



# MTAA



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**Confidential**

## MTAA Submission to Department of Industry, Science, Energy and Resources in response to Departmental Consultation Paper on Auto Principles based best practice

<p><b>Attention:</b></p> <ul style="list-style-type: none"> <li>David Williamson Deputy Secretary Department of Industry, Science, Energy and Resources</li> <li>Donna Looney General Manager, Advanced Technologies Branch Department of Industry, Science, Energy and Resources</li> </ul> <p>c.c Anne Zeman, Executive Assistant</p>	<p><b>Contact:</b></p> <p>Richard Dudley CEO Motor Trades Association of Australia (02) 5100 8239 0412 146 828 <a href="mailto:richard.dudley@mtaa.com.au">richard.dudley@mtaa.com.au</a></p>	<p><b>Status:</b></p> <p>For information and action as appropriate</p>
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### Context:

- The Department of Industry, Science, Energy and Resources has committed to further consultation with the automotive sector regarding outstanding issues associated with automotive franchising and the recently enacted schedule of amendments for car dealers as part of the Franchising Code of Conduct.
- The Department has sought input from peak automotive organisations to these outstanding matters and in particular principals for compensation and best practice in relation to franchising in the new vehicle retail industry.
- The Motor Trades Association of Australia Limited (MTAA) provided input on 23 June to the Department proposing a five-step approach to addressing outstanding franchise matters that, despite the introduction of the schedule of amendments, continue to impact the automotive sector and have been exacerbated by the GMH decision and behaviour of some other manufacturers.
- The Department has developed as outcomes of this consultation process:
  - A principles-based best-practice guidance document, and
  - A 'journey map' that sets out existing processes and responsibilities that are complementary to the draft principles.
- The Department has sought automotive sector feedback on these draft documents including specific responses to identified issues identified by the Department. This submission provides MTAA's considered response to this request incorporating feedback from Members and their dealer constituents.

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## Key Points:

- MTAA welcomes the Department's work and attention to the development of a principles-based best-practice guidance document and 'Journey Map'. It is apparent that the Department has listened to some of the matters raised by the MTAA including suggestions for principals.
- MTAA is of the view the drafts as presented represent a good start and generally has no issue with the draft principals as presented.
- However, MTAA is very concerned that without specific reference to, or inclusion in, recently enacted schedule of amendments for car dealers to the Franchising Code of Conduct, or an alternative regulatory approach, there is no capacity or capability for enforcement including a penalty regime that supports compliance.
- MTAA is of the view, based on previous experiences in automotive franchising and with other automotive industry 'voluntary agreements' that the principals as presented, without supporting regulation and enforceability, will not achieve their intended purpose and will likely fail. MTAA respectfully suggests it is important to remember that 'voluntary' or 'opt-in' solutions to now recognised attributes of the considerable power imbalance in new car retailing, were extensively canvassed in the Australian Competition and Consumer Commission New Car Market Study. The ACCC recommended a mandated approach that recommendation has subsequently been confirmed by policy makers in the development and enacting of the Schedule of Amendments specific to car dealers to the Franchising Code.
- Placing reliance for success of the principals on 'voluntary' participation by stakeholders who choose to 'opt-in' (or not) and adherence to them in good faith, without any regulatory oversight and enforceability, MTAA respectfully suggests is a recipe for future breakdowns of relationships and dispute.
- MTAA understands the design and purpose of the 'Journey Map' and believes this initiative could be a valuable tool in increasing awareness and education on requirements and obligations. MTAA respectfully suggests the draft could be further improved with specific reference to the sections and clauses in the Competition and Consumer Act (CCA), Franchising Code of Conduct, and Schedule of Amendments for Car Dealers, to which the 'Journey Map' refers, Inclusion of specific references will aid in improved understanding.
- MTAA is disappointed that there has apparently been little or no work on other MTAA identified critical issues and potential solutions and suggestions as outlined in the 23 June 2020 'Critical Issues Brief provided to the Department.

