held that the continued imposition of the freeze was in breach of the implied terms of reasonableness and good faith.

158 On the issue concerning Burger King Corp's financial disapproval of Hungry Jack's which was the second step of a process whereby Hungry Jack's ability to expand was affected, the Court stated (at [276]) that there was considerable force in the trial judge's observation that the "odd thing about BKC's approach, which, in my opinion, is only explicable because of the attitude BKC was taking to HJPL, is that the financial disapproval preceded the receipt of the various information [requested of Hungry Jack's], rather than followed an analysis of it and the exercise of the discretion based on that analysis".

159 The Court held that Burger King Corp's conduct in this regard breached an implied term of good faith, stating (at [310]):

> …the evidence clearly establishes that BKC's conduct is properly characterised as being directed not to furthering its legitimate rights under the Development Agreement but to preventing HJPL from performing its obligations under the Development Agreement.

160 The Court reached the same view regarding the other issue concerning the withdrawal of operational approval. It accepted that Burger King Corp breached its obligations of good faith and reasonableness by its conduct in imposing the third party freeze, and in financially and operationally preventing Hungry Jack's from further expansion.

161 Now the conduct of Burger King Corp was not in good faith because it was directed not to furthering its own legitimate interests but, rather, to preventing Hungry Jack's from performing its obligations under the development agreement. Its conduct was directed to setting up a basis for terminating the development agreement and denying Hungry Jack's the benefit of the contractual bargain. The long-term nature of the parties' bargain in *Burger King* was clear on the contractual documents. Hungry Jack's had the prospect of expanding over a 20-year period and the franchise agreements for each restaurant provided for a term of either 15 or 20 years, with an option to renew for the same period. As the Court said (at [185]), Burger King Corp's conduct was wrongful because it sought to "thwart HJPL's rights under the contract".

162 In particular, the Court held (at [187]) that:

> the discretion conferred in clause 4.1 was one which was required to be exercised reasonably, so that it could not be used for a purpose foreign to that for which it was granted, such as to thwart the respondent's right to develop and ultimately to procure a situation where the Agreement could be terminated.

163 Burger King Corp did not withhold operational and financial approval under clause 4.1 of the development agreement out of any concern regarding the merits of applications for approval submitted by Hungry Jack's under that clause, that being the purpose of the development procedure under that clause. It withheld approval because it wanted to thwart Hungry Jack's right to develop and ultimately to procure a situation where the agreement could be terminated.

164 Let me now deal with *Bond Brewing* and the scenario that it was dealing with. *Bond Brewing* is an estoppel case.

165 In *Bond Brewing*, a notice to quit was served by the plaintiff, a brewery and the owner of the New Brighton Hotel at Manly, NSW, on the defendant, the tenant hotelkeeper, who was holding over as a monthly tenant after expiry of a one-year lease. In 1982, the tenant had, with the consent of the brewery, taken an assignment of an interest in the leasehold and had paid in consideration for the assignment an amount partly attributable to "goodwill".

166 From 1976, the brewery had required incoming tenants to sign a so-called goodwill letter addressed to the brewery, a condition of which was that the brewery would not be obligated to compensate the tenant for loss of goodwill if the brewery decided not to renew the current or any subsequent lease or otherwise retake possession of the premises. During the period 1970 to 1985, which was both before and after the goodwill letter was required of the tenant, the brewery had a practice where on each occasion when it sought to gain possession of a hotel the subject of a brewery lease, it paid the particular tenant substantial compensation for giving up possession even though the tenant was holding over under a weekly or monthly tenancy. The evidence also showed that the person who had authority to state to the tenant in that case what the brewery's policy was in relation to the goodwill letter had told the tenant before its signature was affixed that the letter was a mere formality.

167 The brewery decided not to renew the lease and did not offer to pay any compensation for loss of goodwill to the tenant. The tenant argued that when it took an assignment of the lease, it acted on a representation made by the landlord or relied upon an assumption, which the landlord did not correct, that the landlord would not terminate without paying to the tenant a reasonable sum for the goodwill. The landlord argued that the tenant was precluded from relying upon its understanding of the landlord's practice because of the terms of the goodwill letter.

168 Waddell CJ in Eq upheld the tenant's estoppel in pais argument.

169 *Bond Brewing* is not authority for the proposition for which the applicants have cited the case before me. In summary, neither *Bond Brewing* nor *Burger King* assist the applicants.

170 Now more generally the applicants say that the notion that goodwill as a matter of legal analysis ends when the underlying franchise agreement terminates is inconsistent with the analysis in *Murry*. But I disagree. Goodwill in terms of the *legal* concept did not transcend the non-renewal of the dealer agreements. Moreover, there was no acquisition or appropriation by MBAuP of the dealers' goodwill at the time of the service of the NRNs or at any time thereafter.

171 Further, the applicants say that the question on which legal goodwill depends is what attracts custom. This could be the business itself independently of any trademark licence or it could be the business in combination with the trademark.

