

# DAIMLER

Daimler Truck and Bus Australia Pacific Pty Ltd  
A Daimler Company

13 September 2021

Small and Family Business Division  
The Treasury  
c/o GPO Box 2013  
CANBERRA ACT 2601  
By email: [smallbusinessfranchising@treasury.gov.au](mailto:smallbusinessfranchising@treasury.gov.au)

Dear Sir / Madam

## **Consultation on automotive franchising discussion paper**

Thank you for the opportunity to comment on the August 2021 discussion paper your Department has prepared in relation to Automotive Franchising reforms (**Discussion Paper**). We are pleased to provide our comments on the issues raised in the Discussion Paper, and have done so insofar as they relate to our experience operating in the Australian automotive market.

### **Introduction**

This submission is made by Daimler Truck and Bus Australia Pacific Pty Ltd (**DTB**), one of Australia's premier importer and distributors of commercial heavy and light motor vehicles into Australia. DTB is the supplier of Mercedes-Benz, Fuso and Freightliner branded vehicles and their associated parts. DTB is a member of the Truck Industry Council, has been operating in Australia since 1958. It currently supplies vehicles and parts to 59 dealerships around Australia. DTB understands the requirements of the Australian automotive market, and is well placed to comment on the potential impact of the issues raised in the Discussion Paper.

The Discussion Paper canvases a number of issues, and provides options for implementation in relation to two primary topics as follows:

1. the merits of a stand-alone automotive franchising code or options to reform the current regulatory framework (including the expansion of the 1 June 2021 amendments to the Code that specifically relate to new passenger vehicles dealer agreements to also be applicable to commercial vehicle dealer agreements); and
2. options for mandatory arbitration in the dispute resolution process.

As set out in further detail below, we are concerned that any further reforms to the regulatory framework which governs the manner in which DTB conducts its business may lead to over regulation and have adverse consequences for all participants in the automotive industry.

This submission does not seek to provide comment on each of the options or issues set out in the Discussion Paper, but rather serves to respond to what DTB considers are the key issues that are likely to affect its operations and the broader commercial vehicle industry if adopted.

### **Background to submission**

The automotive industry is already subject to a number of legislative requirements, which impose a significant level of regulation for automotive manufacturers, distributors and dealers. For the most part, the burden of these requirements are borne by manufacturers and distributors across their general operations.

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Automotive franchising is principally governed by the Franchising Code (**Code**) and the Australian Consumer Law (**ACL**) as well as the well-established, judicially considered, common law principles of contract law. In recent times, including as recently as in June 2021, there have been significant amendments to the Code, which has, in effect, introduced a new regulatory framework that relates to automotive distributors and dealers to improve transparency in the distributor / dealer relationship.

Notably, the Code, by operation of its deeming provision, requires automotive distributors to provide extensive information to prospective dealers before any dealer franchise contracts are signed. These advance disclosure requirements required under the Code afford prospective dealers with a significant amount of information to allow them to make an informed decision in relation to the terms as well as the likely minimum costs in entering into and conducting the proposed dealership franchise.

In addition to the above, the ACL contains the following:

- protections for small businesses from unfair contract terms, which are proposed to be subject to separate legislative reforms to strengthen the protections as will be applicable to most automotive dealer franchisees; and
- protections against misleading and deceptive conduct, false or misleading representations, unconscionable conduct amongst other matters..

For completeness, we also note that the collective bargaining class exemption issued in June 2021 by the ACCC, will operate to improve and simplify franchisees' access to collective bargaining when negotiating with franchisors. Relevantly, this exemption applies to automotive dealerships, and is aimed at affording dealership operators with greater collective power in their bargaining relationship with manufacturers / distributors.

As is evident from the above, the automotive franchising industry is already subject to a significant level of regulation, which, for the most part, seeks to mitigate the perceived power imbalance between manufacturers / distributors and dealers. It is DTB's view that the current regulatory framework, which has been the subject of a number of amendments in recent years, is adequate to protect the interests of dealers, and that further reforms to broaden the scope of protections under the Franchising Code is likely to lead to an unnecessary increase in regulation and red tape, which has a real potential to lead to unintended, adverse consequences for the industry.

## **Standalone automotive franchising code**

DTB does not support the establishment of a standalone code of conduct for commercial vehicle dealers. We understand that the primary drivers for the Government's proposal to initiate a standalone franchising code is the perceived power 'imbalance' between automotive dealers and manufacturers / distributors. However, with respect, we consider that the nature of this relationship has been misconstrued. We also submit that there is no evidence to suggest that the recent reforms to the automotive franchising regulatory framework are insufficient, and need to be amended.

In light of the above, we do not believe that there is a demonstrable market failure that needs to be rectified. Establishing a standalone automotive franchising code would be:

- (a) contrary to the *Industry Codes of Conduct Policy Framework (2017)*; and

- (b) unlikely to address any perceived 'market failure' by providing better outcomes for the participants operating in that market.

The reasons that we have formed this view are set out in further detail below.