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- These matters remain critically important given the Senate enquiry into the decision of GMH to vacate the Australian market and the accelerated moves by some manufacturers to fundamentally change business models deployed to sell motor vehicles in Australia which will further impact motor vehicle dealers. It has been made clear by one of these manufacturers that they are pursuing these changes in the Australian market because they can. They have also publicly stated they will not implement these changes in the United States market where there are more comprehensive protections.
- MTAA understands and respects there are many competing resource and legislative priorities for the Department, particularly in light of COVID-19 impacts. Nonetheless MTAA would appreciate continuing dialogue and work on these other outstanding matters. This includes any decisions made not pursue certain issues and rationale for this so the Federation can advise Members and business constituents.
- MTAA remains of the view that the introduction of a Schedule of Amendments to the Competition and Consumer Act Cth 2014 (industry Codes – Franchising) Regulations on 1 June 2020, specific to car dealers, now provides the legislative instrument necessary to address principals and other matters.

## Consideration:

### Issues to consider (as suggested by the Department)

- **Are the issues identified and the principles proposed the appropriate issues and principles to address them? If not, suggest changes to the text or an alternative.**
  - a. **Are there specific situations that should be remedied by the principles, which are not already provided for within the Code and Consumer Law?**
    - MTAA has no objection to the proposed principals as developed and presented in draft by the Department. MTAA understands that the principles have been designed to broadly reflect the areas of concern outlined in MTAA's 23 June 2020 correspondence, and those generally of industry, without going to the specificity of listing principals and their meaning as specific provisions.
    - However, there is no detail on how the presented principals would or could be contained or referred to in the Franchise Code Schedule of Amendments for car dealers, whether they are enforceable, and any penalty regime that may apply to breaches of them.



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- MTAA is concerned that if the intention is for such principals to be voluntarily agreed by sector stakeholders as an 'opt-in' signatory to them, without reference to regulation or enforceability, then they may prove to be a waste of time.
- MTAA supports the light hand of regulation as a means of increasing efficiency, productivity and reducing costs and does not advocate for increased regulations lightly. But in terms of the power imbalance in the relationship between car manufacturers / distributors and dealers, strong regulatory oversight including capacity to address breaches, is absolutely necessary for those who choose to use this power imbalance to disadvantage other market participants.
- MTAA's suggestion of explicit principals and provisions in its 23 June 2020 correspondence intended to provide potential solutions the clarity, surety and improved protections required. MTAA assumes that in considering these suggestions, policymakers have instead adopted a more macro approach.
- MTAA does not necessarily object to this approach, but the suggested principals contained in the Department draft must be reflected in the Schedule of Amendments in some manner with appropriate measures to ensure enforceability and address noncompliance. This could be a reference to industry principals in a provision that describes the existence of principals and that compliance will be enforced with appropriate penalties for breach.

**2. Are there other regulations at the state or federal levels, beyond the Franchising Code of Conduct, that are relevant to the principles and that are impacting dealerships and OEMs?**

- MTAA has the view that the schedule of amendments is complimentary to the Franchising Code, the Competition and Consumer Act and Australian Consumer Law. In the construct of the schedule of amendments specific to car dealers, MTAA has the view that some other concerns impacting franchising more generally will be addressed when Government considers the full review of the Franchising Code and the findings and recommendations of that review.

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- MTAA believes that car dealers should be able to access unfair contract terms and conditions law. Because of thresholds and criteria, car dealers unless very small are not able to seek the protections afforded by this legislation. This means that unfair terms and conditions cannot be adequately challenged. The criteria and thresholds should be changed to include car dealers.
- MTAA again draws attention to the myriad of relevant legislation in the United States that better protects car dealers. While recognising USA State laws and regulations cannot be simply uplifted and put into the Australian legislative context, they do provide the makings of potential solutions for the attributes of the power imbalance and behaviours of some market participants being experienced in Australia. MTAA provides further suggestions on the merits of further examination under Item 6.
- MTAA also draws the Department's attention to proposed legislation for media and digital platforms which is expected to be released soon. MTAA accepts that this proposed legislation is for a completely different market and subject matter but there may be useful parallels.