172 It was said in *Murry* (at [67] and [68]):

> A taxi licence is a valuable item of property because it has economic potential. It allows its holder to conduct a profitable business and it may be sold or leased for reward to a third party. But neither inherently nor when used to authorise the conduct of a taxi business does it constitute or contain goodwill. A licence is a pre-requisite to the conduct of many professions, trades, businesses and callings. But it is not a source of the goodwill of a business simply because it is a pre-requisite of a business or calling. Nor is the situation different when only a limited number of licences are issued for a particular industry.
>
> For legal purposes, goodwill is the attractive force that brings in custom and adds to the value of the business. It may be site, personality, service, price or habit that obtains custom. But with the possible exception of a licence to conduct a business exclusive of all competition, a licence that authorises the conduct of a business is not a source of goodwill. A taxi licence therefore is simply an item of property whose value is not dependent on the present existence of a business. It is not and does not contain any element of goodwill.

173 The applicants say that it is not in dispute that when the business ceases to exist because the underlying licence ends, at that point the goodwill evaporates as legal property. But the applicants say that it follows that if the business at the dealerships continues, even where the underlying basis of the relationship between MBAuP and the dealer changes, the goodwill in the dealership continues because customers are still attracted to the dealership by the assets deployed by the dealer and the trademarks of Mercedes-Benz. This is because, though not identical, the business is being conducted by substantially the same means and in the same manner both before and after the change of contract.

174 Moreover, they say that even though the attraction of customers is the result of the combined or joint contributions of the business and the MB trademarks, the goodwill is not joint goodwill. Rather, each party benefits depending upon its own business. It is said that this is also recognised in the dealer agreements.

175 But these arguments are problematic. Perhaps commercially they make sense. But in terms of the legal concept of goodwill and any suggested misappropriation by MBAuP of the dealers' goodwill they are contrary to authority and incoherent.

176 Further, the applicants say that the gravamen of their case in relation to statutory unconscionable conduct is that the dealers have operated and continue to operate the same businesses, attracting customers and generating customer revenue, as a result of their investments. But as a result of the agency model, they are not entitled to the same share of the revenue generated as previously and the value of their businesses is now reduced. They say that it is a permissible characterisation of that loss as a diminution in goodwill. But they also say that success on their unconscionable conduct case does not depend upon an acceptance of this legal characterisation. Now this is one point upon which I agree with the applicants. A broader perspective may be taken to these questions in the context of addressing whether there has been unconscionable conduct.

177 Let me turn to some of the other themes.

The exercise of power to give the NRNs

178 I have already said something about the scope and purpose of the contractual power of non-renewal. Let me make some points concerning the exercise of power to give the NRNs.

179 First it is not pleaded or run by the applicants that MBAuP itself did not exercise that power. Rather it is said that this was done under the direction of MBAG.

180 Second, it is not said that the exercise of power was some sham exercise.

181 Third, the case being put was that the exercise of power by MBAuP was done under the direction of or at least under the influence of MBAG. Now I accept that the exercise was done under the influence of MBAG but not by its direction.

182 I accept that such influence of MBAG involved approval of the necessary business cases and approval of the elements of the agency model and the terms of the agency agreements. But

even accepting such influence of MBAG, I do not accept the applicants' case that MBAuP exercised no independent judgment whatsoever in issuing the NRNs.

183 Fourth, I accept that MBAuP exercised the power to give the NRNs without regard to the individual circumstances of each of the dealers, including their investments, their performance, any custom or reputation built up with customers, and the potential effect of the agency model on the individual dealer.

184 Fifth, I accept that the exercise of the power was done solely for the benefit of both MBAuP and MBAG and their strategic interests.

185 Sixth, as between MBAuP and MBAG, informing MBAuP's purpose was the desire to act in the interests of MBAG and to act consistently with MBAG's global objectives. But what is also obvious is that MBAuP perceived that what was in MBAG's strategic interest was also in MBAuP's strategic interest. In other words, they were not mutually exclusive interests but rather wholly or predominantly complementary. And that is no surprise when one is considering the position of a subsidiary and its relationship with its ultimate parent company.

186 Now pausing here, in my view none of these purposes of MBAuP are improper, foreign or collateral to the power to give an NRN. And none of such purposes show an absence of good faith.

187 Seventh, there is no *broader* bargain between a dealer and MBAuP outside the contractual framework of the dealer agreement such that it could be said that the exercise of power to give an NRN was inconsistent with the bargain struck.

188 Eighth, the purpose of MBAuP in issuing the NRNs involved pursuing an Australia-wide strategy and, in essence, treating all dealers uniformly. But given the nature of the power being exercised, this was not improper or impermissible.

189 Now true it is that the power is being exercised literally within the framework of an individual dealer agreement as between MBAuP and an individual dealer. So it might be said that it is foreign or collateral to the purpose for which the power to issue an NRN has been granted to:

(a) consider an Australia-wide strategy;

(b) principally follow MBAG's strategy;

(c) treat all dealers uniformly;

(d) not consider the individual circumstances of individual dealers; or

(e) use the occasion to change the relationship to a new model, a circumstance that I will discuss in a moment.

190 But given the nature of the power, it is for the sole benefit of MBAuP. And if that be so, none of points (a) to (e) that I have just listed demonstrate any impermissible purpose let alone a lack of good faith on the part of MBAuP.

191 Let me analyse further four points raised by the applicants.

192 First, they say that the power to issue the NRNs can only be used for the purpose of terminating a relationship between MBAuP and the dealer rather than changing or creating a new relationship with the dealer, that is, one of agency.

