



# MTAA



PO Box 6298 Kingston ACT 2604 \* 02 51008239 \* [admin@mtaa.com.au](mailto:admin@mtaa.com.au) \* [www.mtaa.com.au](http://www.mtaa.com.au)

3 September 2020

## MTAA Submission to Department of Industry, Science, Energy and Resources in second response to Departmental Consultation Paper on Automotive Dealer Agreement Draft Principles

<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 Bruce Wilson Darren Atkinson</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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### Key Points – Draft Principles:

- MTAA welcomes the Department's ongoing work and attention to the development of a principles to support new car dealer franchise agreements.
- MTAA is of the view the draft principles reflect conversations and concerns to date – as a set of principles. However, MTAA suggests the following for clarity:

### Draft Principles for new car dealership agreements

To provide guidance to participants of **issues** the **obligations** to be ~~that should be~~ considered when embarking on the development of a new vehicle dealership agreement

**MTAA Comment:** MTAA suggests the removal of highlighted words and the inclusion of the word 'obligations'. The rationale for this is explained further in this submission.

#### Principle 1

Franchisors should include provisions in new dealership agreements that provide for fair and reasonable compensation for franchisees in the event of early termination resulting from: **non-renewal**; withdrawal from the Australian market; rationalisation of their networks; or changes to their distribution models.

**MTAA Comment:** MTAA suggests the addition of 'non-renewal' be included as this is often used as a rationale for change and makes the distinction that simple non-renewal does not remove the consideration of fair and reasonable compensation. MTAA refers the Department to the Australian Competition and Consumer Commission (ACCC) New Car Market Study (2017) which states 'enhancing a dealers rights to be compensated for capital investment required by the manufacturer in the event of non-renewal of the agreement' as further rationale for the change.

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### Principle 2

Franchisors should not include provisions that exclude compensation in new dealership agreements.

**MTAA Comment:** Supported with no change.

### Principle 3

The 'fair and reasonable compensation' as referred to in Principle 1 above should include appropriate allowances for the loss a franchisee may incur, which can include:

- i. Lost **gross** profit from direct and indirect revenue
- ii. Unrecovered expenditure and unamortised capital expenditure where requested by the franchisor
- iii. Loss of opportunity in selling established goodwill
- iv. Wind up costs

**MTAA Comment:** MTAA did not have a concern with the original wording that described revenue because it did not venture into the 'grey area' of profit and the extension of whether profit is regarded as nett or gross. Most recently this was a factor during recent 'negotiations' by General Motors Holden with their franchisees and it was clear there were significant interpretive differences in gross versus nett which MTAA would argue had a material impact on negotiations.

MTAA supports either reverting to 'revenue' as the descriptor or can support the shift to 'profit' - provided the word 'Gross' is included to satisfy this distinction and likelihood of this matter re-emerging in the future.

### Principle 4

When an agreement is entered into it should provide franchisees a fair and reasonable time to secure a return on investments that have been required by franchisors as part of the agreement.

**MTAA Comment:** Supported with no change.

### Principle 5

Agreements should include reasonable provisions for franchisors to compensate or buy back new vehicle inventory, parts, and special tools, in the event of: non-renewal; withdrawal from the Australian market; rationalisation of their networks; or changes to their distribution models.

**MTAA Comment:** Supported with no change.





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## Principle 6

Agreements should include provision for timely commercial settlement and dispute resolution.

**MTAA Comment:** As mentioned during the videoconference workshop with Departmental officials, MTAA supports this principle but raises whether it can be strengthened along similar lines to those proposed in the Exposure Draft of the *Treasury Laws Amendment (News Media and 7 Digital Platforms Mandatory Bargaining Code) Act 2020*, where a formal arbitration process is described. The concern is, and as demonstrated by General Motors Holden, if there is no provision that compels dispute resolution through mediation, determination, or formal arbitration, then there will be repeats of the behaviours demonstrated in the past by some manufacturers and most recently by GMH to their dealers. It is clear to MTAA there were quite differing definitions in the GMH example of what good faith negotiations mean and the role and function of dispute resolution. MTAA does not believe it to be unreasonable for further exploration of a strengthened Principle 6.

## Key Points – voluntary versus enforced

- MTAA notes that a critical issue of voluntary versus mandated has not been addressed. MTAA remains concerned that without specific reference to, or inclusion in, recently enacted Schedule of Amendments to the Franchising Code of Conduct for car dealers, or any 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 again 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 to resolving the outstanding matters and 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 for some of the attributes of this power imbalance.
- 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 by compliance and enforceability, MTAA respectfully suggests is a recipe for future breakdowns of relationships and dispute.

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- 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 the principles and other matters.

### Further consideration:

- MTAA has undertaken further work on a potential clause which it believes could at a minimum incorporate the agreed principals in the Schedule of Amendments. It has drawn on the recently released Exposure Draft of the *Treasury Laws Amendment (News Media and 7 Digital Platforms Mandatory Bargaining Code) Act 2020* where the Obligations of participating parties are outlined. MTAA suggests one approach might be also refer to the 'Obligations' of the Franchisor and Franchisee by referencing the Industry led principles in the Schedule of Amendments. Such a Clause may appear as:
  - New Division - Obligations (Industry Principals) on dealer agreements for franchisors and franchisees
  - Division 5 Obligations (Industry principals)
  - XX Industry Principals outline the obligations on franchisors in dealer agreements.
  - Franchisors and Franchisees in Dealer Agreements will determine and agree overarching obligations described as Industry Principles for the conduct and operation of dealer agreements. These principals will be agreed by industry representative organisations and reviewed at the same time as the general review of provisions and the Schedule of Amendments. Signatories to these principals will be bound by them and any potential breach which be subject to dispute resolution and enforcement provisions
  - Civil Penalty - 300 Units
- MTAA does not purport to be legislation or regulation drafters nor possess the technical expertise or knowledge of constitutional, legal, or other difficulties such a suggestion may pose. It provides this suggestion as a means of overcoming the critical concerns over a voluntary approach. MTAA is of the view this suggestion could be achieved by introducing a further regulatory change to the Schedule at the earliest opportunity.
- MTAA would welcome further dialogue on how it may be modified to mitigate any identified risks or concerns or complications; or why such an approach will not work or cannot be accommodated.

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- Alternatively, if this suggested approach cannot be accommodated now, then as a compromise, MTAA further suggests the principles be finalised and implemented voluntarily as a transition arrangement to the inclusion of a clause in the Schedule of Amendments that provides a compliance requirement with enforceability.
- To support this compromised approach, MTAA would need an understanding and commitment from government that there will be an inclusion of an enforceable clause in the schedule of amendments by 1 June 2021 at the latest.

### Conclusion:

- MTAA also offers and reaffirms the potential solutions raised in its June, July briefs and matters raised in the videoconference.
- 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 3 September 2020

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