### 3. Do you have suggestions to improve the Journey Map, noting it reflects amendments made to the Franchise Code of Conduct from 1 June 2020?

- MTAA suggests the 'Journey Map' represents a useful awareness and education tool for focusing attention on the interrelationship of the ACL, CCA, Franchising Code and Schedule of Amendments and requirements and obligations. MTAA congratulates the Department on its development. MTAA's experience is such visual 'cues' are a valuable resource in explaining such interrelationships
- MTAA understands the concept of a 'Journey Map' and does not object to the term, but suggests some thought might be given to whether this reference will be clearly understood by all intended recipients or whether some other terminology should be considered.
- MTAA suggests the Journey Map could be further improved by including the specific provisions (and where necessary penalties) to the relevant dot points under each of the headings to assist in identifying the parts of the ACL, CCA, Franchise Code or Schedule of Amendments that the dots points are referring to.





- MTAA also respectfully suggests that the Journey Map should form part of a package of guidance documentation to further explain in simple English the interrelationship of the various parts referred to in the map.

#### 4. Are there aspects of the Journey Map where additional guidance and/or clarification for the parties involved could potentially prevent disputes?

- MTAA believes additional guidance material should be developed to clarify dispute avoidance and in the event of disputes resolution options. This material would form part of a pack previously mentioned that would compliment materials already provided by the Regulator.
- MTAA suggests that it may be beneficial to somehow highlight with a breakout box or balloon where disputation could arise with short reference in a legend to options available for resolution. This maybe during disclosure (including the new requirements for greater specificity), in the operationalization of the agreement and when the agreement is being terminated or not renewed.
- MTAA is cognisant that the inclusion of this material may make the map too complex or busy and be lost and perhaps consideration should be given to a separate 'Journey Map' specific to dispute resolution that includes determined options and processes and access options.

#### 5. Have alternative dispute resolutions (e.g. mediation and arbitration) been effective in resolving disputes about dealer franchise agreements? Where a dispute arises, what are the respective benefits of a) mediation; and b) arbitration; over court proceedings?

- MTAA is of the view that one of the attributes of the power imbalance is dispute mediation and resolution. MTAA respectfully suggests that one of the single biggest frustrations of car dealers is that current provisions and arrangements for resolving disputes fail and are a waste of time. This is exacerbated by limitations placed on the powers of the regulator to address poor behaviours and actions detrimental to other less powerful market participants, the agility of the systems to hear disputes quickly and by accepted independent arbitrators or determinators, the deep pockets of car manufacturers and the cost of litigation.



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- Another attribute of the power imbalance is the 'take it or leave it' terms and conditions provided to car dealers and the inability of them to challenge these or utilise to take advantage of unfair contract terms and conditions legislation without reprisal or risk to the agreement being renewed.
  - MTAA refers the Department to its submissions to the ACCC New Car Market Study, previous submissions to the Department of Treasury on the Franchising Review and submissions to and Hansard of the Joint Parliamentary Franchising Code inquiry for greater detail on this issue. Please contact MTAA should you like copies of these submissions.
  - MTAA has experience in the dispute resolution processes for other automotive industries such as the smash repair industry. Contained in the Voluntary Motor Vehicle Insurance and Repair Code of Conduct there are processes for mediation, determination, and arbitration (generally provided by third parties including Small Business Commissioners in each jurisdiction, Resolution Australia and others). These processes are also not ideal as dominant market participants use rationale for avoiding mediation and in some cases pay lip service to the outcome of determinations.
  - Enforcement and substantial penalties to encourage compliance is regarded as the only solution to ensure dispute resolution mechanisms are adequate and appropriate for new car dealers.
6. **We are interested in exploring opportunities to complement this work. For example, is there merit in a statement about the application of the agency model in the automotive sector in the Franchising Code? Would such a statement provide assurance to the sector of the applicability of the franchising code to the new models? Likewise does the review of the regulatory amendments –scheduled to occur before April 2024- provide an opportunity to evaluate issues raised in the principles and the impact on the sector? Would this be a useful process to tie this work to?**
- MTAA agrees that movement to 'Agent or Agency arrangements' as currently suggested by some manufacturers requires urgent improved clarity through additional provision or provision amendment in the schedule of amendments for car dealers in the Franchise Code as suggested in MTAA's 23 June critical issues brief.