193 Now I must say that I have difficulty with this argument. The power was exercised to terminate the pre-existing relationship under the dealer agreements, even if MBAuP had it in mind or was offering the possibility of a new relationship. Termination of the pre-existing relationship was a necessary anterior step, and so a proper purpose. The fact that MBAuP also had it in mind that there might be the creation of a new relationship does not impugn the contractual purpose. Moreover, there is a causal break in the facts. The NRNs were given at the end of 2020. There were no conditions attached regarding agency. Offers concerning agency were given in mid-2021. Of course, MBAuP had an expectation when giving the NRNs that the dealers would enter into the agency agreements when later offered. But strictly the two events occurred at different times with the former not being conditioned on the latter. The dealers were always free to accept or reject the latter.

194 Further, there is a conceptual problem with the applicants' position. The power of non-renewal like a power of termination is a power to end the *pre-existing* relationship. But it does not say anything about or deny that the parties might have it in mind to enter into a new and different relationship under a new agreement. And it does not foreclose or deny that possibility. As one would expect, the contractual provision is silent on that question. It cannot contemplate let alone deny what the parties may agree to do in the future.

195 Second, it is said by the applicants that the power has been improperly used to appropriate the dealers' goodwill. But that argument is flawed for reasons that I have discussed elsewhere.

196 Third, and relatedly, it is said that the power has been improperly used so that MBAuP could achieve a direct relationship with the end-customers. Now that is the effect of the agency model. But the power to give the NRNs was being used to achieve the direct end of terminating

the dealer agreements. The fact that there are other consequential ends does not impugn the exercise of the contractual power, even if those ends are favourable to MBAuP and unfavourable to the dealers.

197 Fourth, the applicants say that the non-renewal power can only be used for circumstances such as a dealer failing to meet targets or a dealer failing to make mutually agreed improvements or the like. Other examples were also given. But in my view the relevant power has no such limitations. The only relevant limitation is a good faith exercise requirement, either arising under clause 6 of the Franchising Code or under the express or implied terms of the contractual provisions.

198 But it is convenient to say up front that it is difficult to discern a want of good faith in the exercise of a power which can serve only the interests of the party upon whom the power is conferred; see *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 at [23] per Buchanan JA. The ostensible purpose of the exercise of such a power will almost invariably be its true purpose.

199 If a contractual right or power, which is intended to advance only the interests of the party on whom it is conferred, is fettered by the obligation of good faith, resort to the duty may become an obstacle to the promotion of that party's legitimate interests. Such a power may be contrasted with one that is concerned with co-operation to produce a result beneficial to all the parties to the agreement.

200 In *Metropolitan Life Insurance Co v RPR Nabisco Inc* 716 F Supp 1504 (SDNY, 1989) Judge Walker said (at 1517):

> In other words, the implied covenant [of good faith] will only aid and further the explicit terms of the agreement and will never impose an obligation which would be inconsistent with other terms of the contractual relationship ... Viewed another way, the implied covenant of good faith is breached only when one party seeks to prevent the contract's performance or to withhold its benefits ... As a result, it thus ensures that parties to a contract perform the substantive, bargained-for terms of their agreement.

201 He went on to say (at 1519) that it is impermissible to "permit an implied covenant to shoehorn into an indenture additional terms plaintiffs now wish had been included". And he went on to note (at 1520) that assertions made by a plaintiff such as "fundamental basis" or a "fruit of an agreement" are usually in the eye of the beholder seen through hindsight.

202 In *DPN Solutions Pty Ltd v Tridant Pty Ltd* [2014] VSC 511, one clause of the agreement in issue gave the defendant a right to terminate for cause. Another clause gave both parties the

right to terminate without cause by giving the other party one month's notice in writing. The schedule to the agreement described the term of the agreement as ongoing subject to one month's notice in writing from either party.

203 Hargrave J held that although he would not imply an obligation of good faith, had he done so he would have held that there was no want of good faith for the same reasons that he rejected the unconscionability assertion. The termination without cause was done by the defendant in its own legitimate commercial interests.

204 A similar sentiment was expressed by Akenhead J in *TSG Building Services PLC v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) at [51] where he said:

> I do not consider that there was as such an implied term of good faith in the contract. The parties had gone as far as they wanted in expressing terms in Clause 1.1 about how they were to work together in a spirit of "trust, fairness and mutual co-operation" and to act reasonably. Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in Clause 13.3, which was in effect that either of them for no good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract, even though, doubtless, initially each may have thought, hoped and assumed that the Contract would run its full term. Obviously, if South Anglia (and there is no suggestion of this) misrepresented prior to the Contract that it intended to proceed to the full term in circumstances when it was always planning to terminate early, that could give rise to a separate cause of action for one type of misrepresentation or another. Again, if (and there is similarly no suggestion of this) there was some material fraud or dishonesty on the part of South Anglia in and about the termination that might well give rise to some cause of action. Thus, if there were extreme and unusual facts (none being adumbrated so far), the law may well provide TSG with some other remedy.

205 Further, in *Reda v Flag Ltd (Bermuda)* [2002] IRLR 747; UKPC 38, the Privy Council dealt with a termination without cause provision.

