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Our Ref: PKK

13 September, 2021

The Hon Stuart Robert MP
Minister for Employment, Workforce, Skills, Small and Family Business

By Email: smallbusinessfranchising@treasury.gov.au

Dear Sir,

SUBMISSION ON AUTOMOTIVE FRANCHISNG DISCUSSION PAPER

We act for an automotive dealer council (**Council**) who represents the automotive dealers of an Australian wide new automotive vehicle brand. We are instructed to make submissions relaying the Council's views on the Automotive Franchising Discussion Paper July 2021 (**Paper**).

While the contents of this submission are not confidential, our client prefers to remain unnamed.

Executive Summary

We note that the Paper covers three areas, about which we summarise the views of the Council:

1. **Standalone automotive franchising code**: The Council has no particular view on the structural approach of a single, encompassing Franchising Code or a new standalone Code for automotive dealers.

   However, the definition of the dealership structures that fall within a standalone Code (if adopted) needs to be very broad and encompass both the type of contractual relationship and also the commitments and investments made by dealers. In particular, the inclusion of the agency model needs to be maintained (which we expect will be), but consideration needs to be given to other models, such as agency loan/leasing/share, standalone service centres and future alternatives.

   Whatever the relationship, it is likely that the commitment and investment made by dealers needs to be considered and, where akin to a "normal" dealership model, protections are required from the Code.

2. **Expansion to other vehicle types**: The Council, given it represents dealership for new passenger vehicles, has no particular view on this aspect.

   The proviso for this position is that, by including dealerships for other dealer types, there is no watering down of protections in trying to cater for a wider range of models and sectors. New motor vehicle dealerships do need much higher commitments and control than most other non-passenger vehicle motor dealerships.

3. **Mandatory binding arbitration**: The Council considers that mandatory arbitration can be an effective option to resolve disputes. It makes the following submissions:

(a) Mediation should be available before arbitration is imposed;

(b) To maintain the benefit of arbitration as less formal and requiring lower preparation and documentation requirements (and therefore speed and lower cost), time limits should be included; and

(b) Ideally, the obligation to arbitrate should be mandatory and binding. Given potential Constitutional limitations, arbitration could be *prima facie* binding but still appealable to Court if the decision has manifest error.

If pre-contractual arbitration is to be mandated then the Option 2, as expressed in the Paper, is the Council's preference. Pre-contractual arbitration should also apply for specific scenarios impacting existing dealers, such as manufacturer withdrawal from the market or material change to dealer relationship structure. Such changes require a new agreement (eg. surrender or variation agreements, and arbitration is considered pre-contractual to such agreements).

We expand on the three points in the annexure to this letter.

If there are any questions or further comment is requested from the Council, please contact Paul Kirton by the contact details below.

Otherwise, the Council thanks you for the opportunity to express its views.

Yours faithfully

[redacted]

Macpherson Kelley
Paul Kirton
Legal Practice Principal
Commercial Practice Group | National Head – IP + Trade Team

[redacted]

13 September, 2021

The Hon Stuart Robert MP
Minister for Employment, Workforce, Skills, Small and Family Business

Annexure

1. Standalone automotive franchising code

The Council has no particular view on whether there should be a separate Code for automotive dealers or the existing protections (and others, as determined) sit within the existing Franchising Code.

However, given the increasing range and variety of dealership structures, if the option for a separate Code is chosen, the definition for the "dealership" relationships that fall within the standalone Code needs to be broad.

Otherwise, some relationships with automotive manufacturers may fall within the standalone Code, some in the existing Franchising Code (as a franchise), and some may not have any applicable code at all.

The current definition of "motor vehicle dealership" in the existing Code covers the more traditional franchised dealership by express inclusion. It now also covers the newer agency model by express inclusion, as this is not strictly a "dealership" relationship.

Beyond these two relationships, there may be relationships with automotive manufacturers not currently covered. So, in making changes to the Code through this review, the Council submits that any known or likely additional relationships should be included now.

For example:

(a) Leasing is expressly included in sub-clause (a) of the definition, where the dealer does the leasing, but it is not covered in sub-paragraph (b). A future model of car "ownership" by loan / lease / share that is conducted by the manufacturer, but where the dealer acts as the manufacturer's agent (or other service provider, eg. deliverer, inventory storer, collection point) would not fall within this definition;

(b) Examples of "user pays" subscription models are developing, where use, function, features or options are paid for by the car owner for a set period or on a "per use" basis. This model is occurring with electric vehicles where software options can be offered, developed and turned on by payment. As electric models of electric vehicles increase, this "pays for use" model is likely to become common. While these payments, at the point of sale/delivery, may flow through the dealers, subsequent new or renewal payments are made directly to the manufacturers. However, dealers are required to address problems, questions and troubleshoot issues, and maintain the infrastructure and investment to do so;

(c) Manufacturers are more commonly granting (separately to the sale or agency supply of vehicles) service centre agreements. These do not fall within the existing Code, and likely not within a standalone Code, unless there is a widening of the definition.