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- As movement to these arrangements are currently under active consideration and in some cases implementation, MTAA argues this is a critical 'live' issue now requiring urgent attention and cannot wait for inclusion in a subsequent review.
- While MTAA provided some simplified words in the 23 June 2020 brief, the Federation has undertaken further investigations into potential solutions regarding the impacts of 'agent arrangements' to assist the Department in further consideration of this issue.
- MTAA notes that in recent commentary on the emergence of agent or agency arrangements one car manufacturer, Mercedes-Benz, has indicated that it intends to move to what it describes as an 'Agent Agreement'.
- MTAA notes comments attributed to Mercedes Benz executives that the company does not wish to avoid compliance with the Franchising Code of Conduct and that proposed agent arrangements will be compliant with franchise code obligations and requirements. MTAA also notes comments attributed to a senior Mercedes Benz executive, that interestingly the company does not intend to implement the agent arrangement in the United States where legislation offers significant enhanced protections for dealers against such unilateral change. MTAA remains concerned that the application of such arrangements could fundamentally damage dealers and potentially lead to similar experiences endured by GMH dealers over recent months.
- MTAA understands the Corporations Act (Cth) 2001 exempts franchises from the application of the provisions relating to Managed Investment Schemes (MIS). For all practical purposes a franchise would be covered by the scope of the MIS provisions except for the regulatory exemption.
- MTAA is of the view in relation to recent public announcements from Mercedes-Benz that it is moving to agent arrangements where Mercedes owns and sell the vehicles and the dealers are only paid a commission. The agent arrangement appears to have the elements of a Managed Investment Scheme save for the exemption contained in the Act.
- Based on this assumption, MTAA would respectfully suggest there are further options available to the Commonwealth Government to better protect dealers from what MTAA regards as a clear unilateral change to the business model in circumstances where dealers have invested many millions of dollars in a business format model and not an agent model.



## Option 1 – Amend the Corporations Act (Cth) 2001

- MTAA suggests the first option to consider is to amend the Corporations Act (Cth) 2001 to remove the exemption of franchise arrangements from the application of the act so they are regulated as Managed Investment Schemes under the Corporations Act rather than as franchises under the Franchising Code of Conduct. The current exemption contained in the Corporations Act and could be removed by amending the definition of franchise agreement contained in section 9 which presently states:

*"franchise means an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trademark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf."*

- While MTAA understands the above definition of franchise is different to that contained in the Franchising Code of Conduct, MTAA considers such an amendment necessary to remove any ambiguity that an agent or agency arrangements or some such similar arrangement is not a franchise as defined in the Corporations Act (Cth) 2001, despite being a franchise agreement as defined in the Franchising Code.
- The Corporations Act (Cth) 2001 requires a Managed Investment Scheme to have all of the following elements:
  - it must be a "scheme";
  - it must involve a contribution of money or money's worth to acquire rights to benefits;
  - the contributions are to be pooled or used in a common enterprise to produce benefits for the scheme members; and
  - the members do not have day to day control over the scheme.
- Although MTAA has not seen the details of the Mercedes-Benz proposal for agent arrangements, MTAA has formed a view that what is being suggested by Mercedes Benz has all the elements of a Managed Investment Scheme and therefore it is reasonably arguable in public policy terms that such an agency arrangement should be regulated by the *Corporations Act (Cth) 2001* rather than the Franchising Code of Conduct.



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- Based on MTAA's limited understanding, the agency arrangement proposed by Mercedes-Benz does not appear to have the following usual features associated with a franchise arrangement as reflected in the current dealer agreement:
  - where the franchisee makes a payment for the purchase of vehicles;
  - where the franchisee is primarily responsible for the marketing and promotion of the vehicles in its PMA; and
  - where the franchisee owns the customer data.