206 Lord Millett stated (at [42] and [43]):

> Under the terms of the appellants' contracts, therefore, Flag had an express contractual right, which it exercised, to bring the appellants' contracts of employment to an end at any time during the contract period without cause. Their Lordships agree with Flag that that is an end of the matter. As the Court of Appeal observed, 'the very nature of such a power is that its exercise does not have to be justified.'
>
> The principal ground on which this was disputed by the appellants at trial was that the decision of Flag's directors to bring their contracts to an end was vitiated by their 'collateral purpose' in seeking to avoid having to grant the appellants stock options. But in the present context there is no such thing as a 'collateral' or improper purpose; a power to dismiss without cause is a power to dismiss for any cause or none. The directors of Flag were, of course, obliged to exercise their powers as directors in good faith and for the benefit of the company. As the Court of Appeal pointed out, however, this was a duty owed to the company and not to its employees. There is no reason to

> doubt that, in resolving to exercise Flag's contractual right to terminate the appellants' contracts without cause and before a stock option plan had been established, the directors were loyally seeking to further the interests of Flag as they saw them, and Flag's shareholders implicitly approved the action that they took on its behalf. They could properly form the view, as they undoubtedly did, that it would not be appropriate to grant the appellants stock options or, to put the matter another way, that it would be commercially inappropriate to grant such options to employees whose contracts of employment had only a few more weeks to run.

207 He also said (at [45]):

> Their Lordships accept that the appellants' contracts of employment contained an implied term that Flag would not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee. The existence of such a term is now well established on the authorities: see *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] IRLR 66 at pp. 70–72; *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462; *Johnson v Unisys* [2001] IRLR 279. But in common with other implied terms, it must yield to the express provisions of the contract. As Lord Millett observed in *Johnson v Unisys* it cannot sensibly be used to extend the relationship beyond its agreed duration; and, their Lordships would add, it cannot sensibly be used to circumscribe an express power of dismissal without cause. This would run counter to the general principle that an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification: see *Nelson v British Broadcasting Corporation* [1977] IRLR 148 (where it was sought to imply a restriction of location into a contract which contained an unqualified mobility clause). Roskill LJ said at p.151: '... it is a basic principle of contract law that if a contract makes express provision ... in almost unrestricted language, it is impossible in the same breath to imply into that contract a restriction of the kind that the industrial tribunal sought to do.'

208 Of course contracts of employment differ from franchise agreements, but these general observations are not inapposite to the present context.

209 Further, *Bhasin v Hrynew* [2014] 3 SCR 494 dealt with a non-renewal clause.

210 Mr Bhasin had been an enrolment director for Can-Am since 1989. Can-Am marketed education savings plans to investors through retail dealers, known as enrolment directors, like Mr Bhasin. It paid those directors compensation and bonuses for selling such plans. Now the directors were in effect small business owners and the success of their businesses depended on them building a sales force. The term of the contract was three years. Clauses 8.3 and 8.4 allowed termination on short notice for misconduct or other cause. Clause 3.3 provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary. The parties' relationship soured. Can-Am decided not to renew the dealership agreement with Mr Bhasin and gave the requisite notice under clause 3.3.

211 Cromwell J considered that such a context did not fit within any of the existing situations or relationships in which duties of good faith had been found to exist. And he stated that "[c]lassifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation" (at [72]).

212 But relevantly to my context, his Honour said about non-renewal powers (at [90] and [91]):

> It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para 32. Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organising principle of good faith contractual performance.
>
> I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (N.J. Super. Ct. 1972); aff'd 307 A.2d 598 (N.J. 1973); *Atlantic Richfield Co. v Razumic*, 390 A.2d 736 (Pa. 1978), at pp. 741–742. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F.Supp. 1173 (D.Mass. 1984), at p. 1184; *Pitney-Bowes, Inc v. Mestre*, 517 F.Supp. 52 (S.D. Fla. 1981), cert. denied, 464 U.S. 893 (1983).

213 Now as to the content of any good faith duty as it applies to a termination without cause provision or a power of non-renewal, such a power has two features that distinguish it from contractual provisions that are concerned with co-operation to produce a result beneficial to all the parties to the agreement.

214 First, the very purpose of such a power is to bring the existing contractual relationship and implicit bargain to an end.

215 Second, such a power can serve only the interests of the party upon whom it is conferred. The ostensible purpose of the exercise of such a power will almost invariably be its true purpose.

216 So, the exercising party's obligation pursuant to the good faith duty to act honestly and with fidelity to the bargain between the parties is informed by these distinguishing features and must recognise that the nature of the power is to bring that bargain to an end. That approach also gives effect to the principle that the standard of fair dealing or reasonableness that is to be expected in any given case must recognise the nature of the contract or relationship, the different interests of the parties and the lack of necessity for parties to subordinate their own interests to those of the counterparty.

217 In summary, the good faith duty applied to such a power of non-renewal without cause does not convert an agreement into a contract of indefinite duration. But it does require that the exercising party act honestly in matters that are directly and intimately connected to its performance of the contract and its exercise of the non-renewal power.

218 Let me address some other matters that were the subject of evidence and submissions before me and some of which I have already touched on.

The wishes of the parent?