Dealers who have these agreements should be afforded similar Code protection. The investments, commitment, obligations, etc are of a similar nature to the sales/agency dealership agreements. The disparity of bargaining strength between dealers and manufacturers is only likely to widen with these alternate models, where dealers are less able to negotiate and compete for sales, and more dependent on service fees, bonuses and rebates from manufacturers.

Further, in relation to service centres, if manufacturers pull out of the Australian market or move to being the sole retailer of vehicles (outside of a dealership or agency model) then dealers may only have service centre agreements.

Accordingly, while no preference is expressed on having a standalone Code, the Code (however structured) needs to cover all the possible relationships between dealers and vehicle manufacturers (not just sales and leasing).

It is submitted that one option is to focus less on the form of contractual relationship but the commitment and investment being imposed on dealers (especially relating to lease, fitout and staffing) by the manufacturers.

2. Expansion of new motor vehicle dealership agreements to other vehicle types

The Council, given it represents dealership for passenger vehicles, has no position on this aspect.

However, this this position has one proviso.

Other forms of motor dealerships (ie. not falling within the definition of "new vehicle dealership agreement") may or may not require the same level of investment, control and commitment that new vehicle dealerships have. For example, boat and agricultural equipment sellers tend to be more traditional multi-brand resellers of products that, but for the dealership inclusion, would fall outside the Code. Others do have branding, premises and other controls imposed, where the dealers are as absolutely beholden to a manufacturer as are new vehicle dealers.

So, in some cases, such as truck and agricultural branded dealerships, dealers would also need the level of protection afforded to and needed by new vehicle dealers.

The Council has no objection to a wider range of automotive dealerships being included, but by doing so, it would not want to see the protections for new vehicle dealers being watered down to cater for a wider dealership group with lesser protections needed.

3. Binding arbitration

The Council supports the comments already expressed in the Paper about the lack of genuine dispute resolution options.

<u>Post-contractual arbitration</u>

The Council notes the limitations imposed by the Constitution to making arbitration mandatory and binding. We return to this issue at the end of this section, but first make some observations and submissions absent those potential limitations.

The Council accepts that the benefit of arbitration is that it is less formal and should have lower preparation and documentation requirements. Therefore, it should be faster and lower cost. These benefits do help address the power imbalance in disputes against manufacturers.

The consequences of an adverse arbitration decision are final. Parties have more to lose. From a manufacturers' point of view, the ramifications of losing against one dealer may have a snowball effect across the network. For a dealer, the outcome of an arbitration may be catastrophic, given dealers often have their whole family's asset base and future tied up in the dealership.

Accordingly, given those risks, the tendency can be that a party approaches arbitration with the full resources of a litigation process. The other party must then respond accordingly. This outcome is amplified if the outcome in binding and unappealable. The cost and formality benefits are then lost.

Accordingly, to encourage fast and low cost arbitration, were it to be mandatory, the Council submits that:

(a) A time limit needs to be included, like the other Codes referred to in the Paper;

(b) Mediation should remain available before a party can require arbitration (if a party calls for it); and

(c) Any arbitration could only be, *prima facie*, binding but still appealable to Court if the outcome has manifest errors.

These carveouts may serve to either avoid the limitations on binding arbitration under the Constitution or, if still unavoidable, encourage all or a majority of manufacturers to voluntarily sign up to the provisions.

Pre-contractual arbitration

In terms of the options expressed in the Paper in relation to pre-contractual arbitration, the Council supports this in respect of the terms of a Dealership Agreement (whether traditional, agency or other).

The Council also supports binding and mandatory arbitration to the extent it may apply to a subsequent contract being negotiated when an existing dealership agreement is already on foot.

For example, pre-contractual arbitration could occur if a manufacturer pulls out of the Australian market or a manufacturer seeks to change, mid term or without renewal, the entire dealership model. It is that new contract (ie. settlement, release or variations agreements) that would warrant arbitration to redress the resulting power imbalance.

In terms of the model, the Council prefers Option 2 (the Media Bargaining Code).