



**FEDERAL CHAMBER
OF AUTOMOTIVE
INDUSTRIES**

ABN 53 008 550 347

5 April 2017

LEVEL 1

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AUSTRALIA

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Committee Chair
Senate Education and Employment Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Chair,

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 ('Bill')

The Federal Chamber of Automotive Industries (FCAI) is the peak industry body for the Australian manufacturers and importers of passenger motor vehicles, light commercials and motor cycles. Our members supply the vast majority of new vehicles provided to the Australian market each year.

Our members are concerned about what appears to be the unintended reach of the Bill and the consequent confusion it is likely to cause. We would like to draw your attention to 2 aspects of the Bill in particular.

Is a motor vehicle dealer a 'franchisee entity'?

The Bill is clearly intended to apply to franchises, 'in the ordinary meaning of the term' (see section 49 of the Explanatory Memorandum). It is not intended to apply to 'distribution agreements' (see paragraph 50 of the Explanatory Memorandum). The Bill also appears to be based on the assumption that the Franchising Code of Conduct only applies to franchises, in the ordinary meaning of the term. Motor vehicle dealer agreements are in a unique position: they are not franchises in the ordinary meaning of the term but they are subject to the Franchising Code of Conduct.

The distribution of new motor vehicles in Australia is undertaken through a structure supported by dealership agreements with motor vehicle dealers. Dealers, who are appointed by the Australian distributor of the respective vehicle brand, purchase the vehicles, parts and accessories from the distributor, effectively at a wholesale price, and then sell these goods to retail consumers.

The relationship between a dealer and its distributor is not a franchise in the ordinary meaning of the term – it more akin to a distribution arrangement.

The ordinary meaning of 'franchise agreement' is comprehensively defined in section 5 (1) of the Franchising Code of Conduct. Motor vehicle dealer agreements do not fit within this definition because there is no franchise fee (or its equivalent) payable by the dealer to the distributor (which is one of the requirements in the definition). Dealer agreements are however, subject to the Franchising Code of Conduct because they are expressly deemed to be a 'franchise agreement' (by section 5(2)(c) of the Code). But for this deeming provision, motor vehicle dealer agreements would not be covered by the Code.

In summary, motor vehicle dealers could be considered 'franchisee' entities' under the Bill given that they are subject to the Franchising Code of Conduct, even though they are not franchisees in the normal meaning of the word and are part of a distribution system.

'Significant degree of influence or control'

The second aspect of the Bill we would like to draw to your attention is the requirement that a 'responsible franchisor entity' must have a significant degree of influence or control over the franchisee's affairs. (Section 558A(2)(b)). As these terms are not defined, presumably they are intended to be read broadly.

It is extremely important for motor vehicle distributors to protect and enhance their respective brands. They do this by controlling, as much as possible, all aspects of, and impacts on, their brand. This includes becoming involved in various facets of their dealers' operations. Increasingly, distributors have been concerned about not just the corporate identity requirements for a showroom (for example) but about enhancing a customer's entire buying experience at a dealership. This seems to amount to having a degree of control over a dealer's affairs and could amount to having a 'significant' degree of control or influence.

Inevitably, some dealers will require more input from a distributor than others and some might require more input at various times. Does this mean that in some instances and at some times the distributor will have a 'significant degree of control or influence' while at other times they might not?

Finally, if this degree of involvement does amount to a significant degree of control or influence over the dealer's affairs, it will not be in the areas which impact on, or are relevant to, the terms on which employees are employed by the dealership. Again, this seems to be contrary to the intention of the Bill.

How to rectify the Bill

The concerns of the FCAI can be easily addressed by defining 'franchisee entity', 'franchise' and 'franchisor' by reference to the definition of an 'ordinary' franchise in clause 5(1) of the Franchising Code of Conduct. This would have the added benefit of meaning that section 558A(1)(b) of the Bill could be deleted, as this requirement would be covered in the new definition.

I hope the above provides the outline necessary to inform the Committees considerations of our request.

Please call me or Tony McDonald in our office on [redacted] if you would like further information or to discuss this request.

Yours sincerely,

Tony Weber
Chief Executive