219 Generally speaking, a subsidiary is entitled to take direction from and act in the interests of its immediate or ultimate holding company.

220 There is nothing in the contractual power to issue a notice of non-renewal to suggest that in acting bona fide MBAuP could not substantially take into account the interests and wishes of MBAG. Of course, this may be a matter relevant to statutory unconscionability which I will discuss later.

221 But I do agree that it would be acting outside the contractual power if MBAuP was merely to be an automaton acting solely on the direction of MBAG without any independent consideration of the matter.

222 Now did MBAuP merely act as an automaton? I think not. True it is that it was very substantially influenced by the position, conduct and strategies of MBAG. Moreover, MBAG approved all business cases. But it is going too far to say that MBAuP had no relevant input. Moreover, Mr von Sanden was firmly in favour of the initiative from an early time, and I accept his evidence in this regard. Perhaps he anticipated the zeitgeist within Stuttgart and offered up Australia and the dealers as guinea pigs. But nevertheless, there was significant Australian involvement.

223 Moreover, it was the act of MBAuP and not MBAG that gave the NRNs. And if it is necessary to identify and attribute a state of mind to MBAuP in relation to that act, then the relevant state of mind was that of Mr von Sanden, and possibly also Mr Nomikos.

224 Now there were no board decisions of MBAuP which have been minuted recording the relevant decision of MBAuP to give the NRNs. But it seems nevertheless to be an act of the CEO that he considered he had board approval for which constitutes the relevant act with authority to give the NRNs.

225 Further, let it be supposed that what I have said in the preceding paragraph is correct. And let it be supposed that Mr von Sanden acted for multiple purposes in giving the NRNs, namely, what he considered was in the interests of MBAuP and what he considered was in the interests of MBAG. In my view that does not show the giving of the NRNs to be outside the contractual power or given in bad faith.

226 Let me deal with another topic which is relevant to MBAG and its global experiment.

The model

227 From time to time during the case, senior counsel for MBAuP sought to strongly emphasise the distinction between model D, as discussed and sought to be implemented by MBAG globally wherever it could, and the agency model as used and implemented in Australia by MBAuP under the direction and authorisation of MBAG.

228 But once the evidence was in, it became clear to me that such a distinction had an air of unreality to it. Model D was the genus. And the agency model as implemented in Australia was clearly one of the country-specific species embraced by the genus.

229 Now senior counsel for MBAuP persisted with the distinction no doubt because he perceived that somehow that supported his case concept that MBAuP came up with and independently initiated the agency model for Australia. But the contemporaneous documents of both MBAuP and MBAG present a more complex picture. But in any event, the agency model in Australia was one emanation of model D which MBAG was clearly pushing. And the MBAuP personnel in Australia were promoting for Australia what they thought that MBAG wanted. In other words, MBAuP was anticipating its parent's desires.

Job lot

230 When MBAuP exercised its power and issued the NRNs it did not consider each dealer's individual circumstances. In essence it gave the NRNs at the same time and without regard to individual investments and positions. Moreover, the agency offer, the agency agreements and associated documents were all in standard form.

231 Moreover, MBAuP's and MBAG's financial analysis which under-pinned the various versions of the business cases was modelled on the average dealer. But on any view the dealers in the top 30% were likely to do worse under the agency model than if the dealer model had been left in place.

232 So and generally speaking, MBAuP adopted a "one size fits all approach". It did not discriminate. And its whole approach was to move from one model (the dealer model) to another model (the agency model) seamlessly and without regard to individual positions of and individual effects on particular dealers.

233 Now there are two questions that arise.

234 First, could the power to give an NRN without cause to a particular dealer under an individual dealer agreement be validly exercised in good faith without regard to that dealer's individual circumstances? In my view and given the nature of the power, which was for the sole benefit of MBAuP, it could be so validly exercised.

235 Second, of what relevance are these circumstances to the question of statutory unconscionability? Now this is a trickier question.

236 If it be assumed that the giving of the NRNs was valid contractually and there was no unconscionable conduct in their issue, so that the dealer agreements came to an end, where does any of this go so far as agency is concerned? Sure, the "job lot" approach may be relevant to the unconscionable conduct question so far as the subsequent implementation of the agency model. But of course the dealers were not compelled to sign up to the agency agreements.

237 Is it being said that the very giving of the NRNs, which were otherwise contractually valid, amounted to unconscionable conduct upon issue because the individual circumstances of the dealers were not taken into account? If so, there are clear difficulties for the applicants including the potential rewriting of the contractual bargain. And surely it was not unconscionable for MBAuP to give the NRNs to pursue an Australia-wide strategy or indeed

a strategy consistent with the global strategy promoted by its parent, MBAG? I will return to this later.

The benefits

238 It is difficult to see how it can be said that MBAuP is engaging in conduct that has prevented any exemplar applicant from enjoying the benefit of its dealer agreement. After all, each dealer agreement was subject to non-renewal by either party without cause. That was a benefit that either party had. Indeed, the applicants' asserted fetters on MBAuP's power of non-renewal would seek to impermissibly deny MBAuP the fruits of the relevant provision.