### Option Two - Amend the Franchising Code of Conduct through the car dealer schedule of amendments

- MTAA's proposed the second option is to consider leaving agent or agency agreements to be regulated by the Franchising Code of Conduct, but to amend The Franchising Code Schedule of Amendments for Car Dealers to prevent motor vehicle distributors making unilateral variations to the existing business format franchising model which has formed the basis for dealers investing in the brand in the first place. Since the inception of the Code in 1998 it has been a significant weakness that it has failed to include appropriate conduct provisions that prevent franchisors from engaging in exploitative conduct.
- The recent introduction of a new Schedule to the Franchising Code that applies to new car dealers and distributors now provides an opportunity to apply further changes to the Schedule that will provide effective remedies to dealers in relation to exploitative conduct including distributors making a unilateral variation to a franchise business model to the financial disadvantage of dealers.
- One way of amending the Franchising Code could be to adopt a specific provision that prevents motor vehicle distributors making unilateral decisions either to vary the franchise agreement or to change the business model to the financial disadvantage of dealers. This approach has been adopted in overseas jurisdictions such as Michigan in the USA where specific automotive legislation prohibits motor vehicle distributors from engaging in certain conduct – see *Michigan, Motor Vehicle Manufacturers, Distributors, Wholesalers, and Dealers Act 1981*.

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- MTAA respectfully suggests the following draft provision, inserted in the new schedule to the Franchising Code would clarify and provide the solution sought.

*"a motor vehicle manufacturer or distributor shall not change or alter the business model for the distribution of new motor vehicles by way of a franchise agreement or other distribution system including an agency agreement to new motor vehicle dealers unless any change is supported by a majority of dealers and that dealers in general will not be financially disadvantaged by such a change."*

- Another way of amending the Franchising Code to deal with unilateral changes made by distributors to the business model, could be to include a new provision in the Code providing compensation to dealers in a wide range of circumstances where the existing dealer agreement is terminated, not renewed or where a dealer decides not to enter into a new agreement where the distributor has substantially changed the business model, as outlined in MTAA's 23 June Critical Issues Brief. MTAA in the brief provided quite explicit provisions drawn from various legislatures in the United States.
- MTAA has also undertaken further work in this area and provides a further potential solution which is more abridged and guided by Section 20 of the Michigan, USA Motor Vehicle Manufacturers, Distributors, Wholesalers and Dealers Act.
- Section 20 details the action a new motor vehicle dealer can take to recover actual damages reasonably incurred as a result of the termination, cancellation, failure or discontinuance of a dealer agreement. Such a provision if adopted in Australia would appear to be wide enough to encompass unilateral variation in moving to an agent or agency model or a manufacturer vacating the Australian market. Section 20 provides:
  - *"If a manufacturer or distributor terminates, cancels, fails to renew, or discontinues a dealer agreement for other than good cause as defined in this act , the new motor vehicle dealer may bring an action against the manufacturer or distributor to recover actual damages reasonably incurred as a result of the termination, cancellation, failure or discontinuance."*

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*A manufacturer or distributor who violates this act is liable for all damages sustained by the new motor vehicle dealer as a result of this violation.*

*A manufacturer or distributor or new motor vehicle dealer may bring an action for declaratory judgement for determination of any controversy arising pursuant to this act.*

*A manufacturer or distributor who violates this act shall be liable for all court costs and reasonable attorney's fees incurred by the dealer."*

- MTAA is happy to expand on these potential options to address the emerging issue of agent or agency arrangements.

### Conclusion:

- MTAA reaffirms the issues and potential solutions raised in its 23 June Brief to the Department including a five-step proposal to provide refreshed thinking on how to potentially address these complex policy matters
- MTAA thanks the Department for ongoing consultation on these critical issues and remains available any time to expand on this submission or to provide any additional clarity or further information.

MTAA Secretariat July 2020

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