### Dealer and distributor relationship

While DTB supports the Government's efforts to ensure fairness within the relationship between manufacturers / distributors and dealers, it is DTB's view is that the existing relationship cannot properly be characterised as a market failure. We say this because this relationship is considerably different to that of a traditional franchisor / franchisee, and is more closely related to a distribution model. By way of example, the following represent, in our view, key points of difference, and demonstrates that automotive dealers have a significant degree of power in their dealings with manufacturers and/or distributors:

- the relationship between dealers and distributors is co-dependent by nature of the roles that they perform;
- dealers generally don't pay franchise fees for the right to use a manufacturer or distributors intellectual property, or for access to the goodwill associated with the brand;
- vehicle manufacturers / distributors do not exercise the same degree of control over how a dealer operates its dealership compared to a significant number of franchise systems, with dealers exercising a significant degree of autonomy over their dealership
- in most cases, DTB dealership operators are sophisticated businesses which are operated by experienced professionals, and most often supported by appropriate professional advisors;
- dealers often own the real estate from which the dealership is operated. As such, it is often in the best interests of manufacturers / distributors to maintain a good relationship and work collaboratively with its dealers, as the loss of a strategic location may impact heavily on the success of a brand in a particular location/region;
- dealers are often multi-franchised; and
- in circumstances where a dealership agreement is not renewed at a particular site, the dealership will commonly establish a relationship with another distributor at the same site.

It follows that, on the whole, dealers play a vital role in the operations of manufacturers and distributors, and, coupled with the significant amount of industry regulation, hold a significant degree of power in these relationships. As such, we are not of the opinion that this relationship is reflective of any demonstrated 'market failure', and submits that the current regulatory framework, particularly as proposed to be enhanced by the ACCC, is sufficient to protect the interests of its automotive industry participants.

Moreover, DTB submits that the relationship between automotive manufactures / distributors and dealers is generally excellent. Given the co-dependant nature of the relationship, it follows that the relationship cannot successfully function for either party if it is adversarial in nature. As with any commercial relationship, there are instances where this breaks down, but for the most part, it is in the interests of both parties work together to maintain a healthy relationship. DTB invests a significant amount of time and money in building and maintaining its relationship with its dealers, to ensure that they are satisfied with the service and product being supplied.

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Finally, we note that it is an important part of any manufacturer / distributor's business to have the flexibility to manage its brand footprint within the market. From time to time, it is necessary to adjust the network of dealers to account for the changing conditions of the Australian market as determined by always changing customer needs. It is also important that a manufacturer / distributor has the flexibility to lawfully manage underperformance over a period of time, and equally to be able to facilitate and drive performance and profitability for their brands and their network partners. Flexibility is critical to any business model to ensure that it remains profitable and competitive within the current marketplace.

Although DTB supports the Government's efforts to ensure the fairness of relationship between manufacturers / distributors and dealers, this must be balanced so as not to be at the expense of being able to adapt the brand's network in order to effectively meet ever-changing consumer behaviour.

As such, the establishment of a standalone automotive franchising code is unlikely to provide any material benefit to dealers in its commercial relationships with manufacturers and/or distributors. In DTB's view, the current legal and regulatory framework is appropriately equipped to handle the challenges that may arise in the commercial relationship between manufacturers / distributors and dealers.

## Introduction of a standalone automotive franchising code

As noted above, in recent times there have been a number of significant reforms of the Code, which have had a significant impact on the automotive industry, and in particular, on the commercial relationship between automotive manufacturers / distributors and dealers. This includes the introduction of Parts 5 and 6 of the Code, which came into effect on 1 June 2020.

DTB considers that it is premature to contemplate further reforms to the current regulatory framework, as the impact of these changes to the Code have not yet been realised. The reason for this is that, in many instances, the new requirements will only translate to practice at the expiration of dealers' existing contracts during the subsequent renegotiations.

In our view, these new measures should be given sufficient time to be adopted and tested broadly within the industry in order to determine how they will impact the behaviour of manufacturers, distributors and dealers before calling for further regulatory change.

Finally, we also note that overseas vehicle manufacturers may perceive the introduction of a standalone code as the starting point for further regulation of automotive franchises in Australia, and one that is divergent from other franchises. In our view, this has the potential to unnecessarily send the wrong message to manufacturers, who are critical to the continued success of the automotive industry.

## **Pre-contractual arbitration**

Although DTB supports initiatives that seek to reduce the time and costs associated with disputes that arise between automotive manufacturers / distributors and dealers, we do not support the proposition of introducing pre-contractual arbitration into the current regulatory framework.

This proposition is not supported on the basis that it is unlikely to facilitate expeditious contractual negotiations between the parties, and allow the parties to negotiate freely and on commercial terms. In DTB's view, the terms on which they do business should be a matter for the parties to a contract.

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When negotiating the terms of any commercial contract with dealers, manufacturers and distributors negotiate in good faith, and in doing so, seek to facilitate an outcome that is mutually acceptable to both parties. In our view, having an arbitrator involved at the pre-contractual stage of the negotiation of any commercial contract is likely to enhance the number of obstacles that the parties have to overcome prior to finalising a contract. Such a process is likely to add significant time and costs for both parties in circumstances where, in our view, there is no need for such a process to be implemented. It also follows that the terms on which parties are willing to conduct its business cannot be determined by a third party, with no vested interest in the outcome.

Finally, it is DTB's view that it is unlikely that pre-contractual arbitration will reduce the number of disputes between parties once a contract has been finalised. As set out above, from time to time, disputes arise between parties as is the case in any commercial relationship. However, in our experience, these disputes are often resolved between the parties on commercial terms, and without litigation or any third party intervention. Having access to arbitration prior to a contract being signed will not reduce the likelihood of these disputes arising, but rather, are likely to facilitate an increase in the number of disputes at an earlier stage of the relationship between the parties.

## Conclusion

The appropriate regulatory setting should be one that is cognisant of the need to encourage continued investment and growth within Australia by overseas vehicle manufacturers. In recognising that there must remain a certain degree of business risk in any commercial undertaking in order to accommodate equal opportunity to generate reward for all parties, the current regulatory framework governing automotive franchising arrangements is suitably appropriate, with no demonstrated material market failure that would indicate a need to adjust the needle further by imposing additional administrative burdens on the distributor/manufacturer and dealer relationship.

Yours sincerely



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