239 Further, there is no suggestion here that MBAuP has breached any implied term to cooperate. Any required cooperation concerned obligations and benefits in the context of the dealer agreement as it was ongoing and being performed. Any such implied term had nothing to say concerning non-renewal without cause. Indeed it is conceptually incoherent to talk of the notion of co-operation in relation to a non-renewal power that can be exercised by a party without cause. The whole point of non-renewal is to bring the contractual relationship to an end, which is the antithesis of co-operating in or on anything.

240 Further, the applicants' assertion of fetters on the power, save and except for it being exercised in good faith and for the purpose for which it was conferred, would if accepted confer a benefit on the applicants which was not bargained for and be at odds or at least in tension with the express provisions of the dealer agreements.

Unconscionable conduct

241 Let me make reference to my views on some matters of relevance concerning the statutory unconscionable conduct case in addition to what I have already said.

242 First, on one view MBAuP cherry-picked the best bits of the dealers' businesses on which the agency model was imposed and left the dealers with less desirable features. So it was that the dealers had to also enter into service and parts agreements, but as vendors/retailers rather than agents. So risk was left with them. No doubt this was seen by MBAuP to be advantageous to it by leaving the allocation of risk elsewhere.

243 Second, the agency agreements imposed were standard form contracts.

244 Third, the dealers ultimately had a lack of choice concerning the terms of the agency agreements. Ultimately they were presented on a take it or leave it basis. I also accept that

they were given little time to negotiate the *final* form of the agency agreements and the associated agreements.

245 Fourth, and related to the third point, there is no doubt that MBAuP played hard-ball in its negotiations with the dealers. There was no meaningful negotiation that the new model to be imposed would be an agency model. There was, however, some negotiation over the detail of some aspects. But on the financial aspects, MBAuP only made concessions on rats and mice issues. And on the main commission aspects, in my view MBAuP and MBAG ratcheted this down as low as they thought that they could get away with.

246 Fifth, there is no doubt that the introduction of the agency model has significantly diminished the upside that dealers had under the dealership model in terms of potentially earning profits in the good times. But then of course one must consider that some of the commercial and financial risks that the dealers had under the dealership model have now been shifted to MBAuP under the agency model.

247 Sixth, although the dealers had little meaningful choice concerning the agency model, in a sense that lack of choice was brought about by the issuing of the NRNs, which I have found to be valid. In other words, the lack of choice was a causal function of the terms of the dealer agreements that the dealers had signed up to, including the power to issue the NRNs without cause. I must assume that the dealers entered into the dealer agreements after taking such commercial and legal advice as they thought fit and well knowing of the risks, but taking the calculated risk that if they performed then they were unlikely to be given an NRN. In other words they perceived that if they performed then it was to the mutual benefit of both MBAuP and the dealer(s) to continue the relationship. That was no doubt a sensible commercial risk to take. But nevertheless a risk as they must have appreciated. The seeds of their ultimate lack of choice were sown a long time ago in the form of the dealer agreements and the form of the non-renewal provisions. Now in the form of these provisions there was some symmetry as between the parties. But in terms of contractual risk allocation, the dealers always had more to lose if MBAuP decided not to renew than if a particular dealer decided not to renew; a dealer was always more likely to be vulnerable to the sunk costs problem.

248 Seventh, I accept that the dealers were ultimately placed in a position of situational disadvantage and possibly constitutional disadvantage in terms of the agency model. But in a sense this was in part self-induced by the dealers' entry into the dealer agreements and a willingness, it must be inferred, to accept the risks and the risk allocation enshrined in those

agreements including the risks inherent in the contractual power of MBAuP to issue the NRNs without cause. They made the relevant capital investments knowing of or when they ought to have known of such risks. And on a broader front, the dealers were well-heeled individuals and corporations that hardly had any socio-economic vulnerability.

249 Eighth, the dealers say that MBAuP took unconscientious advantage of them in imposing the agency arrangements. But let it be assumed that the NRNs were validly given and the dealer agreements rightly came to an end. Although MBAuP clearly obtained an advantage under the terms of the agency model, it is difficult to see how this was unconscientious. Of course there can be an unconscientious advantage taken even if MBAuP acted honestly and in good faith. But where is the unconscientious element once the dealer agreements terminated? The dealers had a choice, and I have rejected the economic duress argument.

250 Ninth, the applicants have also run a case that the giving of the NRNs themselves constituted unconscionable conduct. But that assertion is not sustainable as I explain later.

251 Tenth, I accept that in some respect MBAuP encouraged the dealers to make long term investments in some of the facilities. But where this occurred this was usually reflected in a longer term being negotiated under the dealer agreement. Further, with such terms and the various renewals, there is no evidence that dealers have not earned a reasonable rate of return on their assets and also in many instances also recouped their capital investment over time. And where they have not, they still have the assets. Now perhaps there would have been a drop in value if they had to be repurposed, which perception may have led some of the dealers to think that they had no choice but to enter into the agency agreements. But again, this all stems from the giving of the NRNs that I have found to be valid.

252 Eleventh, I accept that MBAuP did not consider the individual circumstances of dealers. Moreover, it had little regard for the top 30% of dealers who were likely to suffer under the agency model. It noted that effect but had no sympathy for it.

253 Twelfth, there were various themes that from time to time MBAuP put to dealers that were either exaggerated or turned out to be incorrect.

254 It was put that the substantial reason justifying the agency model was because of the problem of disruptors, aggregators and future on-line transactions. But this was all exaggerated in terms of the relevant time horizon that I was dealing with, which on one view, at the time the NRNs

were given, was only out to 2026. These so-called concerns were also used in an effort to spook the dealers.

255 Further, a theme was run at one stage to the effect that the "dealers wanted agency". This was also incorrect.

256 Further, the theme was run from time to time that "no dealers would be worse off" under the agency model. This was clearly not correct in relation to the top 30% of dealers at least.

257 Further, MBAuP persistently ran the line that a concern was the intra-brand discounting between dealers and that the agency model was designed to avoid this. But the reality was that most of the intra-brand discounting was brought about by MBAuP's and MBAG's conduct in causing over-supply to increase market share and also the incentives to discount that MBAuP itself created flowing from its commission structure with the dealers.

258 Further, MBAuP at one stage represented that it would not implement the agency model without the dealers' consent. But I do accept that it eventually resiled from that position and made this clear to the dealers in a timely fashion.

259 But none of this conduct together with the other conduct and circumstances makes out the applicants' statutory unconscionable conduct case as I will explain later.

260 Finally, at one stage I became concerned during the trial as to whether the dealers had been misled about the level of protection offered under the safety net. I also became concerned about the relevant costing margin and whether, if the dealers had known about it, they could have negotiated for a higher margin and forgone the benefits of the safety net.

261 But after being educated further on this topic by Mr Robert Craig KC for MBAuP, I realised that the dealers had not been misled and that the costing allowance from MBAuP's perspective for the risk coming to fruition was not a potential benefit or margin that the dealers could bargain for in lieu of the protection. My initial concern had been founded on an ontological rather than a semantic category mistake.

Process complaints

262 Finally, the applicants have made general and broad sweeping assertions about process matters. But much of their complaints have been exaggerated.

263 It has been said that MBAuP hid witnesses and documents. But there is no substance to the suggestion of hiding witnesses. MBAuP was entitled to select its witnesses. I have dealt with *Jones v Dunkel* points elsewhere. As for hiding documents, this assertion is also exaggerated. But I do accept that there were delays in producing relevant material. And I do accept that the late production of minutes of meetings concerning MBAuP was unsatisfactory.

264 Further, and related to the previous point, I do accept that there was to some extent non-compliance by MBAuP and MBAG with my discovery orders and deadlines from time to time. And no doubt this hampered the preparation and presentation of the applicants' case. But some of this is explicable by the fact that I brought the trial on quickly. Further, some of the material had to be located and reviewed in Stuttgart. Further, what occurred was also a function of the broad-sweeping case being run by the applicants. Now I can emphasise with Mr Timothy Castle SC for the applicants who presented an impressive forensic case. But at the end of the trial there were no outstanding deficiencies. And the applicants had all the discovery that they required to fairly put their comprehensive case.

265 Further, one matter that did underwhelm me was the extensive confidentiality claims that were made by MBAG and MBAuP. These claims hampered the smooth running of the trial to some extent. But at the end of the day the applicants did not suffer any lingering disadvantage.

266 Let me now descend into the detail and begin with the applicants and their lay witnesses.

…

Paragraphs [267] to [3750] (pages 46 to 653) have been temporarily redacted due to confidentiality claims. When these claims have been resolved, a publicly accessible fuller version of these reasons will be published.

Conclusion

3751 For the foregoing reasons, the individual claims of the exemplar applicants must be dismissed.

3752 I will hear further from counsel as to the necessary orders.

I certify that the preceding three thousand seven hundred and fifty two (3752) numbered paragraphs are a true copy of the Reasons for

Judgment of the Honourable Justice Beach.

Associate:

Dated: 30 August 2023

SCHEDULE OF PARTIES

VID 604 of 2021

Applicants

Fourth Applicant	BAKER MOTORS PTY LTD ACN 008 538 672 AS TRUSTEE FOR CONVAIR MOTORS UNIT TRUST (ABN 11174106372) T/A BAKER MOTORS
Fifth Applicant	BUCKBY MOTORS PTY LTD ACN 077 722 555 AS TRUSTEE FOR RAINBOW MOTORS TRUST ABN: 47 264 305 077 T/A BUCKBY MOTORS
Sixth Applicant	CALLAGHAN MOTORS PTY LTD ACN 005 912 041, AS TRUSTEE FOR THE B F CALLAGHAN FAMILY TRUST ABN 80 652 667 949 T/A CALLAGHAN MOTORS
Seventh Applicant	CAPRICORN MOTORS PTY LTD ACN 065 519 244 T/A DC MOTORS (MERCEDES BENZ ROCKHAMPTON)
Eighth Applicant	CCMG PTY LTD ACN 104 843 192 AS TRUSTEE FOR THE CCMG UNIT TRUST ABN 92 209 345 591 T/A MERCEDES BENZ GOSFORD
Ninth Applicant	CENTURY AUTO GROUP PTY LTD. ACN 631 370 904 T/A KEN MUSTON AUTOMOTIVE ABN 11 631 370 904 (MERCEDES-BENZ SHEPPARTON)
Tenth Applicant	CESSNOCK AUTOMOTIVE SALES PTY LIMITED ABN 11 089 268 397 T/A MERCEDES-BENZ NEWCASTLE
Eleventh Applicant	GARRY CRICK AUTO GROUP PTY. LTD. ACN 080 312 689 T/A MERCEDES-BENZ SUNSHINE COAST
Twelfth Applicant	GEELONG MOTORS PTY LTD ACN 124 009 141 T/A MERCEDES BENZ GEELONG
Thirteenth Applicant	GRAND MOTORS GROUP NSW PTY LTD ACN 129 161 888 AS TRUSTEE FOR THE GRAND MOTORS GROUP SYDNEY UNIT TRUST T/A MERCEDES-BENZ PARRAMATTA
Fourteenth Applicant	GRAND MOTORS PRESTIGE PTY. LTD. ACN 075 414 112 T/A MERCEDES-BENZ GOLD COAST

Fifteenth Applicant	JLS ENTERPRISES (VIC) PTY LTD ACN 149 345 460 T/A MERCEDES-BENZ BALLARAT
Sixteenth Applicant	K.A.P. MOTORS PTY. LTD ACN 009 645 845 T/A MERCEDES-BENZ DARWIN
Seventeenth Applicant	MB VIC PTY LTD ACN 608 791 877 T/A SILVER STAR MOTORS
Eighteenth Applicant	MCGRATH CANBERRA PTY LTD ACN 093 024 107 T/A MERCEDES-BENZ CANBERRA
Nineteenth Applicant	MIKE BLEWITT PTY LTD ACN 001 535 780 T/A MERCEDES-BENZ COFFS COAST
Twentieth Applicant	NGP MELBOURNE PTY LTD ACN 004 074 819 T/A MERCEDES-BENZ BRIGHTON & MERCEDES-BENZ MORNINGTON
Twenty First Applicant	NGP TOORAK PTY LTD ACN 608 590 361 T/A MERCEDES-BENZ TOORAK
Twenty Second Applicant	NIPLAG PTY LTD ACN 007 995 619 ATF THE CARLIN & GAZZTRUST T/A CARLIN & GAZZARD (60 134 644 088)
Twenty Third Applicant	NORTH SHORE AUTOMOTIVE PTY LTD ACN 601 789 708 T/A MERCEDES-BENZ NORTHSHORE
Twenty Fourth Applicant	NORTHSTAR AUTOMOTIVE GROUP PTY LTD ACN 626 338 412 T/A NORTH STAR MILDURA MOTORS
Twenty Fifth Applicant	PARIE PTY LTD ACN 009 278 228 T/A MERCEDES-BENZ BUNBURY
Twenty Sixth Applicant	PATRICK AUTO GROUP PTY LTD ACN 632 997 730 T/A MERCEDES-BENZ TAREE
Twenty Seventh Applicant	PERFORMANCE AUTOMOBILES PTY LIMITED ACN 120 402 806 T/A MERCEDES-BENZ HOBART
Twenty Eighth Applicant	PETER WARREN AUTOMOTIVE PTY LTD ABN ACN 000 293 621 T/A MACARTHUR AUTOMOTIVE & MERCEDES-BENZ PETER WARREN
Twenty Ninth Applicant	PT WESTERN PLAINS PTY LIMITED ACN 164 506 870 T/A MERCEDES-BENZ DUBBO
Thirtieth Applicant	RON POYSER MOTORS PTY. LTD. ACN 005 959 197 T/A MERCEDES-BENZ BENDIGO

Thirty First Applicant	SANDERSONS EASTERN SUBURBS PTY LTD ACN 063 611 129 AS TRUSTEE FOR THE SANDERSON FAMILY TRUST ABN 95 436 833 473 TRADING AS SANDERSONS RUSHCUTTERS BAY
Thirty Second Applicant	TRINITY MOTORS PTY LTD ACN 097 743 578 T/A MERCEDES-BENZ CAIRNS
Thirty Third Applicant	TYNAN MOTORS PTY LTD ACN 000 663 347 T/A TYNAN MERCEDES MIRANDA
Thirty Fourth Applicant	WAGGA MOTORS PTY LTD ACN 075 526 957 AS TRUSTEE FOR THE WAGGA MOTORS UNIT TRUST (ABN 33 556 730 405) T/A WAGGA MOTORS
Thirty Fifth Applicant	WEST ORANGE MOTORS PTY LIMITED ACN 113 542 411 T/A WEST ORANGE MOTORS
Thirty Sixth Applicant	WOLLONGONG CITY MOTORS PTY LTD ACN 002 019 598 T/A MERCEDES-BENZ WOLLONGONG
Thirty Seventh Applicant	WOODLEY MOTOR GROUP PTY LTD ACN 090 535 925 T/A MERCEDES-BENZ TAMWORTH
Thirty Eighth Applicant	WS MOTORS PTY LTD ACN 608 791 804 T/A WEST-STAR MERCEDES-BENZ (MERCEDES BENZ TOOWOOMBA)
Interested Person	RAGLAN RIDGE ADVISORS PTY LTD
Interested Person	AUSTRALIAN AUTOMOTIVE DEALERS ASSOCIATES LTD
Interested Person	FOWLSTONE COMMUNICATIONS PTY LTD
Interested Person	MERCEDES-BENZ GROUP AG